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



# REPLY BRIEF

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

SUSAN W. FOX, ESQUIRE
Florida Bar No. 241547
MACFARLANE AUSLEY FERGUSON
& McMULLEN
Post Office Box 1531
Tampa, Florida 33601-1531
(813) 273-4200
Attorneys for Cottingham, et al.

and

ROBERT J. ANGERER, ESQ.
Florida Bar No. 178546
ROBERT J. ANGERER, JR., ESQ.
Florida Bar No. #995381
ANGERER & ANGERER
Post Office Box 10468
Tallahassee, Florida 32302
(904) 576-5982
Attorneys for Petitioner
Coastal Caribbean Oils &
Minerals, Ltd.

ATTORNEYS FOR PETITIONERS

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES



### RULES



### OTHER

## INTRODUCTION

The "Reply Brief" submitted on behalf of Respondents should have been denominated as an "Answer Brief". Accordingly, under the Florida Rules of Appellate Procedure, the present brief is the actual "Reply Brief", and is submitted on behalf of Petitioners.

## REBUTTAL STATEMENT OF CASE AND FACTS

In Respondents' Statement of the Case and Facts, they accept Petitioners' Statement of the Case and Facts as correct, but then set out to provide additional information on two matters which are not necessarily factual differences, but are argumentive in nature. A brief reply to these points is needed.

First, Respondents contend that the leases which gave rise to the royalty interests of Petitioners are "licenses" instead. The point of this assertion is not readily apparent. Assuming the point being made is related to whether or not the royalties are real property interests for which inverse condemnation is an appropriate remedy, their point is not well taken. Royalty interests are uniformly recognized as real property interests which are compensable in inverse condemnation if taken. Terry v. Conway Land, Inc., 508 So.2d 401 (Fla. 5th DCA 1987) Aff'd., 542 So.2d 362 (Fla. 1989); Valls v. Arnold Industries, Inc., 328 So.2d 471, 473, 474 (Fla. 2d DCA 1976), cert. denied, 342 So.2d 1104 (Fla. 1977).

Second, Respondents defend their assertion in their Motion to Dismiss the appeal before the Fifth District that the service charges for transfer of venue were paid September 26, 1994, by pointing to a Reply filed by the Clerk of Hernando County to

Petitioners' Mandamus Petition to the Fifth District. Respondents state, "That's where the September 26th date came from." (Respondent's Brief page 1). With all due respect, that document is no "support" for the assertion. The Hernando clerk's statement was likewise unsupported, and the Hernando clerk, like the Assistant Attorney General who made the assertion to the Fifth District, was in no position to actually know whether or not the statement (which related to a transaction between Petitioners and the Leon clerk) was true or false. Neither the Hernando clerk nor the Assistant Attorney General has ever identified any effort having been made to verify the truth or falsity of this assertion. As the First District found below, Respondents' representation "has not been substantiated in any manner, and all record evidence indicates [that the representation was incorrect]". The First District further stated, "We assume that this representation was made by the State in error."

If in fact the representation was made in error, then the State does not admit the error here[1] or the fact that Petitioners' rights have clearly been prejudiced by a misrepresentation made by the Florida Attorney General's office to a District Court of Appeal. The false representation resulted in a transfer of the appeal, which the same party is now trying to capitalize on to obtain dismissal of the appeal. This is what was once known as

---

[1]Although the error is not admitted, Respondents do urge a different set of facts here than they represented before the Fifth District. Implicitly, this concedes that the facts presented to the Fifth District were inaccurate.

"sharp practice."

It is no excuse for the Attorney General's office to state that they were simply repeating an unsupported statement they had picked up from the Hernando County clerk. If they made no effort to verify the truth of the statement, they should not have presented it to the court as "fact". Rule 4-3.3(a) (Candor towards the tribunal) of the Rules Regulating the Florida Bar forbids a lawyer from making a false statement to a tribunal. The comments to this rule state, "An assertion purporting to be on the lawyers' own knowledge ... may properly be made only when the lawyer knows the assertion to be true or believes it to be true on the basis of a reasonably diligent inquiry." Moreover, Rule 4-3.3(b) requires the lawyer to disclose the true facts to the tribunal if he later learns that he has inadvertently made a false representation. In all fairness, this would require Respondents' counsel to correct his representation to the Fifth District and request that the matter be remanded now to the Fifth District so that the original order transferring the appeal could be rectified. Instead, Respondents' counsel is seeking to take advantage of his own misconduct. We hope that this court will not reward his game of cat and mouse with anything other than proper sanctions.

## ARGUMENT

I.

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

Respondents make no effort to answer the certified question or to address the questions raised by Petitioners. Rather, they would have the court address an issue that is not even on appeal, was not addressed by the trial court, the Fifth District or the First District. In fact, Respondents' brief does not answer Petitioners' Initial Brief at all. Instead, the brief before this court is further argument on the motion for remand that this court has already deferred. Since further argument of that motion is clearly improper and unauthorized under the Appellate Rules, this court may disregard it.

On the merits, Respondents have little to say. They begin by sympathizing with this court over how "frustrating" it must be to be told that its opinion has created procedural complications. Virtually without elaboration, they describe the Vasilinda rule as simple and easy to understand. They say that venue transfer is effective when the service charges "are paid" but cast no light on how to determine when this critical act takes place, thus disregarding all of the First District's concerns. They make no effort to explain why they implicitly argued in favor of a mailing date before the Fifth District, and now suggest a receipt date.

Petitioners have made a serious effort to present this court with argument on an issue that the First District felt was

important enough to justify a certified question. Moreover, this was a question raised sua sponte by the First District, not on motion for certification by Petitioners.[2] Respondents contend that Vasilinda is clear and unambiguous and requires no modification. This superficial position does nothing to enlighten the question before this court.

Respondents suggest that all of the issues raised by Petitioners are "covered in existing statutes, rules, and Vasilinda", however, they do not undertake to explain where the filing fee critical to the determination of jurisdiction should be filed, when the court file should be transmitted, whether payment of the filing fees should be deemed effective on mailing or on receipt, or why the rule announced in Vasilinda should create an exception to the provisions of the appellate rule as to where the Notice of Appeal is filed.

These questions are of great public importance, because without answers to them, the procedures are a mine field. While we sincerely hope that the factual situation before this court is in fact unique to this case, i.e., that no one else has suffered as much as Petitioners have due to the lack of clarity in these rules, the questions are bound to be repeated. We ask the court to

---

[2]In another example of grossly unfair arguments, Respondents intimate that Petitioners argued and persuaded the First District of certain matters contained in its opinion, and are now changing their argument before this court. All of the prior arguments on this issue were included in Petitioners' Appendix and are fairly consistent throughout the unfortunate course of this case. It is in actuality Respondents, not Petitioners who are trying to "have it both ways" by arguing a different set of facts and standards here.

prevent that result by clarifying the rule announced in Vasilinda as requested in the Initial Brief.

The appellate rules were designed to eliminate traps for the unwary, not to create them. This court obviously values rules of procedure that are coherent, consistent and easy to understand. The civil rules expressly instruct that they be construed "to secure the just, speedy and inexpensive determination of every action." Those objectives are not achieved by the Vasilinda rule, as this case demonstrates.

Interestingly, one respected treatise writer has adopted the very same reading of Vasilinda and Davis v. Florida Power Corp., 486 So.2d 34 (Fla. 2nd DCA 1986) that Petitioners have requested here. Judge Padovano, in "Florida Appellate Practice", Section 18.4 (1988) wrote that

> "an appeal from [an order transferring venue] should be directed to the District Court of Appeal having jurisdiction over the lower court from which the case was transferred since that court will have rendered the order drawn into question by the appeal. The fact that the lower court to which the case was transferred is not in the same appellate district is immaterial." (Emphasis in original)

Judge Padovano cites Davis v. Florida Power Corp., supra, for this rule. In the 1995 Supplement to his treatise, Judge Padovano states,

> "An appeal from an order transferring venue is to the appellate court having jurisdiction over the transferor court. Jurisdiction to review an appeal from any other appealable order depends upon the date of the appeal in relation to the change of venue. [Citing and discussing Vasilinda] ... In Attorneys' Title Insurance Fund, Inc. v. North River Insurance Co., 634 So.2d 731 (Fla. 4th DCA 1994), the court transferred an appeal from an order granting a change of venue to the appellate court having

> jurisdiction over the transferee court. The change of venue to the transferee court had been completed at the time the Notice of Appeal had been filed. The court relied on **Vasilinda v. Lozano** ..., but that case seems to have dealt exclusively with jurisdiction to appeal from a non-final order other than the order granting a change of venue."

Thus, according to Judge Padovano, this appeal should have been in the Fifth District because review of all orders transferring venue belong in the transferror district court, and Vasilinda did not change this rule. Everyone is confused by Vasilinda, the District Court, the treatise writers, the clerks, and the Bar. Petitioners ask this court to clear up the confusion.

## REPLY TO FURTHER ARGUMENT ON MOTION FOR REMAND

The remainder of Respondents' brief is a direct rebuttal of the Response to Motion For Remand. An Answer Brief on the merits is an improper vehicle for this type of rebuttal. If Respondents felt the need to reply to the Response, they should have sought leave from the court rather than burden the court with it in what is supposed to be a brief on the merits. In addition, if the issues raised in the Motion For Remand were properly addressed in the briefs on the merit, then presumably Respondents could have reserved all of its arguments for its brief on the merits and need not have burdened the court with a separate motion. Petitioners suggest that the court should strike this section of Respondents' brief. Moreover, this portion of the brief is unnecessarily vitriolic and tests, if not crosses, the bounds of appellate advocacy.

Respondents' first point is that Petitioners improperly

questions the provision of the order requiring them to pay the clerk's service charges. Petitioners agree that the order did say they should pay the fees, and discussed the propriety of that portion of the order only in the context of the uncertainty under current rules and statutes as to who is responsible for paying the filing fee. Petitioners did not undertake an appeal over the $75.50 issue of the filing fee since obviously the time and effort to debate this issue would far exceed the amount in question. Thus, this issue is a red herring.

Respondents gloss over the premature transfer of the court file in one sentence with the statement that it was not contrary to law or procedure and "had absolutely no affect". This begs the question. There was an order directing that the file not be transferred until after the service charges were paid. Just as Respondents contend the party responsible for payment of the fee is governed by the order of transfer, logically, one would expect the time of transfer to be similarly governed by the terms of the order. Respondents make no effort to explain this inconsistency in their presentation. Petitioners had, in compliance with the order, obtained a check in the correct amount for delivery to the Hernando clerk immediately after the Notice of Appeal was filed. These plans were thwarted by the premature transfer. Yes, it had an effect.

Respondents go on to discuss what they refer to as a "mailing game" that was supposed to further Petitioners' desire to have the Fifth District hear the appeal. This argument stretches the limits

of credibility. There was, at the time the notice of appeal was sent to Hernando with the appeal filing fee and a copy with the transfer filling fee sent to Leon, no reason for Petitioners to suspect the chaotic turn that was about to take place resulting in an inability to do something as simple as file a Notice of Appeal and pay the service fees as instructed by the order. Whatever unsavory implication Respondents wish to make by virtue of the efforts to appeal to the Fifth District, the Notice of Appeal had already been prepared identifying the Fifth District as the court to which the appeal was being taken before learning of the premature transfer.

Respondents state that both the clerks of Hernando and Leon Counties instructed Petitioners' counsel to pay the services charges to the Leon County clerk's office, and asks, rhetorically, "What is difficult to understand about those instructions?" (Respondents' brief page 5). The difficulty was that it was contrary to the order of the trial court. Since there is no statute or rule which specifies a place of payment, then presumably the terms of the order would control. As Petitioners argued in the Initial Brief, the very informality with which filing fees are handled make this an awkward event for passing jurisdiction from one court to another.

Next, Respondents attempt to expose some inconsistency between the Response to the Motion For Remand and the Response to the First District's Order to Show Cause. The suggestion is made that counsel's arguments are "tailored to the problem at the moment,

with no regard for consistency or accuracy." The alleged inconsistency has to do with recitation of the communications from the Leon clerk's office to a secretary. Frankly, before the current problems came about, this attorney never would have imagined that either the First District or this court would have needed to hear the intimate details concerning the internal communications and the clerical efforts to obtain the check that was needed to pay the transfer fees. Thus, no effort was made to explain to the First District about the three different checks that were in circulation to pay the transfer fees. However, in light of the First District's uncertainty over some of the details as expressed in its order transferring the case back to the Fifth District, Petitioners felt that an effort to explain all of the details should be made and would ultimately assist in responding to the certified question raised by the First District. Petitioners strenuously disagree that there is any inconsistency or "tailoring" of the facts, and clearly the record does reflect that two checks were sent to Leon County because of inconsistent communications concerning the amount of the filing fee.

Next, Respondents criticize Petitioners' counsel for waiting to pay the fee until the time was "about to expire" and ominously predict that "she must suffer the consequences." As justification for this statement, Respondents argued that Petitioners' counsel was aware that the service charge had to be made payable to the Clerk of Court, Leon County and thus imply that she cannot complain of the change of place from Hernando to Leon. This is another

highly unfair accusation since, as the record reflects, counsel was advised both by the terms of the order and by the Hernando clerk that the check for the service fee was to be delivered to the Hernando clerk, although it was to be made payable to the Leon clerk. Thus, the instructions as to how the check was to be drawn provided no clue that the place of payment was going to be changed a few days before the 30 day period expired. Surely, the rules are not designed to discriminate against out of town counsel.

As for the characterization as "incredible" of Petitioners' argument that there is no reason why payment of filing fee might be deemed effective upon mailing for some purposes and not others, the distinction has obviously been made throughout the procedural rules adopted by this court that "filing" for some documents and "service" for others is the critical act. When determining the date jurisdiction transfers under Vasilinda, a mailing date (i.e., service) of a filing fee is completely unworkable, for reasons which have already been explained by the First District in the First District in its order. There is no comparable reason why filing, rather than service should be required for other purposes under the civil rules. The rules routinely make these distinctions. However, there is no reason to draw those fine lines here.

II.

**WHETHER FLORIDA RULE OF CIVIL PROCEDURE 1.060 REQUIRES DISMISSAL OF THE COMPLAINT.**

For all Respondents' accusation that Petitioners have "strayed from the questions certified to this court", the most glaring example of such straying is the effort to raise this point on an

appeal of a non-final order transferring venue. Do Respondents contend that they can raise this point by cross-appeal? They readily admit the point was not even raised before the First District, and therefore sought remand to raise it. The argument has no bearing on the question certified by the First District.

This appeal addresses the propriety of the trial court's decision to transfer venue from Hernando to Leon County. An ancillary question has arisen as to which District Court should hear the appeal. The Respondents are attempting now to raise a matter which arose after that order, and indeed after the Notice of Appeal was filed. These facts are before this court to determine the question of appellate venue, not to litigate dismissal under Rule 1.060, Fla. R. Civ. P. which has yet to be filed. A Motion to Dismiss under this rule should be presented to the trial court, who would then have jurisdiction to grant or deny the motion, and in the course of doing so, to determine whether the rule even applies in this case and whether the circumstances warrant dismissal. The trial court's ruling on such an order would be reviewable after final judgment in the case, but is not even reviewable as a non-final order. Rosie O'Grady's v. Del Portillo, 521 So.2d 183 (Fla. 3rd DCA 1988) (order denying Motion to Dismiss because of failure to pay venue transfer fee was not appealable under Rule 9.130(a)(3)(A) as an order "concerning venue"; only the most urgent orders are appealable under this rule, and administrative tasks relating to such payment are not matters of such urgency).

The trial court would also be the proper forum to evaluate

whether, as Respondents suggest, there was unreasonable delay in attempting to effectuate the delivery of the transfer fee, or whether any delay should be excused in light of the changing instructions concerning the place of payment of the filing fee and the proper amount, as well as the premature transfer of the court file.

More importantly, Rule 1.060 applies only where the action was commenced in a "wrong venue", which was not the case here. Hernando County was a correct venue, but, the trial judge granted the State the right to assert its optional venue privilege to move it to Leon County. This decision was erroneous and that is the basis for the underlying appeal, however, by no stretch can Hernando County, where the property is located, be described as a wrong venue.

Respondents unfairly take a number of cheap shots at Petitioners' counsel saying that she "blames everyone but herself" for the problem, belatedly "sprang into action" upon learning that the file had been transferred, and "stretched out the filing fee string too far". The facts instead show that in compliance with the terms of the order and the Vasilinda case, the check had already been obtained for delivery to Hernando County and the arrangements made virtually immediately after the order was issued, but that unusual circumstances intervened to thwart these plans. It is unnecessary to belabor these circumstances any further.

Even if this court were to find that the question of dismissal under Rule 1.060 were properly before it and that the rule applied

to this case, it should decline to exercise its discretion in favor of dismissal. In Rosie O'Grady's v. Del Portillo, the Third District implied that the failure of Appellant to pay a transfer fee when filing a timely Notice of Appeal of a venue order has no affect upon jurisdiction of the court over the appeal. This court held in Williams v. State, 324 So.2d 74 (Fla. 1975) that the failure of a party to pay a filing fee had no affect upon the jurisdiction of the court, but that the sanction to be applied is within the court's discretion after reasonable notice. Similarly, in ABI Walton Insurance Co. v. Department of Management Services, 641 So.2d 967 (Fla. 1st DCA 1994), the First District held that an agency cannot dismiss an action for failure to pay filing fees without reasonable notice.

In State v. Family Bank of Hallandale, 623 So.2d 474 (Fla. 1993) this court approved a denial of interest on state warrants because of delays in the litigation caused by the warrant holder. These delays included failure to pay a service charge after the case was transferred for improper venue. Id. at 480. If Respondents' position in this case is accurate, this court would have simply dismissed the claim on the state warrant, and the State would have paid nothing.

The Respondents' reliance on Zirin v. Charles Pfhizer & Co., 128 So.2d 594 (Fla. 1961), which decried needless steps in litigation and encouraged the speedy administration of justice, is particularly ironic. These Petitioners have been given a classic run-around courtesy of state officials. In all candor, if they had

conspired together specifically to prejudice Petitioners rights, they could not have done a better job of it. Petitioners, however, trust that this court will observe the limits of its own jurisdiction as well as honor the letter and spirit of its own rules of procedure and deny this back door attempt to thwart a legitimate claim against this State.

## CONCLUSION

The relief requested by Petitioners was set forth in the Initial Brief and will not be repeated here. Petitioners continue to request the same relief.

Respectfully submitted,

SUSAN W. FOX, ESQ.
Florida Bar No. 241547
MACFARLANE AUSLEY FERGUSON
& McMULLEN
P. O. Box 1531
Tampa, FL 33601
(813) 273-4200
Attorneys for Cottingham et al.

and

ROBERT J. ANGERER, ESQ.
Florida Bar No. 178546
ROBERT J. ANGERER, JR., ESQ.
Florida Bar No. #995381
ANGERER & ANGERER
Post Office Box 10468
Tallahassee, Florida 32302
(904) 576-5982
Attorneys for Petitioner Coastal Caribbean Oils & Minerals
ATTORNEYS FOR PETITIONERS

## 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 5th day of October, 1995.

Attorney