SUPREME COURT OF FLORIDA

STEPHEN L. RUTH, etc.
et. al.

Petitioners,

v.

DEPARTMENT OF LEGAL AFFAIRS,

Respondent.

CASE NO. 86,872

District Court of Appeal,
2nd District - Nos. 94-03341
94-03609
94-03619

PETITIONERS' BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

This action was commenced on October 3, 1990, by the filing of a Complaint by Appellee/Respondent (hereafter "the State") against Appellants/Petitioners (hereafter collectively "Ruth, et.al.") in the Circuit Court of the Tenth Judicial Circuit, Polk County, Florida (App. 1). The Complaint (App. 1) pursuant to Chapter 895, Florida Statutes (the Florida Racketeer Influenced Corrupt Organization Act), primarily sought forfeiture of real property allegedly owned by Ruth, et.al. in Charlotte County, Florida, and Sarasota County, Florida (App. 1) (App. 7). Personal service was obtained on Stephen Ruth who was a resident of Polk County.

On July 16, 1991, a hearing was held on a motion for summary judgment filed by Ruth, et.al. At that hearing Judge Joe Young sua sponte raised the question of whether the Polk County Circuit Court had jurisdiction (App. 10). Both parties took the position that the Court did not have jurisdiction (App. 10). However, pursuant to instructions from Judge Young, they subsequently briefed the jurisdiction question. Ruth, et.al., by memorandum filed on August 2, 1991, contrary to their initial position, asserted that the subject matter of the forfeiture suit is in rem; that it is governed by the local action rule; that the Polk County Circuit Court lacked jurisdiction; and that lacking jurisdiction, the court could not transfer the action (App. 11). Thus, the State was made aware of its jurisdictional problem and the position of Ruth, et.al. no later than August 2, 1991.

Judge Young, although he did not enter an order, announced at a hearing on October 4, 1991 that he had concluded that the Polk County court had jurisdiction (App. 12).

On April 11, 1994, Ruth, et.al. filed a motion to dismiss the complaint for the reason that (among other things) the court lacked subject matter jurisdiction (App. 2). On May 5, 1994, they

also filed a new motion for summary judgment and a motion for partial summary judgment (App. 3, 4).

The motions to dismiss, the motion for summary judgment, and the motion for partial summary judgment came on for hearing before the Honorable Susan W. Roberts on June 3, 1994. On June 28, 1994, the State filed a motion to sever and transfer the action (App. 8). The issues raised at the June 3, 1994 hearing, which had not been concluded, came before the court again on July 6, 1994 (App. 6). Ruth, et.al. again asserted that the complaint should be dismissed for the reason that on its face, the property sought to be forfeited is not located in Polk County, and the "local action rule" requires forfeiture actions to be brought in the county where the real property is located (App. 2).

On August 29, 1994, Judge Roberts entered an "Order Denying Motion to Dismiss and Summary Judgment and Order Granting State's Motion to Transfer" (App. 7).

The State was directed by the last mentioned order to prepare an order of transfer. (App. 8) Two orders of transfer were prepared and submitted to Judge Roberts. She executed both. One order purportedly transferred a part of the forfeiture action to Charlotte County. The other purportedly transferred the remaining part to Sarasota County (App. 9).

Pursuant to Rule 9.030(b)(3), and Rule 9.100, Florida Rules of Appellate Procedure, Ruth, et.al., filed in the Second District Court of Appeal a Petition for Common Law Certiorari (App. 13) challenging the "Order Denying Motion to Dismiss and Summary Judgment and Order Granting State's Motion to Transfer". Subsequently, after the orders of transfer were entered, they filed in the Second District Court of Appeal Notices of Appeal from the two non-final transfer orders (App. 15, 16) in Polk County and a Notice of Appeal in each of the counties to

which each part of the segmented forfeiture suit was transferred. (App. 17, 19) Rule 9.130(a)(3)(a), Florida Rules of Appellate Procedure; Attys' Title Ins. Fund v. N. River Ins. Co., 634 So.2d 731 (Fla. 4th DCA 1994).

The certiorari petition and the appeals were consolidated by order of the Second District Court of Appeal on November 17, 1994 (App. 20).

On October 13, 1995 the Court of Appeal issued its opinion (App. 21). The opinion "dismissed" the petition for certiorari but in effect disposed of it by affirming the appeals from non-final orders. Succinctly, relying primarily on two federal cases, the Court held that inasmuch as the Polk County court had in personam jurisdiction over Stephen Ruth "... it had the power to adjudicate the right to the property as between Ruth and the state". On this premise it concluded that the Polk court had jurisdiction to sever and transfer the action (App. 21). The Court did not address the argument of Ruth, et.al. that if Polk had jurisdiction there was no basis for a change of venue because the State had chosen the Polk venue. One judge concurred in the result but opined that Ruth et.al. were correct in their contention that the forfeiture action was governed by the local action rule; and that accordingly the Polk court lacked jurisdiction to effectuate a forfeiture. However, he stated that he would hold that the court had jurisdiction to transfer the actions. The court certified the following questions to this Court:

I. DOES A CIRCUIT COURT WHICH HAS IN PERSONAM JURISDICTION OVER THE DEFENDANT BUT DOES NOT HAVE IN REM JURISDICTION OVER THE PROPERTY HAVE JURISDICTION TO DETERMINE THE RIGHT TO THE PROPERTY AS BETWEEN THE STATE AND THE DEFENDANT IN A CIVIL FORFEITURE ACTION BROUGHT PURSUANT TO SECTION 895.05(2), FLORIDA STATUTES?

II. DOES A CIRCUIT COURT WHICH HAS IN PERSONAM

JURISDICTION OVER THE DEFENDANT BUT DOES NOT HAVE IN REM JURISDICTION OVER THE PROPERTY HAVE JURISDICTION TO ENTER A FINAL JUDGMENT OF FORFEITURE OR MUST THE COURT TRANSFER THE ACTION TO THE CIRCUIT COURT WHICH HAS TERRITORIAL JURISDICTION OVER THE LAND SOUGHT TO BE FORFEITED.

Following the certification, Ruth et.al. filed their Notice to Invoke Discretionary Jurisdiction on November 9, 1995.

It should be noted that the proceedings in the Court of Appeal were initiated by a Petition for Writ of Certiorari pursuant to Rule 9.100, Florida Rules of Appellate Procedure and by appeals to review non-final orders pursuant to Rule 9.30, Florida Rules of Appellate Procedure. Those Rules require that such proceedings be submitted without the original records. Rule 9.100(e)(4) and (g); Rule 9.130(f). The appendix to the Petition for Writ of Certiorari to the Court of Appeals (and the Appendix to Ruth et.al.'s Initial Brief in the Court of Appeal) bear the same appendix numbers as the appendix that accompanies this brief. The additional documents in the present Appendix were generated during the course of the proceedings in the Court of Appeal.

This is Ruth, et.al.'s Initial Brief on the merits.

SUMMARY OF ARGUMENT

I

The Polk County Circuit Court did not have jurisdiction to determine whether the State or Ruth, et.al. had the right to the real property sought to be forfeited because it did not have territorial jurisdiction over the real property which is located in Charlotte County and Sarasota County, Florida.

The Second District Court of Appeal answered its first certified question affirmatively. It must be answered in the negative.

A court has no power to act in the absence of a jurisdictional foundation for the power. Subject matter jurisdiction is the court's power to act; the authority to adjudicate the subject matter. And, when the cause is one in rem, the court must have judicial power or control over the res, the thing that is the subject of the controversy. Lovett v. Lovett, 93 Fla. 611, 112 So. 768, 776 (1927); The Board of Trustees of the Internal Improvement Trust Fund of the State of Florida v. Mobil Oil Corporation, 455 So.2d 412 (Fla. 2d DCA 1984) quashed on other grounds but affirmed on the relevant point, Coastal Petroleum Company v. American Cyanamid Co., 492 So.2d 339 (Fla. 1986). Every cause of action the object of which requires the court to act directly on the property or on the title to the property, i.e. the res, is an in rem action. Goedmakers v. Goedmakers, 520 So.2d 575, 578 (Fla. 1988); Publix Super Markets, Inc. v. Cheesbro Roofing, Inc., 502 So.2d 484 (Fla. 5th DCA 1987).

Florida's "local action rule" is that when the objective of a cause of action is to have the court act directly on the property or its title, including a cause of action whereby a plaintiff "seeks to compel a change in the title to real property" it is local to the circuit in which the land

lies. Goedmakers v. Goedmakers, supra; Board of Trustees v. Mobil Oil Corporation, supra. The local action rule is a rule of subject matter jurisdiction, not a rule of venue. Board of Trustees v. Mobil Oil Corporation, supra; Publix Super Markets, Inc. v. Cheesbro Roofing, Inc., supra.

Section 895.05(2)(b) and (c), Florida Statutes, 1993, upon which the case sub judice is based, clearly contemplates that the State will be awarded title to the forfeited property if it prevails on the merits. The major, if not the only, thrust of the complaint is the attempt by the state to gain the forfeiture of lands in counties other than the forum county, Polk.

The Florida courts do not appear to have ruled on the question of whether a civil action seeking forfeiture of real property is governed by the local action rule. However, Florida Courts of Appeal consistently have held in cases involving personal property that forfeiture civil actions are in rem. In re Forfeiture of 1986 Pontiac Firebird, 600 So.2d 1178 (Fla. 2d DCA 1992); Navolio v. Dickey, 579 So.2d 328, 329 (Fla. 5th DCA 1991); Doersana v. Brescher, 468 So.2d 427 (Fla. 4th DCA 1985); Forfeiture of Approximately Forty Eight Thousand Nine Hundred Dollars, 432 So.2d 1382, 1384 (Fla. 4th DCA 1985); In re forfeiture of a 1981 Ford Automobile, 432 So.2d 732, 733 (Fla. 4th DCA 1983).

The Court of Appeal's reliance on the federal cases which it cites is misplaced. United States v. Real Property Located at 11205 McPherson Lane, Ojai, Cal., 74 F.Supp. 1483 (D. Nev. 1991), aff'd, 32 F.3d 573 (9th Cir.), cert. dismissed sub nom. is based on patently flawed reasoning; it gives no citations of authority to support its conclusion on the point under consideration; it is not consistent with the majority of federal decisions; it does not involve Florida's local action rule; and it is not consistent with Florida's local action rule. The other

case relied on by the Supreme Court simply follows the first case. Both are out of step with most federal decisional law which holds that civil forfeiture proceedings are necessarily in rem, Republic National Bank of Miami v. United States, 506 U.S., 1113 S.Ct., 121 L.Ed. 2d 474 (1992); United States v. One 1974 Porsche, 682 F.2d 283, 285 (1st Cir. 1982); and that a court's power to exercise such in rem jurisdiction derives entirely from its control over the res. One 1983 Home Made Vessel Named Barracuda, 858 F.2d 643, 647 (11th Cir.1988); United States v. One Lear Jet Aircraft, 836 F.2d 1571, 1573 (11th Cir. 1988) (en banc), cert. denied ____ U.S. ___, 108S. Ct. 2844, 101 L.Ed. 2d 881 (1988); U. S. v. $20,193.39 U.S. Currency, 16 F. 3d 344, 347 (9th Cir. 1994). A valid seizure of the res is a pre-requisite to the *initiation* of an in rem civil forfeiture proceeding. Republic National Bank of Miami v. United States, supra.

There is absolutely nothing in Section 895.05, Florida Statutes, (1993) to indicate that the legislature intended to abrogate the local action rule when the relief sought is forfeiture of real property lying outside a circuit court's territorial jurisdiction. Moreover, there is some question as to whether the legislature could have given the circuit courts extra-territorial jurisdiction in RICO actions had it wanted to. See Board of Trustees of Internal Improvement Fund v. Mobil Oil, supra at 415.

Even if it is concluded that the Court of Appeal was correct in its holding that the Polk County Circuit Court had jurisdiction over the action seeking forfeiture of real property in Sarasota County and Charlotte County, the decision should be overturned because the question becomes one of venue, not jurisdiction, and there was no basis for changing venue from Polk County to Charlotte County.

II

The Polk County Circuit Court did not have the jurisdictional power to order the transfer of the in rem forfeiture cause of action to Charlotte County and Sarasota County.

A circuit court which has in personam jurisdiction over the defendant but which does not have territorial jurisdiction over the res of an in rem cause of action does not have subject matter jurisdiction to transfer the in rem cause of action to the proper circuit. Its only alternative is to dismiss or strike the cause of action.

The local action rule is a rule of subject matter jurisdiction, not a rule of venue. Board of Trustees v. Mobil Oil Corporation, supra; Publix Super Markets, Inc. v. Cheesbro Roofing, Inc., supra. Subject matter jurisdiction is the court's power to act. The authority to adjudicate the matter. Department of Public Safety v. Scott, supra. The venue statutes necessarily presuppose that a court where venue properly lies has jurisdiction over the subject matter of the suit. They do not confer extra-territorial jurisdiction. Lakeland Ideal Farm & Drainage Dist. et al. v. Mitchell, 97 Fla. 89, 122 So. 516 (Fla. 1929); Georgia Casualty Co. v. O'Donnell, supra; The Board of Trustees of the Internal Improvement Trust Fund of the State of Florida v. Mobil Oil Corporation, supra.

Subject matter jurisdiction must be properly invoked by pleading and service of process. Lovett v. Lovett, supra at p. 776. In order to invoke a court's jurisdiction over an in rem cause of action the court must have territorial jurisdiction over the res at the time the suit is *initiated* because a valid seizure, either actual or constructive is necessary to *initiate* a forfeiture action. Republic National Bank of Miami v. United States, 506 U.S., 1113 S.Ct., 121 L.Ed. 2d 474 (1992); Lovett v. Lovett, supra. If a complaint attempting to state an in rem cause of action is filed in a court that doesn't have territorial jurisdiction over the res, *and the summons is issued*

by that court, that court never acquires jurisdiction over the cause of action because the res has not been lawfully brought before it by lawful process. Succinctly, without a valid seizure of the res, either actual or constructive, --- because the court lacks extra-territorial jurisdiction over it --- no forfeiture action can be initiated by a proper pleading and service of process. Republic National Bank of Miami v. United States, supra. Lovett v. Lovett, supra.

An in rem cause of action that because of jurisdictional deficiencies has not been lawfully *initiated* manifestly cannot be transferred because the transferring court, not having acquired subject matter jurisdiction, has nothing to transfer and the receiving court has nothing to receive. When a court lacks subject matter jurisdiction it has no power to adjudicate or determine any issue or cause submitted to it. Capricorn Marble Company v. George Hyman Construction Company, 462 So.2d 1208 (Fla. 4th DCA 1985). It has no power to do anything but to dismiss or strike the cause of action. The Mayor v. Cooper, 73 U.S. (6 Wall.) 247, 18 L. Ed. 851, 852 (1867); Drew v. State, 765 S.W.2d 533, 536 (Tex.App. 1989); Swope v. Northern Illinois Gas Company, 581 N.E. 2d 819 (Ill.App.1991); Tonkin v. Sonnenberg, 539 So.2d 1143 (Fla. 5th DCA 1989).

For the foregoing reasons, the orders of transfer in the instant case were nullities --- orders of no force and effect. The Polk Court, lacking subject matter jurisdiction, had no alternative but to dismiss the case.

ARGUMENT

I

The Polk County Circuit Court did not have jurisdiction to determine whether the State or Ruth, et.al. had the right to the real property sought to be forfeited because it did not have territorial jurisdiction over the real property which is located in Charlotte County and Sarasota County, Florida.

The Second District Court of Appeal's first certified question reads as follows:

> DOES A CIRCUIT COURT WHICH HAS IN PERSONAM JURISDICTION OVER THE DEFENDANT BUT DOES NOT HAVE IN REM JURISDICTION OVER THE PROPERTY HAVE JURISDICTION TO DETERMINE THE RIGHT TO THE PROPERTY AS BETWEEN THE STATE AND THE DEFENDANT IN A CIVIL FORFEITURE ACTION BROUGHT PURSUANT TO SECTION 895.05(2), FLORIDA STATUTES?

That Court answered the question affirmatively (App. 21, p. 8). The law demands that it be answered in the negative.

The principle that underlies Ruth et.al's position in this case is that a court has no power to act in the absence of a jurisdictional foundation for the exercise of the power. Lampkin-Asam v. Dist. Ct. of Appeal, Third Dist., 364 So.2d 469, 471 (Fla. 1978); State v. Carroll, 102 So.2d 129, 131 (Fla. 1958); Southeast First National Bank of Miami v. Herin, 357 So.2d 716, 718 (Fla.1978); Dewey v. Mynatt, 183 So.2d 234, 235 (Fla. 2d DCA 1966); Bumby and Stimpson, Inc. v. Peninsular Utilities Corp., 179 So.2d 414, 415 (Fla. 3d DCA 1965).

The Polk County Circuit Court was powerless to act on the State's purported cause of action seeking forfeiture of Ruth et.al.'s real property in Charlotte and Sarasota counties because it lacked subject matter jurisdiction over the cause of action. By definition, subject matter jurisdiction is a court's power to act; the authority to adjudicate the subject matter. State

Department of Highway Safety and Motor Vehicles v. Scott, 583 So.2d 785, 787 (Fla. 2d DCA 1993), citing Lovett v. Lovett, supra at 776.

A court, to have jurisdiction over the subject matter and the parties, must (i) have jurisdiction over the class of case to which the cause belongs; (ii) the jurisdiction must be lawfully invoked in that particular case by bringing the necessary parties before the court; (iii) the controversy must be presented by proper pleading; and (iv) when the cause is one in rem the court must have judicial power or control over the res, the thing that is the subject of the controversy. Lovett v. Lovett, supra at 776; The Board of Trustees of the Internal Improvement Trust Fund of the State of Florida v. Mobil Oil Corporation, 455 So.2d 412 (Fla. 2d DCA 1984) quashed on other grounds but affirmed on the relevant point, Coastal Petroleum Company v. American Cyanamid Co., supra. It is the second and fourth of the jurisdictional requirements articulated in Lovett that govern this case.

Every action which involves property in litigation is not an in rem action; but *every cause of action* the object of which requires the court to act directly on the property or on the title to the property, i.e. the res, is an in rem action. Publix Super Markets, Inc. v. Cheesbro Roofing, Inc., 502 So.2d 484 (Fla. 5th DCA 1987). Actions in rem *must* be *brought* in the county in which the land lies because the court must have direct control over the res in order to exercise its jurisdiction and grant the relief sought. Goedmakers v. Goedmakers, 520 So.2d 575, 578 (Fla. 1988); Publix Super Markets v. Cheesbro Roofing, supra. Florida's "local action rule" is that when the objective of a cause of action is to have the court act directly *on the property or its title*, the action is local to the circuit in which the land lies. Board of Trustees v. Mobil, supra. More specifically to the point vis-a-vis the case sub judice, when a plaintiff "seeks to compel a

change" in title to real property the local action rule requires the suit to be brought in the county where the land is situated. Goedmakers v. Goedmakers, supra. Without question, Section 895.05, Florida Statutes, under which this alleged cause of action for the forfeiture of real property was brought, contemplates that the State will be awarded title to the forfeited property. See Section 895.05(2)(b) and (c), Florida Statutes (1993). How can it possibly be said that the suit is not seeking to compel a change in the title to real property? Goedmakers v. Goedmakers, supra.

The local action rule is a rule of subject matter jurisdiction, not a rule of venue. Board of Trustees v. Mobil, supra, Publix Super Markets v. Cheesbro Roofing, supra. The terms "venue" and "jurisdiction may not be used interchangeably. Stewart v. Carr, 218 So.2d 525 (Fla. 2d DCA 1969); Williams v. Ferrentino, 199 So.2d 504 (Fla. 2d DCA 1967); Bambrick v. Bambrick, 165 So.2d 449 (Fla. 2d DCA 1964).

The Complaint (App. 1) in the case sub judice, purportedly is brought under the authority of Section 895.02(2), Florida Statutes. While the Complaint mentions personal property to be forfeited, and while it mentions damages in the prayer for relief, it doesn't identify any personal property to be forfeited and contains no allegations that the State has been damaged or allegations as to how it has been damaged. The point is that the major, if not the only, thrust of the complaint is the attempt to gain the forfeiture of lands in counties other than the forum county, Polk. Prior to this case the Florida courts do not appear to have ruled on the question of whether a civil suit seeking forfeiture of real property is governed by the local action rule. However, the Florida Courts of Appeal, usually trying to avoid double jeopardy arguments, consistently have held in cases involving personal property that forfeiture civil actions are in rem. In re Forfeiture

of 1986 Pontiac Firebird, 600 So.2d 1178 (Fla. 2d DCA 1992); Navolio v. Dickey, 579 So.2d 328, 329 (Fla. 5th DCA 1991); Doersana v. Brescher, 468 So.2d 427 (Fla. 4th DCA 1985); Forfeiture of Approximately Forty Eight Thousand Nine Hundred Dollars, 432 So.2d 1382, 1384 (Fla. 4th DCA 1985); In re forfeiture of a 1981 Ford Automobile, 432 So.2d 732, 733 (Fla. 4th DCA 1983). It is difficult to understand how forfeiture actions to obtain title to real property, certainly property with a "fixed location", as described in Goedmakers v. Goedmakers, supra, could be anything other than in rem.

The State, in its Response to Petition for Common Law Certiorari in the Court of Appeal (App. 14) nakedly asserted that Chapter 895, Florida Statutes (1993) confers subject matter jurisdiction of forfeiture actions brought pursuant to Florida's "RICO Act" on all circuit courts of the State without regard to where the property that is subject to forfeiture is located. The Court of Appeal, relying on two federal cases, arrived at the result urged by the State even though it is unclear whether it adopted its reasoning.

The Court's reliance on the cited federal cases is clearly misplaced. In the first of the cases, United States v. Real Property Located at 11205 McPherson Lane, Ojai, Cal., 74 F.Supp. 1483 (D. Nev. 1991), aff'd, 32 F.3d 573 (9th Cir.), cert. dismissed sub nom., a Nevada United States district court, in which forfeitures of California real property was sought, based its decision that it had jurisdiction over the action seeking forfeiture of the California property on the proposition that "In addition to subject matter jurisdiction, a court adjudicating rights to real property must have personal jurisdiction over the defendant, in personam jurisdiction, or jurisdiction over the property, in rem jurisdiction". Id. at 1484. It then made the unsupported observation that in rem jurisdiction "refers to a court's power to determine a person's interest in

certain real property as against the whole world." After acknowledging that it didn't have jurisdiction to enter an order "against the whole world" because the property wasn't located in its district the court reasoned that "... plaintiff asks only that we determine that between the United States and Claimant, the United States has a right to the subject property." Id at 1484. It then lapsed into a discussion of venue and service of process outside the forum district. Without question the rationale of the case does not comport with Florida's local action rule because the very hallmark of a local action within the meaning of the rule is that one party "seeks to compel a change in title." Goedmakers v. Goedmakers, supra; Board of Trustees v. Mobil, supra. Under the reasoning of that particular federal court a suit to quiet title, being a "suit against the world," would have to be brought within the territorial jurisdiction of the court, while a mortgage foreclosure could be brought in any circuit where the defendant can be found because such a suit is "not against the world" but is simply a suit to determine which of two claimants has a right to the property. Clearly this is not the law of Florida. Simply put, Real Property Located at 11205 McPherson Lane, is based on patently flawed reasoning; it gives no citations of authority to support its conclusion on this point; it is not consistent with the majority of federal decisions; it does not involve Florida's local action rule; and it is not consistent with Florida's local action rule. The other federal case, United States v. Contents of Accounts Nos. 3034504504 & 144 - 07143 at Merrill Lynch, Pierce, Fenner & Smith, Inc., 971 F.2d 974 (3d Cir. 1992), cert. denied sub nom. cites the first case as authority and appears to be bottomed on the same notion, viz. that in personam jurisdiction gives the court the power to adjudicate ownership of a res located outside its territory as between the government and the defendant.

Id at 982.

Ruth, et.al submit that the two cases relied on by the Court of Appeal are out of step with most federal decisional law which holds that civil forfeiture proceedings are necessarily in rem. Republic National Bank of Miami v. United States, 506 U.S., 1113 S.Ct., 121 L.Ed. 2d 474 (1992); United States v. One 1974 Porsche, 682 F.2d 283, 285 (1st Cir. 1982); and that a court's power to exercise such in rem jurisdiction derives entirely from its control over the res. One 1983 Home Made Vessel Named Barracuda, 858 F.2d 643, 647 (11th Cir.1988); United States v. One Lear Jet Aircraft, 836 F.2d 1571, 1573 (11th Cir. 1988) (en banc), cert. denied ____ U.S. ___, 108S. Ct. 2844, 101 L.Ed. 2d 881 (1988); U. S. v. $20,193.39 U.S. Currency, 16 F. 3d 344, 347 (9th Cir. 1994).

In Republic National Bank of Miami v. United States, supra, the U. S. Supreme Court came right to the point when it observed:

> Certainly it has long been understood that a valid seizure of the res is a pre-requisite to the *initiation* of an in rem civil forfeiture proceeding. (emphasis by the court)

The Court of Appeal majority simply has latched on to two aberrant federal decisions, the seminal one by a trial court, without considering a large body of federal decisional law to the contrary. By adopting the reasoning of the two isolated federal cases and applying it to the instant case the Court of Appeal, plainly and simply, has emasculated the local action rule.

Ruth et. al. agree that as courts of general jurisdiction Florida's circuit courts have subject matter jurisdiction over the "class of case" to which Chapter 895 RICO civil actions belong. I.e., if properly invoked RICO civil actions meet the first prong of the subject matter jurisdictional test of Lovett v. Lovett, supra. That is what Section 895.05(1) means when it says "all circuit

courts" shall have jurisdiction over the type claims described in the subsection. Moreover, Ruth et.al. agree that from a venue standpoint such actions can be brought wherever venue is proper. The venue statutes necessarily presuppose that a court where venue properly lies has jurisdiction over the subject matter of the suit, however. They do not confer extra-territorial jurisdiction. Lakeland Ideal Farm & Drainage Dist. et al. v. Mitchell, 97 Fla. 89, 122 So. 516 (Fla. 1929); Georgia Casualty Co. v. O'Donnell, supra; The Board of Trustees of the Internal Improvement Trust Fund of the State of Florida v. Mobil Oil Corporation, supra.

There is absolutely nothing in Section 895.05 to indicate that the legislature intended to abrogate the local action rule when the relief sought is forfeiture of real property lying outside a circuit court's territorial jurisdiction. In other words, there is absolutely no language in the statute that confers extra- territorial jurisdiction on the circuit courts of the state to forfeit real property not located within the particular court's jurisdictional boundaries. Yet, the majority opinion in the Court of Appeal has held just that in this case.

A quick look at the RICO statute leaves little doubt but that Ruth et.al. are correct in their assertion that the RICO statute does not confer extra-territorial jurisdiction over circuit courts. First, the "preamble" to Chapter 895, Florida Statutes (1993), cited by the State on page 4 of its Response to the Petition for Certiorari filed in the District Court, only deals with the filing of RICO lien notices and the effects of such filings. It is inapposite. Second, Section 895.05(1) authorizes "any circuit court" after making due provisions for the rights of innocent persons, to *enjoin* violations of the provisions of Section 895.03 by issuing appropriate orders and judgments such as those delineated in that subsection. Certainly an injunction suit generally is in personam and can be filed wherever venue is proper. Most importantly, Section 895.05(1) does not refer

to forfeitures. Third, Section 895.05 (2), which does deal with the forfeiture of property, does not use the "any circuit court" language of subsection (1) nor does it contain any other language that even arguably extends the in rem jurisdiction of circuit courts to real property located outside their respective circuits.

Ruth et.al.'s argument that Section 895.05 does not give the circuit courts extraterritorial jurisdiction over in rem actions assumes, arguendo only, that the legislature could have *constitutionally* given such courts extraterritorial jurisdiction had it wanted to. This caveat is raised because the Second District Court of Appeal seems to have given the territorial jurisdiction of circuit courts constitutional status when it opined:

> Florida's constitution delegated the legislature with the mandatory responsibility of dividing the state into judicial circuits along county lines. See Art. V, § 1, Fla. Const. (1968). Acting pursuant to the command of the constitution, the legislature divided the state into twenty judicial circuits along county lines. See § 26.01, Fla.Stat. (1981). *By the very act of providing for this type of division of the state into judicial circuits, the constitution clearly contemplated territorial limitations upon each circuit court. The geographical boundaries of a circuit court along county lines were designed and prescribed with a definite object in view--to constrict the extent of a circuit court's operation and authority...* (emphasis added)

Board of Trustees of Internal Improvement Fund v. Mobil Oil Co., supra at 415.

While it did not expressly adopt this language, this Court in Coastal Petroleum Co. v. American Cyanamid Co., supra agreed with the Second District that the Mobil case was controlled by the local action rule.

In sum, and to re-iterate, Ruth, et.al. submit that, *other than by discarding the local action rule,* the only way the Court of Appeal's first certified question can be answered affirmatively would be to conclude that the language of Chapter 895 confers extra-territorial jurisdiction on

circuit courts for RICO forfeiture purposes. They further submit that there is absolutely nothing in the statute to justify such a conclusion and if by some stretch of the imagination such language is found to exist it may be unconstitutional. Those considerations should be guided by the principle that forfeitures are not favored at law and statutes providing for forfeitures must be strictly construed. Boyle v. State, 47 So.2d 693 (Fla. 1950); Estate of Maltie v. State, 404 So.2d 384 (Fla. 4th DCA 1981); Ferlita v. State, 380 So.2d 1118 (Fla. 2d DCA 1980).

It is ironic that the State's belated recognition of the fact that the forfeiture action is governed by the local action rule is what caused it to seek to have the case transferred to Charlotte and Sarasota Counties in the first place. There is also irony in the proposition that *if* RICO forfeiture actions are not subject to the local action rule as the Second District Court of Appeal has held, with the result that the Polk court was empowered to determine whether the state or Ruth, et.al. had the right to ownership of the land in other counties, it still was error to transfer the forfeiture cause(s) of action. ***That is because if the local action rule does not apply, the question becomes one of venue, not jurisdiction, and the State was not entitled to a change of venue.***

In other words, the Court of Appeal held "... we conclude that the Polk County Circuit Court had jurisdiction over the forfeiture action". (App. 21, p. 8). Premised on this holding, coupled with the fact that the Polk court had in personam jurisdiction, the Court concluded that the Polk court had jurisdiction to order the transfer. The question now being asked is "why should the case be transferred if the Polk court had jurisdiction over the forfeiture action?"

The State chose the Polk County venue. Moreover, it was a proper choice insofar as venue is concerned. It was proper because Section 47.011, Florida Statutes, (1993) which

governs venue in the absence of special statutory provisions to the contrary states that actions shall be brought only in (i) the county where one of the defendants resides, (ii) the county where the cause of action accrued, or (iii) the county where the property in the litigation is located. The Complaint clearly shows that venue is properly lodged in Polk County based on the allegations regarding defendant Stephen L. Ruth's Polk County residency and the requested relief seeking money damages from Ruth, et.al.

The Complaint (App. 1, p. 2) also alleges that defendant Eileen Borg is a resident of Englewood, Florida and that the defendant Eileen Borg Revocable Trust is a resident of Venice, Florida. Both Englewood and Venice are in Sarasota County. Thus, a suit brought in Sarasota County, in addition to satisfying the local action rule, also would have been a proper venue under Section 47.011, Florida Statutes (1993). Notwithstanding this fact, the State chose to file suit in Polk where another defendant resided. Accordingly, Polk was a proper venue.

A plaintiff's initial decision regarding venue is presumptively correct and the party challenging venue has the burden to demonstrate any impropriety in the Plaintiff's initial choice. Berrycook Ford, Inc. v. Ford Motor Company, 571 So. 2d 61 (Fla. 1st DCA 1990). The party seeking the change in venue has the burden of establishing that the initial choice of venue was improper and not just that venue is proper elsewhere. Schecter v. Fishman, 525 So. 2d 502 (Fla. 5th DCA 1988). A plaintiff's choice of venue may not be disturbed on a motion to transfer for improper venue as long as the complaint does not affirmatively show that venue is lacking. Polackwich v. Florida Power and Light Company, 576 So. 2d 892 (Fla. 2nd DCA 1991). A plaintiff's initial election of venue controls, unless venue will not lie in that place. Peavy v. Parrish, 385 So. 2d 1035, (Fla. 4th DCA 1980).

The State cannot show that *venue* was not proper in Polk County. It based its "Renewed Motion to Sever and Transfer Action" on the theory that it would be prejudiced by potential lien priority problems or statute of limitation problems if this action was not transferred (because of the local action rule). *It failed to either allege or prove that the original choice of venue was improper.* There is no authority that allows a plaintiff to "venue shop" *after it makes its initial choice.*

Accordingly, if the Court of Appeal's first certified question is answered in the affirmative the case should be sent back for reversal because there was no legal basis for the change of venue. The State simply should not be able to "have its cake and eat it too".

Resorting to the vernacular the "bottom line" is that the first certified question must be answered in the negative. The scar it will leave on the decisional law of Florida, if it is allowed to stand, simply will be too deep.

II

The Polk County Circuit Court did not have the jurisdictional power to order the transfer of the in rem forfeiture cause of action to Charlotte County and Sarasota County.

The Court of Appeal's second certified question reads as follows:

> DOES A CIRCUIT COURT WHICH HAS IN PERSONAM JURISDICTION OVER THE DEFENDANT BUT DOES NOT HAVE IN REM JURISDICTION OVER THE PROPERTY HAVE JURISDICTION TO ENTER A FINAL JUDGMENT OF FORFEITURE OR MUST THE COURT TRANSFER THE ACTION TO THE CIRCUIT COURT WHICH HAS TERRITORIAL JURISDICTION OVER THE LAND SOUGHT TO BE FORFEITED.

This question cannot be answered in either the affirmative or the negative because it erroneously assumes, as one of its alternatives, the central issue in controversy, viz., whether the

Polk County Circuit Court, having in personam jurisdiction over defendant Stephen Ruth, *had subject matter jurisdiction to order a transfer* of the alleged in rem cause of action. I.e., the certified question begs the very question that brought the case to the Court of Appeal and on to this Court. The question can be better stated as follows:

> Does a circuit court which has in personam jurisdiction over the defendant but which does not have territorial jurisdiction over the res of an in rem cause of action, have subject matter jurisdiction to transfer the in rem cause of action to the proper circuit or must it dismiss or strike the cause of action?

Albeit Ruth et.al. have respectfully suggested that the question should be rephrased, this appeal should be decided on the answer to this question, not the first certified question. This question raises an issue that all too often is not recognized by both litigants and courts. It is one that needs to be resolved in Florida. Ruth et.al. submit that the certified question must be answered in the negative without regard to the wording.

To help focus on the point being made, it is helpful to restate several points of law made above. The local action rule is a rule of subject matter jurisdiction, not a rule of venue. The Board of Trustees v. Mobil Oil, supra, Publix Super Markets v. Cheesbro Roofing, supra. Subject matter jurisdiction is a court's power to act; the authority to adjudicate the subject matter. State Department of Highway Safety and Motor Vehicles v. Scott, 583 So.2d 785, 787 (Fla. 2d DCA 1993). The venue statutes necessarily presuppose that a court where venue properly lies has jurisdiction over the subject matter of the suit. They do not confer extra-territorial jurisdiction. Lakeland Ideal Farm & Drainage Dist. et al. v. Mitchell, 97 Fla. 89, 122 So. 516 (Fla. 1929); Georgia Casualty Co. v. O'Donnell, supra; The Board of Trustees of the Internal Improvement Trust Fund of the State of Florida v. Mobil Oil Corporation, supra.

To properly focus on the problem, it also is necessary to revisit one of the basic rules of

subject matter jurisdiction. Subject matter jurisdiction must be properly *invoked* by *pleading and service of process;* and "when the cause is in rem the court must have judicial power or control over the res." Lovett v. Lovett, supra at p. 776. This simply has to mean that when an initial pleading, in this case the complaint, attempts to state an in rem cause of action, the court must be able to attain jurisdiction over the res when process, whether actual or constructive, is served or it doesn't acquire subject matter jurisdiction over the in rem cause of action. Put slightly differently, a court that cannot acquire subject matter jurisdiction of the in rem cause of action because it can't seize the res which lies outside its territory, does not have before it a cause of action that was *initiated* by proper pleading and service of process. How does a complaint that is filed in a court that doesn't have territorial subject matter jurisdiction, and a summons that is issued by a court that doesn't have such jurisdiction, bring the res before the Court?

Ultimately, if an in rem cause of action is never before the court because it cannot be lawfully *initiated* in that court, the court has nothing but useless paper to transfer to the proper county. The order of transfer must be a nullity in such a circumstance. In the instant case no court, whether it be in Polk, Sarasota, or Charlotte *has ever acquired jurisdiction of the* in rem *cause of action* because a proper pleading invoking subject matter jurisdiction has not been filed and served with lawful process in any of the counties involved. If there was no jurisdiction over the cause of action in *any* court *before* the transfer, how does any court acquire jurisdiction over it? If it can, it must be by some method akin to alchemy. Certainly in personam jurisdiction over the defendant does not supply the answer.

The construction being urged is buttressed by the U. S. Supreme Court's ruling in Republic National Bank of Miami v. United States, supra. In that case the res had been removed

from the court's territorial jurisdiction after it was seized. The Court of Appeals held that the court no longer had jurisdiction of the in rem action. The Supreme Court reversed, positing that "a valid seizure of the res is a prerequisite to the *initiation* of an in rem civil forfeiture proceeding." It has to be obvious that without a valid actual or constructive seizure of the res --- because the court lacks territorial jurisdiction over it --- no forfeiture action can be *initiated* by proper pleading and service of process. And, again, if a cause of action has not been *initiated*, how can it be transferred?

It is a fundamental principle of law that when a court lacks subject matter jurisdiction it has no power to adjudicate or determine any issue or cause submitted to it. Capricorn Marble Company v. George Hyman Construction Company, 462 So.2d 1208 (Fla. 4th DCA 1985). This fundamental principle leaves no room for the Polk County Circuit Court to have ordered the transfer of the in rem forfeiture cause of action to another county, or to have entered any other order other than an order of dismissal. It did not have subject matter jurisdiction over the cause of action so it did not have any jurisdictional basis or power to order a transfer of the cause of action to the proper counties. While there does not appear to be any Florida cases addressing this proposition directly, there is support for it.

The U. S. Supreme Court, in The Mayor v. Cooper, 73 U.S. (6 Wall.) 247, 18 L. Ed. 851, 852 (1867) opined:

> The court held that it has no jurisdiction whatever of the case, and yet gave a judgment for the costs of the motion, and ordered that an execution should issue to collect them. This was clearly erroneous. If there were no jurisdiction there was no power to do anything but to strike the case from the docket. In that view of the subject the matter was as much coram non judice as anything else could be, and the award of costs and execution was consequently

> void. Such was the necessary result of the conclusions of the court. (emphasis added)

Plainly, when a court lacks subject matter jurisdiction over a cause of action it is as if the cause was coram non judice, "in the presence of a person not a judge".

In Drew v. State, 765 S.W.2d 533, 536 (Tex.App. 1989), the court said:

> Where a court lacks jurisdiction, it should proceed no further than to dismiss the cause for want of power to hear and determine the controversy...any order or decree entered, other than one of dismissal is void.

In Swope v. Northern Illinois Gas Company, 581 N.E. 2d 819 (Ill.App.1991), an Illinois appellate court stated:

> When a trial court lacks subject-matter jurisdiction, the only thing it has the power to do is dismiss the action. Cahoon v. Alton Packaging Corp. (1986), 148 Ill.App.3d 480, 101 Ill.Dec. 934, 499 N.E. 2d 52, In re Marriage of Passiales (1986), 144 Ill.App.3d 629, 98 Ill.Dec. 419, 49 N.E. 2d 541. Any order entered without subject-matter jurisdiction is void. Talandis Constr. Corp. v. Illinois Building Authority (1978) 60 Ill.App.3d 715, 18 Ill.Dec. 84, 377 N.E.2d 237).

See also Johns-Manville Corp. v. U.S., 893 F.2d 324, 326-327 (Fed.Cir. 1989); United States v. Rice, 176 F.2d 373 (3d Cir. 1949); Buttram v. Central States Health & Welfare Fund, 781 F.Supp. 1429 (E.D. Mo. 1992); Myers v. Long Island Lighting Company, 623 F.Supp. 1076, 1080 (E.D.Ny. 1985).

It is true that there has been at least one case wherein a Florida appellate court, after determining in a particular case that the local action rule mandated jurisdiction in a county other than the one where the case was tried, reversed and remanded the case for transfer to the county having jurisdiction. See State Department of Natural Resources v. Antioch University, 533 So.2d 869, 873 (Fla. 1st DCA 1988), relied on by Judge Blue in his concurring opinion below. There

is absolutely nothing in Antioch University or any other Florida case indicating that the question of whether a court that lacked territorial jurisdiction over an in rem cause of action had jurisdiction to order a transfer of the cause of action to the proper county *was either raised or considered.* Obviously the question was not recognized, or possibly was ignored, by both counsel and the courts. The fact that transfers may have been ordered in Antioch and perhaps other cases does not mean that they were the result of proper analysis, or, indeed any analysis at all. They should have no precedential value unless the issue was raised and considered. Counsel submits that the case now before the court is unique in Florida law insofar as this question is concerned.

One Florida appellate court appears to have recognized the problem. After concluding that the transfer it was ordering was based on venue, not in rem jurisdiction, the Fifth District Court of Appeal noted:

> If subject matter jurisdiction were truly involved, it would not be possible to transfer the cause to another circuit.

Tonkin v. Sonnenberg, 539 So.2d 1143 (Fla. 5th DCA 1989). This observation may be dictum but it strongly suggests that the deciding panel of the Fifth District recognized and understood both the problem that arises when territorial subject matter jurisdiction is lacking in an in rem case, and what the inevitable solution would have to be.

The transfer order challenged by these proceedings cannot be justified on the basis of the "inherent power" of the Polk County court. Regularly constituted courts have power to do anything that is reasonably necessary to administer justice *within the scope of their jurisdiction,* but not otherwise. "Inherent power" has to do with the incidents of litigation, control of the court's process and procedure, control of the conduct of its officers and the preservation of order

and decorum with reference to such proceedings. Such is the scope of inherent power unless the authority creating the court clothes it with more. Booker v. State, 514 So.2d 1079, 1081 (Fla.1987); Petition of The Florida Bar, etc., 61 So.2d 646, 647 (1952); State v. Booth, 291 So.2d 74, 76 (Fla. 2d DCA 1974). The Florida Legislature, even if it constitutionally could do so, has not clothed the circuit courts of this state with the power to transfer in rem causes of action over which they have no territorial jurisdiction to the proper court, even when they have in personam jurisdiction over the defendants. The reasoning of the concurring judge in the court below seems to be that if the court had in personam jurisdiction it had the inherent power to order a transfer. For the reasons set forth above, this cannot be correct.

Lastly, this case does not involve a transfer between two courts in the same county. The rules make specific provision for such transfers which manifestly do not involve territorial jurisdiction. Rule 1.060, Florida Rules of Civil Procedure (If an action is pending in the wrong court in a county it may be transferred to the proper court *within said county*). See e.g. Spradley v. Doe, 612 So.2d 722 (Fla. 1st DCA 1993). A legislative act to the effect that a court which does not have subject matter jurisdiction over an in rem action because the res lies outside its territory has jurisdiction to transfer the action to a court having such jurisdiction might provide the authority that is lacking in this case if it could pass constitutional muster. The fact is that no such act exists. Inclusio unis est exclusio alterius seems applicable.

In sum, there is no legal authority justifying a transfer to another county of an in rem cause of action which was not initiated by proper pleading and process, because the res did not lie within the territorial jurisdiction of the court in which the suit was filed and which issued the process.

CONCLUSION

Ruth et.al respectfully submit that the Court should answer both certified questions in the negative for the reasons set forth above. The Court of Appeal should be directed to reverse the case and remand it to the Polk County Circuit Court with instruction to dismiss the forfeiture cause of action for lack of subject matter jurisdiction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail, postage prepaid, to Jeanne Clougher, 2002 N. Lois Ave., Suite 520 Tampa, Florida 33607, this 12th day of December, 1995.

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