Florida Law Review

Volume 53 | Issue 3 Article 4

July 2001

Appellate Procedure: Incompetence Forgiven

Allen C. Winsor

CASE COMMENTS

APPELLATE PROCEDURE: INCOMPETENCE FORGIVEN

Kaweblum v. Thornhill Estates Homeowners Ass'n, 755 So. 2d 85 (Fla. 2000)

*Allen C. Winsor**

Kaweblum, a civil litigant, lost his case on a summary judgment order in circuit court.[1] After the trial court issued the order, the Florida Rules of Civil Procedure allowed Kaweblum thirty days in which to file a notice of appeal.[2] Within that thirty-day period, Kaweblum did file a notice of appeal but filed it with the wrong court.[3] That "wrong court" subsequently forwarded the notice to the correct court, which docketed the notice precisely one day after the thirty-day time limit had expired.[4] The district court of appeal then ordered Kaweblum to show cause why the appeal should not be dismissed as untimely.[5] After reviewing Kaweblum's response to the show cause order, the court dismissed the appeal.[6] Arguing that the dismissal was improper, Kaweblum petitioned the Supreme Court of Florida for writ of mandamus.[7] Stating that a petition for writ of mandamus is appropriate to evaluate the correctness of a dismissal for lack of jurisdiction by a lower court, the supreme court found that it had jurisdiction.[8] The Florida Supreme Court reversed the appellate court's decision and HELD, when a notice of appeal is innocently filed in the

---

* To my wife Alicia. Special thanks to Professor Mary Twitchell for her helpful thoughts and comments.

1. Kaweblum v. Thornhill Estates Homeowners Ass'n, 755 So. 2d 85, 86 (Fla. 2000).

2. *Id.* at 86 n.2. Petitioner claimed the mistake was an inadvertent clerical error in which the appeal was mailed to the wrong court. *Id.* at 86 n.1. In Florida, appeals must be filed with the clerk of the trial court that issued the decision that is being appealed, rather than directly to the appellate court. FLA. R. APP. P. 9.110(b).

3. *Kaweblum*, 755 So. 2d at 86.

4. *Id.* The original dismissal order was rendered on Dec. 7, 1998. *Id.* Kaweblum filed his notice of appeal with the incorrect court on Dec. 30, 1998. *Id.* That court then forwarded the notice of appeal to the correct court which docketed the notice on Jan. 7, 1999, exactly one month (but thirty-one days) after the original order was rendered. *Id.*

5. *Id.*

6. *Id.* In its dismissal order, the court of appeal cited *Upshaw v. State*, 644 So. 2d 451 (Fla. 1st DCA 1994). *Id.*

7. *Id.* at 85.

8. *Id.*

wrong court in a timely manner, the notice should be treated as timely filed in the correct court.[9]

The Florida Constitution gives the Supreme Court of Florida the responsibility of adopting procedural rules for all state courts "including the time for seeking appellate review, the administrative supervision of all courts, [and] the transfer to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked."[10] Using this constitutional authority, the court created the Florida Rules of Appellate Procedure.[11] At issue in *Kaweblum* is the relation between two of those rules. First, Rule 9.110 strictly lays out the requirements to invoke appellate jurisdiction.[12] The appellant must file a notice of appeal with the clerk of the lower court within thirty days of the order that is being appealed.[13] On the other hand, Rule 9.040 specifically anticipates a litigant's improper filing by providing "[i]f a proceeding is commenced in an inappropriate court, that court shall transfer the cause to an appropriate court."[14] Conspicuously absent in the latter rule is the effect, if any, the transfer has on the timeliness of an appeal.[15]

The Florida Supreme Court first addressed Rule 9.040 in *Lampkin-Asam v. District Court of Appeal* in 1978.[16] In that case, the petitioner lost her civil suit in the trial court and incorrectly mailed her notice of appeal to the appellate court rather than the trial court.[17] The appellate court received the notice within the thirty-day filing period and forwarded it to the trial court pursuant to Rule 9.040(b).[18] By the time the trial court received and filed the notice, the thirty days had expired and the appellate court dismissed the appeal as untimely.[19] The supreme court affirmed the dismissal by holding that Rule 9.040 did not apply.[20] The rule, the court

---

9. *Id.* at 88.

10. FLA. CONST. art. V, § 2(a).

11. Alfonso v. Dep't of Envtl. Regulation, 616 So. 2d 44, 46 (Fla. 1993).

12. FLA. R. APP. P. 9.110(b).

13. *Id.* "Commencement. Jurisdiction of the court under this rule shall be invoked by filing 2 copies of a notice, accompanied by filing fees prescribed by law, with the clerk of the lower tribunal within 30 days of rendition of the order to be reviewed." *Id.* Rule 9.110 also includes certain exceptions and other formalities that are not at issue in the case at hand. *See id.*

14. FLA. R. APP. P. 9.040(b). The rule includes a similar provision for parties that seek an improper remedy. FLA. R. APP. P. 9.040(c). In those cases, "the cause shall be treated as if the proper remedy had been sought." *Id.*

15. *See* FLA. R. APP. P. 9.040.

16. 364 So. 2d 469, 470 (Fla. 1978).

17. *Id.*; *see also* text accompanying note 2. Petitioner did not mail the appeal until two days before the thirty-day time limit had run. *Lampkin-Asam*, 364 So. 2d at 470. After receiving the forwarded appeal, the correct court filed it seven days after the time had run. *Id.*

18. *Lampkin-Asam*, 364 So. 2d at 470.

19. *Id.*

20. *Id.* at 470-71. "Inasmuch as the transfer provision of Florida Rule of Appellate Procedure

reasoned, applied in cases in which the appeal was taken to the wrong appellate court,[21] "[f]or instance, where an appeal in a bond validation proceeding is taken to the District Court of Appeal instead of to the Supreme Court, or where an appeal in a case where the death penalty has been imposed is taken to the District Court instead of the Supreme Court . . . ."[22] The court found that given the facts, appellate jurisdiction had never been invoked rather than invoked in the wrong court.[23] To invoke appellate jurisdiction, litigants must follow Rule 9.110 and file with the trial court.[24]

Over the next decade, the Florida Supreme Court retreated from the *Lampkin-Asam* decision considerably.[25] The court then completely abandoned *Lampkin-Asam* in *Alfonso v. Department of Environmental Regulation*.[26] Like in *Lampkin-Asam*, the petitioners in *Alfonso* mistakenly filed a notice of appeal with the appellate court instead of the trial court as required by Rule 9.110.[27] After discovering the error, petitioners filed a "Motion to Transfer Notice of Appeal to Lower Tribunal and Restart Appellate Timetables, or to Deem Filing Sufficient to Invoke Appellate Jurisdiction, and Alternative Motion to Certify Question."[28] The appellate court dismissed the appeal and concluded on a motion for rehearing that it lacked jurisdiction.[29] In its order, after citing the "controlling and indistinguishable authority of *Lampkin-Asam*," the appellate court noted that the supreme court's decisions in *Johnson v. Citizens State Bank*[30] and

---

9.040(b) does not apply herein, the untimely filing of the notice of appeal constitutes a jurisdictional defect depriving the district court of jurisdiction to entertain petitioner's appeal...." *Id.*

21. *Id.* at 470.

22. *Id.* (quoting S.E. First Nat'l Bank v. Herin, 357 So. 2d 716, 717-18 (Fla. 1978)). The rule was required because of the revised state constitution that created the district courts of appeal and proscribed jurisdiction of the appellate courts. *Id.* "*Southeast First National Bank*... considered the former Florida Appellate Rule 2.1(a)(5)(d), which was revised and renumbered as Florida Rule of Appellate Procedure 9.040 in 1977." Alfonso v. Dep't of Envtl. Regulation, 616 So. 2d at 46.

23. *Lampkin-Asam*, 364 So. 2d at 470.

24. FLA. R. APP. P. 9.110(b).

25. *Alfonso*, 616 So. 2d at 47 (citing Johnson v. Citizens State Bank, 537 So. 2d 96 (Fla. 1989); Skinner v. Skinner, 561 So. 2d 260 (Fla. 1990)).

26. *Id.*

27. *Id.* at 45. For a case with similar facts but a different outcome than *Alfonso*, *see Flaksman v. State*, 1981 Ohio App. LEXIS 10671 (1981) (dismissing a complaint when petitioner incorrectly filed notice with appellate court instead of trial court as required by Ohio procedural rules despite a finding of good faith on petitioner's part and despite error being remedied within four days of deadline).

28. *Alfonso*, 616 So. 2d at 45.

29. *Id.*

30. 537 So. 2d 96 (Fla. 1989). In *Johnson*, the petitioner made a procedural error by filing a notice of appeal with the circuit court rather than a petition for certiorari in the district court. *Id.* at 97. In reversing the dismissal, the court held that article V, section 2(a) of the Florida

Skinner v. Skinner[31] left doubt as to the force of *Lampkin-Asam*.[32] The appellate court then presented the issue to the supreme court as a certified question.[33] In response to the certified question, the supreme court completely abandoned *Lampkin-Asam* by holding that an appellate court's jurisdiction can be properly invoked by a timely filing of notice in *either* the trial court *or* the appellate court.[34] The proper filing remained in the trial court, but "[t]he notice of appeal . . . wrongly filed should be transferred to the appropriate court *with the date of filing being the date the document was filed in the wrong court.*"[35]

After *Alfonso,* the First District Court of Appeal passed on an opportunity to further relax Rule 9.110.[36] The petitioner in *Upshaw v. Florida* filed his notice of appeal in the wrong trial court.[37] The court forwarded his notice to the correct court, but the clerk never received it.[38] The appellant contended that his notice to the incorrect court was legally sufficient to invoke jurisdiction of the appellate court.[39] The court explored

---

Constitution prohibits district courts from dismissing as untimely a notice of appeal that should be considered as a petition for a writ of certiorari. *Id.* at 97-98.

31. 561 So. 2d 260 (Fla. 1990). In *Skinner*, a follow-up to *Johnson*, the court held that a district court of appeal has jurisdiction even when a petition for certiorari is filed with the appellate court and not the circuit court. *Id.* at 261.

32. *Alfonso*, 616 So. 2d at 45 (quoting Alfonso v. State Dep't of Envtl. Regulation, 588 So. 2d 1065, 1065 (Fla. 3d DCA 1991)). The district court discussed and questioned the continuing validity of *Lampkin-Asam*, but found that because of the narrow and clear holding of *Lampkin-Asam*, it had no choice but to dismiss the appeal. *Alfonso*, 588 So. 2d at 1066.

33. *Alfonso*, 588 So. 2d at 1066.

34. *Alfonso*, 616 So. 2d at 47.

35. *Id.* (emphasis added). The court noted that affirming the district court decision without receding from *Johnson* and *Skinner*, would result in an unfortunate and nonsensical position:

> [A]ppellate jurisdiction would exist if a claimant committed two errors, choosing the wrongly captioned appellate relief and filing the notice of appeal or petition for certiorari in the wrong court; but appellate jurisdiction would not exist when only one error was committed such as filing a correctly captioned notice of appeal or petition for certiorari in the wrong court.

Id. The court found that it must recede either from the *Lampkin-Asam* or from the *Johnson* and *Skinner* decisions. *Id.* "The better rule of law is to recede from Lampkin-Asam . . . ." *Id.*

36. *See* Upshaw v. State, 641 So. 2d 451, 452-53 (Fla. 1st DCA 1994).

37. *Id.* at 452. Petitioner, a prisoner in a state correctional facility, contended that he had filed two notices of appeal, one in the wrong court and the other in the correct court. *Id.* He did not attach prison mail records or notarized notices in support of his claim and the correct court had no record of receiving his appeal. *Id.* It is interesting that given these facts the court still made no express mention of the credibility of the petitioner's claims.

38. *Id.* At any rate, "[i]t appears that no notice of appeal has ever been filed with the clerk of the [correct] circuit court at any time, and that no attempt has been made to timely file a notice of appeal in this [the appellate] court." *Id.*

39. *Id.*

Alfonso but distinguished it because in *Alfonso*, the petitioner filed with the court that would have had appellate jurisdiction. Noting *Alfonso's* expansion of the rule to allow jurisdiction to be invoked with a filing of notice in either the correct trial court or the court that would have appellate jurisdiction, the court pointed out that the appellant at bar had done neither.[40] Accordingly, the court dismissed the appeal for want of jurisdiction.[41]

The *Kaweblum* court finds that the *Upshaw* court applied *Alfonso* too narrowly.[42] While *Alfonso* expressly allows for jurisdiction when the notice of appeal was filed in either the lower court or the court which would have appellate jurisdiction, the court notes that *Alfonso* does not limit its holding to those facts.[43] "Nowhere in *Alfonso* did this Court explicitly hold that the *only* situation where a misfiled notice of appeal properly invokes the appellate court's jurisdiction is when the notice is erroneously filed with the appellate court."[44] Examining the committee notes of the rule as well as the language of the rule, the *Kaweblum* court interprets Rule 9.040(b) to mean a "notice of appeal timely filed in the wrong court must be transferred to the proper court and treated as timely filed in that court."[45] In so doing, the court overturns *Upshaw* and further liberalizes Rules 9.040(b) and 9.110(b).[46]

Statutes of limitations and time limits for appeals serve to keep courts operating efficiently and to treat litigants fairly.[47] "Indeed, there exists a 'compelling need for finality in litigation'. . . ."[48] The court's decision in *Kaweblum* favors the interests of the errant litigant over those of the appellee to achieve that finality. Of the line of cases in this area, the *Kaweblum* court is clearly the most sympathetic (and generous) to the misfiling party.[49]

---

40. *Id.* at 452-53.

41. *Id.* at 453.

42. Kaweblum v. Thornhill Estates Homeowners Ass'n, Inc., 755 So. 2d 85, 87 (Fla. 2000).

43. *Id.*

44. *Id.*

45. *Id.* Interestingly, after "determining the clear intent of the rule," the court notes that it will refer the issue to the Appellate Rules Committee to determine if clarification is necessary. *Id.* at 87-88.

46. *Id.* at 88.

47. David N. May, *Pioneer's Paradox: Appellate Rule 4(A)(5) and the Rule Against Excusing Ignorance of Law*, 48 DRAKE L. REV. 677, 693-94 (2000) ("[I]t is important that 'someday' the catastrophe [of litigation] must cease, normalcy must return, and 'there must be an end to litigation.'") (quoting Ackermann v. United States, 340 U.S. 193, 198 (1950)). "In fact, the very purpose of the Appellate Rules is to 'bring litigation to an end . . . .'" *Id.* (citing Cosmopolitan Aviation Corp. v. N.Y. State Dep't of Transp., 763 F.2d 507, 514 (2d Cir. 1985) (quoting McCormack v. Schindler, 520 F.2d 358, 362 (2d Cir. 1975))).

48. *Id.* (quoting Marcangelo v. Boardwalk Regency, 47 F.3d 88, 90 (3d Cir. 1995)).

49. There are now few, if any, permutations remaining in which an incorrectly filed notice

The *Kaweblum* court poses a hypothetical situation in support of its position:[50] A party timely files notice of appeal in the incorrect trial court, which forwards it[51] to the correct trial court.[52] If the forwarded notice reached the correct court within the thirty-day period for appeals, jurisdiction would be invoked.[53] If, however, the forwarded notice arrived beyond the thirty-day period, no jurisdiction would exist.[54] The court uses this hypothetical situation to reason that "[t]he timeliness of a misfiled notice of appeal should not depend on how quickly the court where the notice was improperly filed transfers the notice to the appropriate court."[55]

This hypothetical situation is equally illustrative in another way. By allowing the filing date to relate back to the date the notice was filed in the incorrect court, the thirty-day period for the correct court (as well as the opposing party) to receive notice of appeal is extended indefinitely.[56] If the court that wrongly received the notice "inadvertently" delayed forwarding, lost the notice, or even forwarded it to another incorrect court, notice of an appeal could be delayed months or years. Such delay would undermine whatever purpose the thirty-day limitation was designed to further.[57] Such

---

is refused jurisdiction. A litigant's notice may be filed in the trial court in which the appealed decision was entered, the appellate court that would hear the appeal, a trial court that did not enter the appealed decision, or an appellate court that will not hear the appeal. *See generally* Kaweblum v. Thornhill Estates Homeowners Ass'n, 755 So. 2d 85 (Fla. 2000).

50. *Id.* at 88.

51. FLA. R. APP. P. Rule 9.040(b).

52. *Kaweblum*, 755 So. 2d at 88.

53. *Id.*

54. *Id.*

55. *Id.* The Arkansas Supreme Court was not so understanding in *Rossi v. Rossi*, 892 S.W.2d. 246 (Ark. 1995), in which the Arkansas Supreme Court found that when the attorney's courier delivered the notice to the wrong court, the error deprived the court of jurisdiction. *Id.* at 246-47. "It was an error by the attorney. . . . It is the duty of the attorney, not of the clerk, to perfect an appeal." *Id.* at 247. Basing its decision on rules similar to those in Florida, the court found "substantial compliance" not to be sufficient as petitioner argued. *Id.* at 246. For other firm interpretations of the rules, *see Ala. Dep't of Mental Health & Mental Retardation v. Marshall*, 741 So. 2d 434 (Ala. Civ. App. 1999); *H.R. Lee Inv. Corp. v. Groover*, 225 S.E.2d 742 (Ga. App. Ct. 1976). *But see* Compton v. Tenn. Dep't of Corr., No. M1997-00066-COA-R3-CV, 1999 Tenn. App. LEXIS 799, at *2-*3 (Tenn. Ct. App. Dec. 3, 1999) (finding error on the part of the clerk of court for refusing to accept a timely notice of appeal because it failed certain formalities (e.g., no notarization and not on proper form)). The notice should have been accepted and filed by the clerk, so the later, corrected notice should be considered timely. *Id.* at *8.

56. Indeed, the *Kaweblum* court placed no time limitation on its holding that a notice filed in the wrong court should be considered timely filed. It follows that even if the court that receives the notice because of the appealing attorney's error holds the notice or is unreasonably delayed in forwarding it, the appeal would still be considered timely. *See Kaweblum*, 755 So. 2d at 85.

57. Presumably the purposes include considerations of finality of litigation and fairness to all parties discussed earlier. *See supra* note 47 and accompanying text.

a delay could severely disadvantage an appellee-to-be since notice of an appeal is contingent on appellant filing with the clerk of court.[58]

The court's sympathy for the petitioner in *Kaweblum* becomes even more apparent when it notes that the wrong court in which Kaweblum filed his notice failed to inform him of his mistake.[59] "[W]e believe that Kaweblum should not be prejudiced by any delay that occurred in the transfer of his notice by the circuit court because Kaweblum had no notification of his misfiling until a motion to dismiss was filed . . . ."[60] Kaweblum similarly might have had no notification that the court had not properly received his notice of appeal had he forgotten to send it, his courier mishandled it, or because of a host of other reasons he failed to correctly file his notice. Also important is that in the situation at hand, or the others suggested, Kaweblum had no notification that the correct court *had* properly filed his notice of appeal.

The court makes an appropriate exception to its new rule for cases in which the notice of appeal was intentionally filed with the wrong court for the purpose of convenience or delay.[61] This requirement, however, forces courts applying *Kaweblum* to examine the intent of the filing party. Thus, a litigant who *intentionally* files his notice of appeal with the wrong court for the *purpose* of convenience and delay is denied jurisdiction. On the other hand, a litigant who *inadvertently* files his notice of appeal with the wrong court may be allowed to enjoy the *result* of convenience and delay. Similarly, the opposing party may be forced to suffer inconvenience and delay as a result of his opponent's error. "[T]he majority substitutes a bright-line rule with a rule which is to be determined on the 'intent' of the filer."[62] Hence, after *Kaweblum*, jurisdiction is no longer based on an objective analysis.[63]

Absent in the opinion is any mention of Kaweblum's opponent in the proceeding. While conventional wisdom might suggest that a litigant has a greater chance of success when its opposing counsel is incompetent, the present opinion may add some doubt. After *Kaweblum*, a less careful[64] opposing attorney might cause a litigant great delay and inconvenience which may prejudice his case.

---

58. FLA. R. APP. P. 9.110. Some critics might argue that all petitioner has to do is pick up the telephone and call his opponent to determine if the latter has filed (or attempted to file) a notice of appeal. While in practice this may occur regularly, it shifts the burden of notice from the appellant to the appellee and places the burden opposite where the rules place it.

59. *Kaweblum*, 755 So. 2d at 88.

60. *Id.* at 88 n.4.

61. *Id.* at 88.

62. *Id.* at 89 (Wells, J., dissenting).

63. *Id.* (Wells, J., dissenting).

64. Dishonest attorneys could also mislead the court as to whether the misfiling was "inadvertent."

The decision in *Kaweblum* allows less incompetent litigators across the state to breathe a little easier. The court issues a pass to those who "inadvertently" fail to follow the rules. In relaxing the rules to excuse incompetence, the court has unfortunately lost sight of the right of the appellees-to-be to have the litigation put to rest. The misguided trend to become more forgiving of attorney errors might lead next to allowing appellate jurisdiction to attach if an attorney "inadvertently" forgets to file notice altogether.[65] For fairness to all litigants and for efficiency of the courts, all litigants should be expected to follow the procedural rules regarding timeliness of appeals. Improper filings should be rejected and attorneys thereby encouraged to be prudent and cautious.[66] Courts should demand proficiency from its officers and never excuse incompetence.

65. *Kaweblum*, 755 So.2d at 86 n.2.

66. If the procedural rules do not encourage such behavior, perhaps fear of malpractice suits from harmed clients would.