Filing # 207787107 E-Filed 09/27/2024 09:44:35 AM

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

CASE NO. 3D2024-1048

LOWER TRIBUNAL
CASE NO. 23-31-AP-01

ANTHONY VINCIGUERRA,
and COURTNEY BERRIEN,

Petitioners,

v.

MIAMI-DADE COUNTY
and CITY OF MIAMI,

Respondents.
_____ /

MIAMI-DADE COUNTY'S OPPOSITION TO MOTION FOR REHEARING, CLARIFICATION, AND/OR WRITTEN OPINION

Petitioners Anthony Vinciguerra and Courtney Berrien request rehearing, clarification, or a written opinion in this matter. But because they fail to demonstrate any entitlement to such relief and again just repeat select meritless arguments, their motion should be denied.

I. Petitioners are not entitled to rehearing or clarification

The Court's order stated in its entirety that "[u]pon consideration of the Petition for writ of certiorari, filed on July 24, 2024, and the Responses

thereto, it is ordered that said Petition is hereby dismissed."[1] 8/29/24 Order at 1. Presumably the Court determined that because the petition, on its face, failed to demonstrate any basis for the limited relief available on second-tier certiorari, dismissal was warranted. *See, e.g., AbouElSeoud v. AIM Recovery Servs., Inc.*, 299 So. 3d 428, 429 (Fla. 3d DCA 2019) (dismissing petition because it failed to satisfy standard for granting second-tier certiorari review); *State Farm Mut. Auto. Ins. Co. v. CC Chiropractic, LLC*, 245 So. 3d 755, 756 (Fla. 4th DCA 2018) (dismissing petition that sought prohibited "second appeal").

[1] Petitioners mistakenly characterize the Court's decision as a "*per curiam* affirmance," or PCA, rather than an unelaborated order of dismissal. Typically, a PCA results when the Court summarily affirms on appeal, whereas the dismissal here was a summary rejection of Petitioners' attempt to invoke this Court's original jurisdiction through second-tier certiorari review. But in either case, it is undoubtedly true that motions for rehearing "are rarely, if ever, warranted when the decision is without opinion." *See Marion v. Orlando Pain & Med. Rehab.*, 67 So. 3d 264, 265 (Fla. 5th DCA 2011). "[G]enerally, these motions are considered improper because a motion for rehearing cannot direct the court to matters overlooked if no written opinion has been published." *See Blake v. Am. Sales & Mgmt. Org. LLC*, 319 So. 3d 648 (Fla. 3d DCA 2021) (citation omitted); *Snell v. State*, 522 So. 2d 407, 407 (Fla. 5th DCA 1988) ("To maintain that the court has overlooked something or misapprehended something when no written opinion is available to support the basis of the motion is less than persuasive[.]"); *see also Wells v. State*, 132 So. 3d 1110, 1113 (Fla. 2014) (concluding that Supreme Court's analysis in prior cases as to unelaborated per curiam affirmances and denials is equally valid as to unelaborated per curiam dismissals and that Supreme Court therefore "does not have discretionary review jurisdiction over unelaborated per curiam dismissals from the district courts of appeal").

As the County pointed out in its response, the petition cited the incorrect legal standard and merely repeated the exact same arguments Petitioners unsuccessfully pressed below, including forbidden arguments about whether the local government board's decision was supported by competent substantial evidence. Resp. at 18-21. Moreover, the petition failed to even argue—much less demonstrate—that the Circuit Court's decision caused a miscarriage of justice, which is required to prevail on second-tier certiorari review. *Id.* at 22. And the petition was wrong on the merits. *Id.* at 23-55. Thus, given that Petitioners failed to demonstrate any entitlement to second-tier certiorari relief, the Court's order of dismissal was entirely correct and, accordingly, there is no basis for rehearing or clarification. *See, e.g., AbouElSeoud*, 299 So. 3d at 429; *CC Chiropractic, LLC*, 245 So. 3d at 756.

In seeking a different outcome, Petitioners advance only two arguments, both of which they previously pressed in their petition. First, they again argue that the County's petition for first-tier certiorari to the Circuit Court was untimely filed beyond the jurisdictional deadline. Second, they continue to maintain that their counsel, Mr. Winker, did not hide evidence from the Planning and Zoning Appeals Board (PZAB).

To begin, Petitioners' timeliness argument—raised now for the fourth time, verbatim—is meritless.[2] In the interest of brevity, the County directs the Court to pages 40 through 44 of its response to the petition, wherein the County fully refutes Petitioners' argument. Suffice it to say, like each time before, Petitioners again fail to acknowledge—much less attempt to distinguish—the applicable case law that the County has repeatedly presented. Instead, they continue to cite only inapposite case law dealing with untimely filed notices of appeal.

Indeed, the only two cases Petitioners cite in support of their argument—*Amos v. Reich*, 208 So. 3d 796 (Fla. 3d DCA 2016) and *Miami-Dade Cnty. v. Peart*, 843 So. 2d 363, 364 (Fla. 3d DCA 2003)—both concerned a party who filed a notice of appeal beyond the jurisdictional deadline. But that's not what occurred here. Rather, as previously explained at length, the County ***timely*** filed its petition for certiorari electronically with the Clerk of the Circuit Court below on May 10, and both the docket and the date stamp on the petition itself reflect that it was timely filed on that date in the General Jurisdiction Division of the Circuit Court. That the petition was

[2] Petitioners first complained that the County's petition was untimely in a motion to dismiss, which the Circuit Court denied, and later raised the same argument again in their response to the County's petition below, and then raised it yet again in their petition for second-tier certiorari before this Court.

placed in the "Correction Queue" and docketed by the Appellate Division the next day does not make it untimely filed or change the fact that it was filed with the Clerk of the Circuit Court on May 10, within the time required by the Florida Rules of Appellate Procedure. As such, Petitioners' citation to *Amos* and *Peart*—both of which dealt with the entirely different circumstance of belatedly filed notices of appeal—is unavailing here.[3] Accordingly, then, because Petitioners' timeliness argument is mistaken and still fails to acknowledge the actual facts, the appellate rules, and well-settled case law, it must again be rejected.

Petitioners' second argument for rehearing or clarification fairs no better. Bizarrely, they continue to argue about whether Mr. Winker hid evidence from the PZAB, even though that issue is not mentioned anywhere in the Circuit Court's opinion. In fact, as the County already explained in responding to the petition, the issue of counsel's candor was mentioned only in a footnote to the concurring opinion.[4] And, as the County has already

[3] Aside from citing inapposite case law, Petitioners also continue to try to invent a wholly new standard—one that asks whether there are any mitigating circumstances for filing an appeal in a particular manner and, if not, then the Circuit Court lacks jurisdiction. Unsurprisingly, they still have not cited any case law in support of this invented standard, and there is none.

[4] In fact, the concurrence's footnote—which Petitioners quote in their motion—expressly acknowledges that "the Court chose not to address alleged ethical lapses of counsel" in its opinion.

said, an issue that is not mentioned anywhere in the majority opinion cannot provide any basis for second-tier certiorari relief. Nor does it now supply any basis for rehearing.[5] *See Ephrem v. Phillips*, 99 So. 2d 257, 263–64 (Fla. 1st DCA 1957) ("The principles of law propounded in a concurring opinion . . . form no basis for a valid petition for rehearing.") (on rehearing); *see also Greene v. Massey*, 384 So. 2d 24, 27 (Fla. 1980) ("A concurring opinion does not constitute the law of the case nor the basis of the ultimate decision unless concurred in by a majority of the Court.").

In addition, rehearing cannot be granted on the basis of these arguments, because they are the very same rejected arguments that Petitioners unsuccessfully advanced in their petition. *McConnell v. Sanford*

---

[5] In any event, contrary to Petitioners' argument, both the transcript and video recording of the PZAB hearing refute Petitioners' version of events. The video recording may be viewed at Planning, Zoning and Appeals Board - Mar 15th, 2023 (granicus.com). At time-stamp 1:31:34-1:34:52, Mr. Winker first references the lien report and scrolls through only the first four pages of the document; at time-stamp 2:54:00-2:56:15, he states that he will show the PZAB the entire document, but then only shows pages one through four; and at time-stamp 3:21:10-3:22:24, he is ultimately questioned about the missing page and asked to show it. As is evident from his PZAB presentation included in the record (*see* Pet. App. Ex. D) and from the video, Mr. Winker embedded the first four pages of the lien report into his 15-page presentation that he displayed on screen to the PZAB, but omitted the fifth page. Notably, at time-stamp 1:34:26-1:34:58, he shows on screen a page of his argument outline, followed by four pages of the lien report, followed immediately by another page of his argument outline.

Airport Auth., 200 So. 3d 83 (Fla. 5th DCA 2015) (rehearing "is not a vehicle through which 'an unhappy litigant or attorney [may] reargue the same points previously presented"). In fact, at least some portions of both arguments appear to have been cut-and-pasted verbatim from the petition, which itself was comprised primarily of arguments cut-and-pasted from Petitioners' Circuit Court filings. *See generally Godoy v. State*, 99 So. 3d 613, 614 (Fla. 5th DCA 2012) (rejecting rehearing motion that "simply regurgitate[d], word-for-word, the nine-page argument section of the initial brief without the slightest variation").

Plainly, if an argument was wrong the first time around, it is equally wrong when merely repeated again and again. *See Unifirst Corp. v. City of Jacksonville*, 42 So. 3d 247, 248 (Fla. 1st DCA 2009) (not the function of rehearing "to request the court to change its mind as to a matter which has already received the careful attention of the judges") (citation omitted). Moreover, the purpose of a motion for rehearing is to identify "with particularity the points of law or fact that, in the opinion of the movant, the court has overlooked or misapprehended in its order or decision"—a purpose that cannot be achieved by the mere verbatim repetition of points already raised. *See* Fla. R. App. P. 9.330(a)(2).

Therefore, for each of these reasons, the portion of the motion seeking rehearing or clarification must be denied.

II. Petitioners are not entitled to a written opinion

Rule 9.330(a)(2)(D) of the Florida Rules of Appellate Procedure provides limited grounds upon which a party may request a written opinion, including to obtain "an explanation for an apparent deviation from prior precedent." Here, Petitioners request a written opinion because they believe that the Court's order of dismissal "perhaps appears to deviate from this Court's decisions" in *Amos* and *Peart*, cited above. Mot. at 13. Petitioners are mistaken. As explained above, both *Amos* and *Peart* addressed notices of appeal filed beyond the jurisdictional deadline, not a petition for certiorari that was timely filed in the General Jurisdiction Division and subsequently docketed with the Appellate Division, as occurred in this case. Because *Amos* and *Peart* are thus inapposite to what occurred here, there is no tension between those cases and the Court's decision, and hence nothing to explain in writing.

Moreover, the Court's decision is entirely in harmony with the cases that are actually relevant to the circumstance at hand. For example, in *Burnett v. Starwood Hotels & Resorts Management Co.*, 251 So. 3d 223, 225-26 (Fla. 3d DCA 2018), this Court explained that the Appellate Division

is part of the larger Circuit Court and that a filing made in any part of the Circuit Court is sufficient to invoke the Circuit Court's jurisdiction. Similarly, *Malave v. Malave*, 178 So. 3d 51, 54 (Fla. 5th DCA 2015) held that the court "does not lack jurisdiction simply because a case is filed or assigned to the wrong division within the circuit court." *See also State v. Johnson*, 139 So.3d 968, 969 (Fla. 1st DCA 2014) (holding that "the notice of appeal was timely, having been electronically filed within the jurisdictional time limit," despite clerk placing it in "e-filing portal queue" for correction by filing party).

At bottom, when presented with a petition that failed to show any entitlement to second-tier certiorari relief and instead merely rehashed the same mistaken arguments repeatedly advanced throughout the proceedings, the Court was not required to spill much ink to dispose of the matter. *See generally Horn v. Marine Hosp. Corp*., 745 So. 2d 329, 330 (Fla. 4th DCA 1998) ("In cases so lacking in merit as this one, however, a written opinion would serve no useful purpose."); *see also R.J. Reynolds Tobacco Co. v. Kenyon*, 882 So. 2d 986, 989 (Fla. 2004) (noting "the inherent discretion of [the district] court [of appeal] to issue a written opinion when, in its reasoned judgment, a written opinion is required"). Indeed, the Court's order summarily dismissing the petition was entirely appropriate, and

Petitioners have not shown otherwise. Accordingly, their request for a written opinion should be denied.

Conclusion

In conclusion, "[t]here comes a point in every case that the losing party must accept the fact that the case is over and he or she did not prevail." *See Ardis v. Pensacola State Coll.*, 128 So. 3d 260, 264 (Fla. 1st DCA 2013). In this case, that point has come. For the reasons explained above, Petitioners are not entitled to rehearing, clarification, or a written opinion under Florida Rule of Appellate Procedure 9.330. Their motion should be denied.

Dated: September 27, 2024

Respectfully submitted,

GERALDINE BONZON-KEENAN
Miami-Dade County Attorney
Stephen P. Clark Center
111 N.W. 1st Street, Suite 2810
Miami, Florida 33128

By: */s/ James Edwin Kirtley, Jr.*

James Edwin Kirtley, Jr.
Assistant County Attorney
Florida Bar Number: 30433
Eddie.Kirtley@miamidade.gov
Wilma.morillo@miamidade.gov

Luis M. Reyes, Jr.
Assistant County Attorney
Florida Bar Number: 1011578
Luis.Reyes@miamidade.gov
Annie.Genovez@miamidade.gov

CERTIFICATE OF SERVICE

I certify that the foregoing document has been e-mailed to all parties of record on September 27, 2024 to the e-mail address(es) each has registered with the Florida Courts E-Filing Portal.

By: */s/ James Edwin Kirtley, Jr.*

Assistant County Attorney