

# Supreme Court of Florida

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No. 67,336

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HAZEL S. JELLEN, et al.,  
Petitioners,

vs.

DISTRICT COURT OF APPEAL, THIRD  
DISTRICT, et al., Respondents.

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[MAY 29, 1986]

OVERTON, J.

The petitioners, Hazel S. Jellen and Jane Jellen, petition this Court for a writ of mandamus directing the Third District Court of Appeal to reinstate their appeal, which petitioners allege was improperly dismissed. We have jurisdiction. Art. V, § 3(b)(8), Fla. Const.

In February, 1985, the respondent Abrams & Abrams, P.A., sued petitioners in Dade County. Petitioner Hazel Jellen, an Alachua County resident, and petitioner Jane Jellen, a Broward County resident, each filed a motion to dismiss for improper venue. In an order dated March 26, 1985, the trial court denied both motions.

The petitioners timely filed a notice of appeal directed to the trial court's March 26 order. Petitioners also filed a motion for stay pending review, and respondent Abrams & Abrams, P.A., filed a response opposing a stay. Petitioners then filed their answers to respondent's complaint. Respondent Abrams & Abrams, P.A., responded by filing a motion to dismiss

petitioners' appeal, alleging that petitioners had, by filing their answers, waived their objections to venue. The Third District Court of Appeal granted the motion to dismiss the appeal, thereby denying appellate review of the venue issue.

We grant the requested relief and reject the respondent's argument that, by timely filing answers, petitioners have waived their venue objection and mooted the appeal. The record clearly reflects that petitioners properly and timely adhered to the applicable rules of procedure in raising and preserving their venue objections. Had petitioners chosen not to file answers, they faced the possibility of a default or sanctions and the lack of opportunity to present other defenses. Had they chosen not to appeal the denial of their motions to dismiss for improper venue, they would have been deprived of a right to appeal that is specifically authorized by Florida Rule of Appellate Procedure 9.130(a)(3)(A). The rules of procedure are not written, nor should they be interpreted, to require a party to choose between an appeal of a venue order or answering on the merits of the case.

For the reasons expressed, the petition for writ of mandamus is granted. We withhold the formal issuance of the writ, however, because we believe the Third District Court of Appeal will, pursuant to the directions in this opinion, reinstate petitioners' appeal and consider petitioners' venue challenge on its merits.

It is so ordered.

BOYD, C.J., and ADKINS, EHRLICH and SHAW, JJ., Concur  
McDONALD, J., Dissents

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Original Proceeding - Mandamus

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