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Henry T. Wihnyk*

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Abstract

This article is a survey of decisions involving appellate procedure handed down by the District Courts of Appeal of Florida and the Florida Supreme Court, and reported between December 1, 1988, and October 1, 1989.

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This article is a survey of decisions involving appellate procedure handed down by the District Courts of Appeal of Florida and the Florida Supreme Court, and reported between December 1, 1988, and October 1, 1989. The courts frequently visited procedural issues during the survey period. Therefore, only those decisions of unique impact and significant interest will be addressed here.

I. Rules of Appellate Procedure

A. Amendments

The amendments to Rules 9.020(g), 9.100(c), 9.030(b)(1)(B), 9.200(b)(2), 9.310(c)(1), 9.330(a) and (b), 9.340(b), 9.410, and to the forms in Rule 9.900(d) and (g)II, 5, enacted during the previous survey period, became effective during this survey period.[1] During the current survey period, the Florida Supreme Court issued a clarification of these amendments.[2] This clarification consisted of the further amendment of the form for the Designation to Reporter with the addition of Rules 9.900(g)(6) and (7). The clarification also deleted the committee note accompanying Rule 9.900(g) and substituted a new committee note in its place, providing a new procedure for the preparation and filing of the Reporter's Acknowledgment to the Designation to Reporter.

Florida Rules of Appellate Procedure 9.020 and 9.310 were amended during this survey period as necessitated by the Florida Legislature's enactment of Florida Statute 766.311.[3] These amendments involve the procedure for appealing from awards of deputy commissioners

* Assistant Director, Legal Research and Writing/Lecturer in Appelate Advocacy, University of Florida College of Law. LL.M., Columbia University School of Law, 1990; J.D., Nova University Center for the Study of Law, 1985; B.A., Florida Atlantic University, 1976.

1. *See* Armstrong, *Florida Practice and Procedure*, 13 NOVA L. REV. 791, 814 (1989), for a description of the nature of the amendments.
2. *In re* Florida Bar Rules App. Pro., 536 So. 2d 240 (Fla. 1988).
3. *In re* Emergency Amendments to Rules of App. Pro., 541 So. 2d 1142 (Fla. 1989).

concerning birth-related neurological injuries. Specifically, the amendments provide that an order of a deputy commissioner on a claim for such injuries is to be included under the definition of Administrative Action in Rule 9.020(a). Moreover, the amendments provide for an automatic stay of a deputy commissioner award on a claim for birth-related neurological injuries upon the timely filing of a notice of appeal.[4]

B. Conflict With Florida Rules of Juvenile Procedure

In *In re E.P.*[5] and *In re A.A.*,[6] the Florida Supreme Court considered a conflict between Florida Rule of Appellate Procedure 9.020(g) and Florida Rule of Juvenile Procedure 8.20(b)(3) concerning appeals in juvenile cases. The court resolved the conflict in favor of the juvenile procedural rule. While Appellate Rule 9.020(g) provides that the timely filing of a motion for rehearing tolls the time for taking an appeal, Juvenile Rule 8.820(b)(3) provides that the filing of a motion for rehearing does not so toll in a juvenile proceeding.

Relying on Juvenile Rule of Procedure 8.820(b)(3) the Second District Court of Appeal dismissed, as untimely, two appeals where the appellants filed notices of appeal after denial of timely motions for rehearing but more than thirty days after entry of final judgment.[7] Although Florida Rule of Appellate Procedure 9.010 states that the appellate rules supercede all conflicting rules, the Florida Supreme Court affirmed the Second District Court of Appeal's holding that the juvenile rule prevails. Thus, a party desiring to appeal from a judgment in a juvenile proceeding must sacrifice moving for rehearing and file a notice of appeal within thirty days.[8]

II. Jurisdiction

A critical step in the prosecution of an appeal is the invoking of

4. *Id.* at 1143.
5. 544 So. 2d 1000 (Fla. 1989).
6. 543 So. 2d 1246 (Fla. 1989).
7. *In re* E.P., 507 So. 2d 705 (Fla. 2d Dist. Ct. App. 1987), *aff'd*, 544 So. 2d 1000 (Fla. 1989) and *In re* A.A., 531 So. 2d 1050 (Fla. 2d Dist. Ct. App. 1988), *aff'd*, 543 So. 2d 1256 (Fla. 1989). These cases proceeded to the Florida Supreme Court on certified questions concerning the issue. The Fifth District Court of Appeal has certified the identical question to the Court. *In re* W.S., 541 So. 2d 1257 (Fla. 5th Dist. Ct. App. 1989).
8. *In re A.A.*, 543 So. 2d at 1257.

the appellate court's jurisdiction. Failure to do so timely is fatal to the action. Unfortunately there has been confusion among practitioners, as well as the courts, as to the appropriate procedure under the rules for gaining jurisdiction. Much of this confusion has arisen in situations where the parties are unsure as to the proper remedy to pursue in the appellate court to obtain review of a lower court's ruling.

In *Johnson v. Citizens State Bank*,[9] the aggrieved party improperly sought review of an order of a circuit court acting in its review capacity by way of notice of appeal filed with the circuit court clerk. According to Appellate Rule 9.030(b)(2)(B) the appropriate remedy would have been appellate *certiorari*. Although the notice was filed with the circuit court clerk within thirty days of the order, the notice was not transmitted to the appellate court within that thirty day period. Thus, despite the principle that an appellate court may review a matter even though the form of relief is mischaracterized,[10] the First District Court of Appeal dismissed the appeal because its jurisdiction had not been invoked timely. The court reasoned that it would only have had jurisdiction if it had received the notice of appeal from the circuit court clerk within thirty days of the rendition of the order. The court certified the following question to the Florida Supreme Court as being one of great public importance:

> When a party seeks appellate review of a nonappealable order, and assuming that the notice of appeal is timely filed in the lower tribunal, must the notice of appeal be filed in the appellate court within 30 days of rendition of the order in order for the appellate court to have jurisdiction to treat the notice as a petition for writ of *certiorari*?[11]

The Florida Supreme Court answered this question in the nega-

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9. 518 So. 2d 410 (Fla. 1st Dist. Ct. App. 1988), *rev'd*, 537 So. 2d 96 (Fla. 1989).

10. *See, e.g.*, Hillsborough County v. Marchese, 519 So. 2d 728 (Fla. 2d Dist. Ct. App. 1988), *cause dismissed*, 526 So. 2d 75 (Fla. 1988); Sunshine Dodge, Inc. v. Ketchem, 445 So. 2d 395 (Fla. 5th Dist. Ct. App. 1984); Radio Communications Corp. v. Oki Elecs. of Am., Inc., 277 So. 2d 289 (Fla. 4th Dist. Ct. App. 1973).

11. This question was also certified in Spector v. Trans World Airlines, Inc., 523 So. 2d 704 (Fla. 4th Dist. Ct. App. 1988), *rev'd sub nom*, Johnson v. Citizens State Bank, 537 So. 2d 96 (Fla. 1989); Jones v. Office of the Sheriff, 532 So. 2d 742 (Fla. 1st Dist. Ct. App. 1988), *rev'd*, 541 So. 2d 1149 (Fla. 1989); and Hoyt v. Commonwealth Land Title Ins. Co., 532 So. 2d 72 (Fla. 2d Dist. Ct. App. 1988).

tive.[12] Noting the principle that a cause commenced in an inappropriate court must be transferred to the appropriate court and recognizing the requirement that an appellate court treat a cause seeking an improper remedy as though the proper remedy had been sought, the court ruled that the First District Court of Appeal acted improperly in dismissing the appeal. The supreme court explained that the filing of the notice of appeal was sufficient to confer jurisdiction on the appellate court to consider the matter as a petition for writ of *certiorari*. Moreover, the court declared that the appellate court's jurisdiction did not depend on the transmission of the notice of appeal by the circuit court clerk because "it is the action of the claimant which invokes the jurisdiction of a court."[13] Thus, a district court is prohibited from dismissing as untimely a notice of appeal filed timely with the circuit court, despite the fact that it should be considered as a petition for writ of *certiorari*.[14]

Johnson has not completely resolved the confusion concerning jurisdiction. In *Skinner v. Skinner*,[15] a party seeking review of an order granting a motion for relief from judgment filed a petition for writ of *certiorari* in the Fourth District Court of Appeal. By order, the court designated the cause as a non-final appeal pursuant to Rules 9.130(a)(3)(C)(iii) and 9.130(a)(5). Concluding that it was bound by *Lampkin-Asam v. District Court of Appeal*[16] rather than *Johnson*, the court dismissed the petition for writ of *certiorari* because the appellant failed to file a notice of appeal in the trial court. The dissenting opinion in *Skinner* preferred a reliance on *Pearce v. Parsons*,[17] which would pronounce the timely filing of a petition for writ of *certiorari* in the appellate court sufficient to invoke the court's appellate jurisdiction. The court in *Skinner* certified to the Florida Supreme Court the ques-

12. *Johnson*, 537 So. 2d at 96.
13. *Id.* at 98.
14. *Id.*
15. 541 So. 2d 176 (Fla. 4th Dist. Ct. App. 1989).
16. 364 So. 2d 469 (Fla. 1978). In *Lampkin-Asam*, the Florida Supreme Court ruled that the inadvertent filing of a notice of appeal with the appellate court rather than the trial court was insufficient to invoke the appellate court's jurisdiction. The court strictly read Rule 9.110(b) and concluded that the transfer provision of Rule 9.040(b) did not apply. The court has receded from *Lampkin-Asam* to the extent that it conflicts with the decision in *Johnson*. *Johnson*, 537 So. 2d at 98. In view of the Florida Supreme Court's treatment of *Lampkin-Asam* in *Johnson*, the former's role as precedent in *Skinner* is suspect.
17. 414 So. 2d 296 n.1 (Fla. 2d Dist. Ct. App. 1982).

tion whether an appellate court has jurisdiction to consider a petition for writ of *certiorari* filed to review a non-final order which is reviewable by appeal where no notice of appeal is filed in the trial court.

III. Law of the Case

In *Department of Health and Rehabilitative Services v. Shatto*,[18] the First District Court of Appeal considered the factors necessary to warrant an appellate court's altering the law of a case and held that a decision by the Florida Supreme Court which changes the state of the law is, by itself, not enough.

The defendant, Department of Health and Rehabilitative Services [hereinafter HRS], had previously appealed from a denial of a motion to change venue but was unsuccessful. Subsequently, the Florida Supreme Court abrogated the law upon which the appellate court relied as authority, thereby revealing, as incorrect the earlier decision affirming the denial of HRS's motion for change of venue. Thus, had the district court decided the original appeal after the supreme court changed the law, HRS would have prevailed. Consequently, HRS, relying on the law as altered by the Florida Supreme Court, again moved to change venue. The trial court denied the motion. Appealing from the order denying its second motion, HRS, in *Shatto*, argued that the First District Court of Appeal should change the law of the case by virtue of the intervening change in the law by the supreme court. The district court disagreed, refused to alter the law of the case as established in the earlier decision, and affirmed the denial of the motion to change venue. The court concluded that a modification of the law of the case may be justified by an intervening decision of a higher court only upon a showing that strict adherence to the law of the case might result in manifest injustice to one of the parties. The court found that HRS failed to demonstrate any facts revealing the requisite "manifest injustice."[19]

IV. Preservation of Record on Appeal

A common practice during trial is to instruct the court reporter to cease reporting while a videotaped deposition is presented to the jury. This practice is perilous, however, for it may lead to an incomplete

18. 538 So. 2d 938 (Fla. 1st Dist. Ct. App. 1989).
19. *Id.* at 939.

record on appeal as in *Matson v. Wilco Office Supply and Equipment Co.*.[20]

In *Matson*, the plaintiff played videotaped depositions in their entirety to the jury with the trial court's instruction to the court reporter that it was unnecessary to transcribe the depositions. The videotapes were not filed with the trial court. The First District Court of Appeal granted the defendant's motion to strike the plaintiff's brief without prejudice because it contained references to the deposition testimony that had not been made part of the appellate record. The court noted that a videotaped deposition presented in court is evidence adduced at trial and, thus, must be made part of the record to be competent for consideration on appeal. The court admonished that the reporter should continue recording the proceedings when a tape is played, and that the tape should be offered as an exhibit at the conclusion of the presentation.[21]

V. Mediation

In an effort to formulate a method of alleviating the heavy caseload and backlog in the Fourth District, as well as in the other overloaded Florida appellate courts, the Fourth District Court of Appeal instituted an eighteen month pre-argument settlement conference project on February 1, 1989.[22] This experimental project randomly selects thirty percent of all civil plenary appeals and places them in the mandatory settlement conference process. With the goal of reaching a settlement of the case or, at least, a narrowing of the issues on appeal, the process requires that in addition to filing settlement conference statements providing an outline of the case and the appellate issues, the parties and their lawyers attend a settlement conference presided over by a retired judge. Judge Harry Lee Anstead of the Fourth District Court of Appeal reports that as of August 31, 1989, slightly more than fifty percent of the appeals that have progressed through the process have been settled or dismissed with the remaining cases returning to the "appellate mainstream."[23]

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20. 541 So. 2d 767 (Fla. 1st Dist. Ct. App. 1989).
21. *Id.* at 769.
22. For an excellent description of the history, operation and procedure of the project, *see* Anstead, *Mediation on Appeal*, 64 FLA. B.J. 31 (January 1990).
23. *Id.* at 32. Judge Anstead perceives these results as favorable and expresses the hope that other appellate courts will initiate mediation programs.

Certainly, an appellate settlement conference procedure may be advantageous in certain cases. Overzealous or overconfident appellate advocates and parties with unrealistic attitudes concerning the merits of their cases can be assisted by the mediator in developing more sensible perspectives. Moreover, compelling opposing parties and their attorneys to meet face to face provides settlement opportunities ordinarily not available once the case has progressed to the appellate stage.

This is not to say that the process is flawless. The random selection of cases for participation in the procedure leads to the inclusion of matters that are not necessarily well served by the process. For instance, in a case where a plaintiff/appellant is appealing from the dismissal of his claim for failure to state a cause of action, the defendant/appellee will have little incentive to settle when, at worst, the defendant will merely be required to answer the complaint should the plaintiff prevail on appeal. If the project is expanded to a more permanent, state-wide process, it will be important to modify its current design to provide a more discriminating case-selection mechanism.[24]

24. The courts could develop selection criteria based on an evaluation of the data compiled from the Fourth District Court of Appeal's project. Perhaps selection could be narrowed to those cases most likely to settle reflected by the nature of the cases that settled or were dismissed during the mediation experiment.