

IN THE SUPREME COURT OF FLORIDA

**CASE NUMBER SC05-1282
LOWER TRIBUNAL CASE NUMBER 5D05-1948
LOWER TRIBUNAL FILING DATE 7/18/05
ORIGINAL LOWER TRIBUNAL CASE NUMBER 05-2003-DR-040403**

IN RE: THE MARRIAGE OF

**NANCY MODY,
Petitioner/Appellant/Former Wife**

Vs.

**NARESH MODY,
Respondent/Appellee/Former Husband**

APPELLANT'S JURISDICTION BRIEF

**Nancy Mody
3925 Watroak Way
Titusville, FL 32796
321-383-3346
Petitioner/Appellant/Former Wife**

**STATE OF FLORIDA
COUNTY OF BREVARD**

Sworn to or affirmed and signed before me
on _____ by _____

NOTARY PUBLIC or DEPUTY CLERK

(Print, type, or stamp commissioned
name of Notary or Clerk)

Personally known

Produced identification

Type of identification produced _____

IN THE SUPREME COURT IN AND FOR THE STATE OF FLORIDA

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LOWER TRIBUNAL FILING DATE 7/18/05
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Division Family Division

Nancy Mody,
Petitioner/Appellant

and

Naresh Mody,
Respondent/Appellee

I understand that I am swearing or affirming under oath to the truthfulness of the claims made in this petition and that the punishment for knowingly making a false statement includes fines and/or imprisonment.

Dated: _____

Nancy Mody

**3925 Wateroak Way
Titusville, Florida 32796
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PRELIMINARY STATEMENT

Appellant is the Respondent/Counter-Petitioner/Wife in the lower court and will be referred to as Appellant, Petitioner or Wife. Appellee is the Petitioner/Counter-Respondent/Husband in the lower court and will be referred to as Appellee, Respondent or Husband.

Because of the unique nature of the administrative error that may have been committed by the 5th District Court of Appeals in dismissing Wife's May 27th "Notice of Appeal" for lack of jurisdiction, Wife has included in the Appendix of this Brief documents and correspondence intended to help the Supreme Court assess the possibility of such error.

STATEMENT OF THE CASE AND FACTS

This appeal to the Florida Supreme Court arises from an Order of Dismissal entered by the 5th District Court of Appeals on July 7, 2005, (App. Tab A) in which the Court “sua sponte” ordered that Appellant’s appeal (case no. 5D05-1948) be dismissed for lack of jurisdiction.

The Florida Supreme Court has discretionary jurisdiction to hear this appeal as the 5th District Court of Appeals’ dismissal appears to be the result of administrative error and directly conflicts with the decisions of other Courts of Appeal. As discussed below, Appellant’s Notice of Appeal that was filed with the 5th District on May 27, 2005 was intended to amend and correct a technical defect in a timely Notice of Appeal previously submitted. Such an amendment is permitted under Fla. R. App. P. 9.040(d) and should not have resulted in dismissal for lack of jurisdiction. Bowen v. Bowen, 352 So. 2nd 166, 167 (Fla. 1st DCA 1977); *dismissed* 360 So. 2d 1247 (Fla. 1978).

The facts underlying this appeal begin on December 9, 2004, when the Circuit Court of the 18th Judicial Circuit entered final judgment *IN RE: The Marriage of Naresh Mody, Petitioner/Counter-Respondent/ Husband, and Nancy Mody, Respondent/Counter-Petitioner/Wife*, Case No. 05-2003-DR-040403. (App. Tab B). The proceedings at the 18th Circuit trial court

can only be described as egregious. Wife had been seriously ill and understandably absent from most of the hearings conducted by the trial court, and Wife was also without financial resources to obtain legal counsel to represent her interests. Nevertheless, the trial court proceeded to judgment adopting verbatim Husband's proposed property settlement which awarded substantial marital property and other assets to the Husband, while providing Wife with a paltry alimony notwithstanding the Husband's rather substantial income as a cardiologist.

With the help of relatives, Wife raised \$17,000 to hire legal counsel to seek a rehearing. Wife's counsel then timely filed a Motion for Rehearing with the 18th Circuit trial court on December 14, 2004, (App. Tab C) focusing on the paltry award of alimony provided in the December 9th Judgment. On December 30, 2004, the Court issued an Order denying Wife's Motion for Rehearing. (App. Tab D). Wife then timely filed a Notice of Appeal of the Circuit Court's Order with the 5th District Court of Appeals on January 21, 2005. (App. Tab E). At the time the appeal was filed, Wife lacked financial resources to pay counsel to file the Notice of Appeal and consequently filed the Notice herself on a Rule 9.900 Form. The 5th District Court of Appeals acknowledged the appeal, designating it as Case No. 5D05-256. Subsequently, on February 11, 2005, Wife also

personally filed a second Form 9.900 “Notice of Appeal” for “Case No. 2005-256” with the 5th District Court of Appeals (App. Tab G), in essence amending the original appeal to ensure that it provided for “all lower court rulings to be included in this 5th District Court of Appeals.” In filing this notice, it was Wife’s intent to ensure that appeal no. 5D05-256 covered all parts of the trial court’s judgment, to include both the award of alimony and the award of marital property and other assets.

The instant appeal arises from Husband’s attempt to enforce the trial court’s Judgment with regard to the award of certain parcels of real property while Case No. 5D05-256 is pending before the 5th District Court of Appeals. On May 24, 2005, Husband filed a Motion for Enforcement with the Circuit Court of the 18th Judicial Circuit (App. Tab H), seeking to compel Wife to execute quit claim deeds to certain properties awarded to Husband in the December 9, 2004 Judgment. Wife, again having no financial resources to obtain legal counsel to respond to the Motion, filed on May 27, 2005 another Form 9.900 “Notice of Appeal” for “Case No. 5D05-256” with the 5th District Court of Appeals (App. Tab I), requesting “Revocation and Stay of Execution of Judgment from the Lower Courts.” Wife also drafted and filed with the 5th District Court of Appeals on May 27, 2005, an “Application for Revocation of Judgment and Stay of Execution,”

(App. Tab J) attempting to explain the need for the Stay. In its acknowledgment of Wife's May 27, 2005 "Notice of Appeal," however, the 5th District Court of Appeals erroneously designated Wife's request as a "new case" and assigned it case no. 5DO5-1948 (App. Tab K), rather than treating it as amendment to already existing appeal case no. 5DO5-256. At the time this occurred, Wife did not understand the potential ramifications of this error.

On June 1, 2005, the Circuit Court of the 18th Judicial Circuit held a Hearing on Husband's Motion for Enforcement, at which Wife was present and representing herself pro se. Upon completion of the Hearing, Wife, believing that an Order of Enforcement was imminent, filed with the 5th District court of Appeals on June 1, 2005 a "Request for Immediate Relief from Judgment Signed by Judge Rainwater..." (App. Tab L) again attempting to explain the need for a stay of the enforcement order until the merits of her case could be considered on appeal. On June 7, 2005, Wife also wrote the Court to inform it of instructions received from her Bankruptcy Trustee regarding the status of these properties in Wife's pending bankruptcy proceeding. (App. Tab M)

On June 17, 2005, the 5th District Court of Appeals issued an Order regarding Case No. 5D05-1948, directing Wife to show cause why the

appeal should not be dismissed for lack of jurisdiction. (App. Tab N). The Court considered that the Wife's May 27, 2005 Notice of Appeal was untimely as to the judgments rendered by the trial court and that the subsequent filings of June 1 and June 7, 2005 failed to seek review of any Order rendered by the trial court or the bankruptcy court.

On June 22, 2005, Wife filed, pro se, an answer to the show cause Order (App. Tab O) in which Wife explained the merits of her underlying appeal and stated that transfer of title to property at this time could destroy any possibility of an overturn of the trial court's Judgment in her Appeal.

On June 27, 2005, Wife finally received the trial Court's Order granting Husbands Motion for Enforcement, and Wife again filed, pro se, with the 5th District Court of Appeals a copy of the Order and an "Amendment to the Application of Judgment and Stay of Execution" (App. Tab P) seeking to explain the need for a stay.

By Order dated July 7, 2005, the 5th District Court of Appeals sua sponte dismissed Wife's appeal, Case No. 5D05-1948, for lack of jurisdiction. (App. Tab A). On July 13, 2005, Wife filed the instant appeal before the Supreme Court of Florida.

SUMMARY OF ARGUMENT

It is undisputed that Wife has a timely filed appeal, Case No. 5D05-256, currently pending before the 5th District Court of Appeals. The instant appeal arises from Wife's repeated pro se attempts to stay an enforcement Order obtained by Husband from the trial court that would have required Wife to transfer ownership of certain parcels of real property that were part of a timely filed appeal already pending before the 5th District Court of Appeals under Case No. 5D05-256. The 5th District Court of Appeals apparently did not understand that, in her May 27, 2005 filing, Wife was attempting to stay enforcement of the trial court's judgment by amending an already timely filed appeal and, lacking this understanding, the Court instead treated it as a "new case," with a new Case No. 5D05-1948. Alternatively, the 5th District Court of Appeals may have assigned a new case number, 5D05-1948, to Wife's May 27, 2005 filing because it determined that it would be improper to allow such an amendment to the already existing appeal, case no. 5D05-256.

The 5th District Court of Appeals' sua sponte dismissal of Wife's amendments was either an administrative error resulting from a misunderstanding of Wife's pro se appeal notice filings, or contrary to legal precedent holding that non-jurisdictional defects in notices of appeal may be cured by amendment. It is therefore requested that the Supreme Court find

that the 5th District has jurisdiction over Wife's May 27, 2005 "Notice of Appeal," which amends already existing appeal Case No. 5D05-256, and remand this appeal to the 5th District Court of Appeals for a ruling on the merits of Wife's request for a stay of the trial Court's Enforcement Order of June 22, 2005.

ARGUMENT

Wife's attempt to represent herself, mostly pro se, in a bitter divorce proceeding while struggling with serious physical illness, depression, and bankruptcy is epic in proportion. Although Wife was unable to attend most of the trial court proceedings and was without financial resources to obtain legal representation, the trial court nevertheless entered a Judgment on December 9, 2004 that is extraordinarily biased in favor of the Husband, consisting of a verbatim copy of Husband's proposed property settlement. The only hope that Wife has to "have her day in court" and correct this travesty of justice, is to stay the execution of the trial court's judgment while an appeal that is already properly before the 5th District Court of Appeals as Case No. 5D05-256 goes forward.

It is possible that the 5th District Court of Appeals did not understand that Wife's May 27, 2005 "Notice of Appeal," as well as her subsequent

filings on June 1 and June 7, sought to stay an Order obtained by Husband to enforce the trial court's judgment, which judgment was already the subject of an existing appeal, Case No. 5D05-256, at the 5th District. Although Wife had clearly indicated the case number on the Rule 9.900 Form, the 5th District Court of Appeals subsequently acknowledged it as a "new case," and designated it as Case No. 5D05-1948. The possibility of misunderstanding is also evident from the 5th District's show cause letter of June 17, 2005 in which the Court apparently thought that Wife's May 27, 2005 Notice of Appeal was untimely appealing the judgment of the trial court for the first time, instead of amending an already existing and timely filed appeal.

At the time of the "new case" acknowledgment, and at the time of the show cause notice, Wife had no financial resources to seek the advice of an attorney, and did not herself understand that an administrative error may have been made by the 5th District Court of Appeals. Acting pro se, Wife did the best she could to explain to the Court, through her June 1, June 7, June 22, and June 27, 2005 correspondence, the necessity to stay the enforcement order that Husband had obtained from the trial court.

Although the 5th District Court of Appeals may not have understood the message that Wife was trying so desperately to convey, the Court's

apparent administrative error - in viewing Wife's May 27, 2005 filing as a new appeal - can be corrected in the interest of justice and equity by remanding this matter to the Court for proper consideration of Wife's May 27, 2005 filing as an amendment to Wife's already existing appeal, Case No. 5D05-256.

Moreover, amendment of the appeal notice for Case No. 5D05-256 would be proper under the circumstances of this case. Although Wife's original Notice of Appeal for Case No. 5D05-256 did not contain a request for revocation and stay of execution of judgment of the trial court, this is a technical defect that can be cured by amendment, *i.e.*, through Wife's May 27, 2005 filing. The correction of non-jurisdictional defects through the amendment of appeal notices is permissible provided that it does not appear that the Appellee has not been misled or prejudiced by the defect. Bowen v. Bowen, 352 So. 2nd 166, 167 (Fla. 1st DCA 1977); *dismissed* 360 So. 2d 1247 (Fla. 1978); Jupiter Inlet Corp. and Jupiter Inlet Limited Partnership v. Margarita Brocard and Norman L. Berg, 489 So. 2nd 49 (Fla.4th DCA 1986).

In this case, Wife's original Notice of Appeal of January 21, 2005 and subsequent amended Notice of February 11, 2005 make it clear that Wife is appealing all of the lower court's rulings. Although Wife's Notices did not

also request “revocation and stay of execution of judgment of the trial court,” that is a non-jurisdictional defect which is correctable by amendment. Given the content of Wife’s Notices, Husband cannot claim that he has been misled or prejudiced in any way by Wife’s May 27, 2005 amendment. Moreover, such an amendment is completely consistent with Fla. R. App. P. 9.040(d) which provides:

At any time in the interest of justice, the court may permit any part of the proceeding to be amended so that it may be disposed of on the merits. In the absence of amendment, the court may disregard any procedural error or defect that does not adversely affect the substantial rights of the parties.

To the extent that the 5th District Court of Appeals assigned new case number 5D05-1948 and treated Wife’s May 27th filing as a new appeal because it determined that it would be improper to allow Wife to amend her already existing appeal, 5D05-256, the Court’s dismissal of Wife’s May 27th filing for lack of jurisdiction is inconsistent with the above-cited authorities.

CONCLUSION

Wife needed to amend an already timely filed appeal, 5D05-256, to provide for a revocation and stay of execution of the trial court’s judgment. Wife’s amendment, submitted to the 5th district Court of Appeals on May 27, 2005 as a “Notice of Appeal,” was dismissed by the Court for lack of jurisdiction. To the extent that the Court’s dismissal resulted from

administrative error in not recognizing the May 27, 2005 filing as an amendment to Wife's already existing appeal, Case No. 5D05-256, in the interest of justice and equity this matter should be remanded to the 5th District for a ruling on the merits of Wife's requested amendment. To the extent that the 5th District Court of Appeals treated Wife's May 27, 2005 filing as a new appeal because it determined that it would be improper to allow an amendment to the already existing appeal, the Court's ruling is inconsistent with existing authorities cited above and should be set aside.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 6th day of September, 2005, to Stephen M. Brewer, PA, Attorney for Naresh Mody, 1209 South Washington Avenue, Titusville, Florida 32780, by United States Mail.

Nancy Mody, pro se

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

Nancy Mody, pro se

