

Richard Nathan Markowitz, Petitioner, Appellant  
v.  
Penny Sue Markowitz, Respondent, Appellee

Florida Supreme Court Case No. SC08-230

Florida Supreme Court

February 22, 2008

ON REVIEW FROM THE 3<sup>rd</sup> District Court of Appeals State of Florida  
Case No. 3D07-1173

---

Appeal of Order dated January 24, 2008  
“Accept Reply Brief as Timely Filed”

---

**INITIAL BRIEF OF APPELLANT, RICHARD MARKOWITZ**

---

Richard Markowitz  
210 San Benito Way  
San Francisco, CA 94127  
415-699-4257

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES.....	3
PRELIMINARY STATEMENT.....	4
STATEMENT OF THE CASE AND FACTS.....	6
SUMMARY OF THE ARGUMENTS.....	8
ARGUMENT.....	9
CONCLUSION.....	13
CERTIFICATE OF SERVICE.....	14
CERTIFICATE OF COMPLIANCE.....	14
EXHIBITS.....	15

## TABLE OF AUTHORITIES

### STATE CASES

<i>Caudle v. State</i> , <u>478 So. 2d 359 (Fla. 1st DCA 1985)</u> .....	10
<i>Caudle v. State</i> , <u>478 So. 2d 359 (Fla. 1st DCA 1985)</u> .....	11
<i>Howard v. Baumer</i> , <u>519 So. 2d 679 (Fla. 1st DCA 1988)</u> .....	11
<i>Howard v. Baumer</i> , <u>519 So. 2d 679 (Fla. 1st DCA 1988)</u> .....	1
<i>Mills v. Heenan</i> , <u>382 So. 2d 1317 (Fla. 5th DCA 1980)</u> .....	11

### FLORIDA RULES OF APPELLATE PROCEDURE

Florida Rule of Appellate Procedure 9.300.....	11
Florida Rule of Appellate Procedure 9.210 (a).....	14

### FLORIDA APPELLATE PRACTICE BY THE FLORIDA BAR

<u>APPELLATE PRACTICE § 17.20</u> .....	11
<u>APPELLATE PRACTICE § 17.20</u> .....	12
<u>APPELLATE PRACTICE § 14.3</u> .....	12

## PRELIMINARY STATEMENT

This brief is submitted on behalf of Appellant Richard Nathan Markowitz, who will hereinafter be referred to as appellant, Richard Markowitz, Former Husband, Petitioner or “I” as he speaks in the first person.

The Appellee Penny Sue Markowitz will be referred to as Penny Markowitz, Former Wife or Respondent or appellee.

Appellant is appealing the 3<sup>rd</sup> District’s decision to Accept Appellee’s Reply Brief as timely filed. Prior to this point Appellee had been granted numerous extensions of time dating back to August 2007. The order being appealed was issued while a prior order from the same Court dated November 21, 2007 specifically barred such acceptance and was extremely specific when it stated, “Appellee’s motion for an extension of time to file the answer brief is granted to and including December 16, 2007, **with no further extensions allowed.** If said brief is not timely filed in accordance with this order, appellee(s) will be precluded from filing an answer brief and/or presenting oral argument to the court in this cause.”

On December 14<sup>th</sup> Appellee filed yet another motion for extension of time. The Court issued an order on December 21, 2007 denying Appellee’s motion for extension of time.

On January 24, 2008 the Order being appealed was issued by the Court,  
which was to Accept the Reply Brief as timely filed.

## **STATEMENT OF THE CASE AND FACTS**

This is an appeal from an order dated January 24, 2008. The order is titled “Accept Reply Brief as Timely Filed”.

Appellee filed their first Motion for Extension of Time on August 2, 2007. The Court granted Appellee’s extension of time and extended the due date to September 6, 2007 (Exhibit 3).

Appellee’s second Motion for Extension of Time was filed on August 30, 2007. The Court granted Appellee’s extension of time and extended the due date to October 16, 2007 (Exhibit 4).

Appellee’s third Motion for Extension of Time was filed on October 16, 2007. The Court granted Appellee’s extension of time and extended the due date to November 1, 2007 (Exhibit 5).

Appellee’s fourth Motion for Extension of Time was filed on October 31, 2007. The Court granted Appellee’s extension of time and extended the due date to November 16, 2007 (Exhibit 6).

Appellee’s fifth Motion for Extension of Time was filed on November 15, 2007. 2007. On November 21, 2007 the Court granted Appellee’s fifth extension of time (Exhibit 7), extended the due date to December 16, 2007 and stated, “Appellee’s motion for an extension of time to file the answer brief is granted to and including December 16, 2007, with no further

extensions allowed. If said brief is not timely filed in accordance with this order, appellee(s) will be precluded from filing an answer brief and/or presenting oral argument to the court in this cause.” It should be noted that the words “**with no further extensions allowed**” were typed out in bold letters in the Courts original order.

On December 14, 2007 Appellee filed their sixth motion for extension of time. The Court issued an order on December 21, 2007 denying Appellee’s motion for extension of time (Exhibit 8).

On December 21, 2007 the same day the Court issued their order denying extension of time, Appellee filed their Reply Brief with the Clerk of the Court...*five days past the date it was due and despite the fact that the Court had ruled that she could not file same.*

On January 24, 2008 the Court issued the Order to accept the Reply Brief as timely filed that is being disputed in this brief (Exhibit 9).

## **SUMMARY OF THE ARGUMENTS**

1. The Court ruled in direct conflict with two of its own prior orders.
2. Appellee waited until the last minute to file motion for extension of time. Motion must be made as soon as counsel becomes aware of circumstances that require extension of time.
3. Appellee did not contact opposing party to discuss the extension nor state in her motion whether or not Appellant opposed or agreed to the extension.
4. The Court exceeded its discretion by issuing six extensions of time for the same Reply Brief.

## ARGUMENTS

### The Court ruled in direct conflict with two of its own prior orders

Appellee's fifth Motion for Extension of Time was filed on November 16, 2007. On November 21, 2007 the Court granted Appellee's fifth extension of time and stated, "Appellee's motion for an extension of time to file the answer brief is granted to and including December 16, 2007, with no further extensions allowed. If said brief is not timely filed in accordance with this order, appellee(s) will be precluded from filing an answer brief and/or presenting oral argument to the court in this cause." It should be noted that the words "with no further extensions allowed" were typed out in bold letters in the Courts original order.

On December 14 2007 Appellee filed their sixth motion for extension of time.

The Court issued an order on December 21, 2007 denying Appellee's motion for extension of time.

Appellee, despite the rulings denying the extension of time filed Reply Brief on December 21, 2007, after the December 16, 2007 deadline.

On January 24, 2007 the Court accepted Appellee's Reply Brief as timely filed despite all of the above.

Are Orders of the Court not to be taken seriously? When the Court includes the phrase **with no further extensions** in its order does this really mean no further extension?

**Appellee waited until the last minute to file motion for extension of time.**

**Motion must be made as soon as counsel becomes aware of circumstances that require extension of time.**

Counsel should not wait until the "last minute" to seek an extension of time. To do so may suggest either a lack of diligence or a dilatory purpose. Counsel is well-advised to seek an extension as soon as the circumstances that necessitate it become apparent.

Counsel became aware of her need for surgery on or before 12/7/2007 (Exhibit 1) yet she waited until 12/14/07 to ask for an extension. Moreover, counsel filed a Notice of Unavailability in the Dade County Circuit Court, Case No. 2007-010086-FC-04 (Exhibit 2) on 12/4/07. Why did she wait until 12/14/2007 to file an extension for time when she knew on 12/4/2007 that she was unavailable?

The motion should be filed well before the brief is actually due. See Howard, in which the court noted that, among other defects, the motion for an extension was served only one day before the brief was due. See generally Caudle, in which the court ruled that there was no excuse for failing to request an extension when it became

apparent the brief would not be timely filed. Although an appellate court may be forgiving of a motion for an extension of time filed the same day or even after a brief is due, it is bad form and, in the absence of a genuine last-minute emergency, there is little excuse for this practice.

[FLORIDA APPELLATE PRACTICE § 17.20](#)

We find there is no excuse for an attorney's failure to request an extension of time when it becomes apparent that a brief will not be timely filed.

[Caudle v. State, 478 So. 2d 359, 360 \(Fla. 1st DCA 1985\)](#)

**Appellee did not contact opposing party to discuss the extension nor state in her motion whether or not Appellant opposed or agreed to the extension.**

Appellee has never contacted opposing party to discuss any of the six extensions of time nor have they stated same in their motions.

A motion for an extension of time for serving a brief may be the most common appellate motion. Fla.R.App.P. 9.300(a) is clear on the basic requirements and that rule should be reviewed. The attorney must contact opposing counsel and state whether opposing counsel objects or agrees to the extension. *Id.* Motions that do not contain these statements will be denied. See *Howard v. Baumer*, 519 So.2d 679 (Fla. 1st DCA 1988); *Mills v. Heenan*, 382 So.2d 1317 (Fla. 5th DCA 1980). By its local rules of practice, the District Court of Appeal, Fourth District, will not accept a statement that the movant has been unable to contact opposing counsel and cannot state whether counsel objects or agrees. Therefore, at the outset of an appeal in the Fourth District, counsel may wish to reach an understanding regarding objections or agreement to extensions should the need arise.

[FLORIDA APPELLATE PRACTICE § 17.20](#)

Appellee's motion for extension of time is also inappropriate. First, the motion does not comply with the express requirements of Florida Rule of Appellate Procedure 9.300, in that there is no certification regarding the position of opposing counsel.

[Howard v. Baumer, 519 So. 2d 679, 681 \(Fla. 1st DCA 1988\)](#)

**The Court exceeded its discretion by issuing six extensions of time for the same Reply Brief.**

Presently, the five district courts of appeal routinely grant at least one 30-day extension of time for filing the brief for good cause. A lawyer's involvement in trials or the preparation of other briefs is generally considered good cause. The Florida Supreme Court is reluctant to grant extensions of more than 15 days. Second extension requests are disfavored in all appellate courts and are frequently denied.

[FLORIDA APPELLATE PRACTICE § 14.3](#)

## **CONCLUSION**

For all of these reasons you should remand this case back to lower court with instructions to not accept Appellee's Reply Brief as timely filed and to follow the order of the Court that appellee(s) will be precluded from filing an answer brief and/or presenting oral argument to the court in this cause.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 23rd day of February, 2008 to Ilene Tuckfield, Esquire, 12720 SW 147 Street, Miami, Florida 33186.

---

Richard Markowitz

**CERTIFICATE OF COMPLIANCE**

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

---

Richard Markowitz  
Appellant