

IN THE SUPREME COURT OF FLORIDA

Case No. SC07-299

IN RE AMENDMENTS TO FLORIDA RULE
OF APPELLATE PROCEDURE 9.310

**COMMENTS BY FLORIDA JUSTICE
ASSOCIATION IN OPPOSITION TO PROPOSED AMENDMENTS**

Pursuant to this Court's March 9, 2007, invitation for comments, the Florida Justice Association submits these comments in opposition to the amendments to Florida Rule of Appellate Procedure 9.310 being considered by the Court:

I. INTEREST OF THE FLORIDA JUSTICE ASSOCIATION

For more than forty-five years, the Florida Justice Association, formerly known as the Academy of Florida Trial Lawyers, has been dedicated to strengthening and upholding Florida's civil justice system and protecting the rights of Florida's citizens and consumers. The Association's membership of approximately 3,700 includes thousands of trial and appellate lawyers in Florida who experience first-hand the day-to-day workings of the court system as it affects litigants. The Association's opposition to the amendment of Rule 9.310 is based on these experiences.

II. SECTION 45.045 IS AN UNCONSTITUTIONAL ATTEMPT TO REGULATE APPELLATE PROCEDURE

As an initial matter, this Court is not compelled to amend Rule 9.310 to comply with section 45.045, Florida Statutes (2007), which is the intent behind the proposed amendment. Under article II, section 2(a) of the Florida Constitution, only this Court has the authority to “adopt rules for the practice and procedure in all courts, including the time for seeking appellate review.” Therefore, statutes that purport to alter “practice and procedure” are unconstitutional. *See generally State v. Raymond*, 906 So. 2d 1045, 1048-49 (Fla. 2005).

The Court has approved Justice Adkins’ definition of “practice and procedure” to include “all rules governing the parties, their counsel and the Court throughout the progress of the case from the time of its initiation until final judgment and its execution.” *Allen v. Butterworth*, 756 So. 2d 52, 60 (Fla. 2000) (quoting *In re Fla. Rules of Crim. P.*, 272 So. 2d 65, 66 (Fla. 1972) (Adkins, J., concurring)). The Court has expressly held that the right to delay enforcement of a lower tribunal’s order pending appeal is a matter of procedure reserved to the Court’s rule-making authority. *See Wait v. Fla. Power & Light Co.*, 372 So. 2d 420 (Fla. 1979) (holding that statute conflicting with rule regarding stays pending appeals by the state is unconstitutional). The Court reasoned, “The granting of a stay, because it is a step in the enforcement of a final judgment, is concerned with

‘the means and method to apply and enforce’ substantive rights and falls within the definition of procedural law” *Id.* at 423.

Because section 45.045 is patently unconstitutional, the Court should not amend Rule 9.310 unless it believes in its own judgment that it will improve the justice system in Florida. The remainder of these comments explain why the amendment endorsed by only a small minority of the Appellate Court Rules Committee should be rejected.

III. THE CONTEMPLATED AMENDMENTS ARE AGAINST THE PUBLIC INTEREST

The rule amendments under consideration should not be adopted because they would eviscerate the two purposes served by supersedeas bonds – protecting the appellee’s right of recovery and discouraging frivolous appeals – and would result in a multitude of mini-trials followed by mini-appeals that would further clog up the courts.

A. The contemplated amendments will result in prevailing parties having insufficient protection for their established legal rights.

In any dispute over money, there is always a risk that the party ultimately entitled to prevail will not be able to collect from the losing party. The risk lies with the party that does not have the money that is the subject of the dispute.

Through most of the litigation, that risk lies with the plaintiff.¹ Until the plaintiff is able to levy on a judgment, he bears the risk of a hollow victory because the defendant may – whether out of necessity to pay ordinary debts or out of an intent to shield its assets – spend or lose some or all of its assets during the litigation. On the other hand, if the defendant is forced to satisfy a claim before it is finally upheld in court, then it bears the risk of ultimately prevailing on appeal but being unable to get its money back if the plaintiff has spent it.

Our legal system balances these competing risks by setting the time of the entry of a final judgment as the point at which the risk shifts from the plaintiff to the defendant. The law thus recognizes that a judgment is only worth the paper it is printed on and allows the plaintiff to collect the judgment at that point. This, of course, is not an unconditional right because Florida and federal law provide all judgment debtors with substantial protections, ranging from homestead exemptions, protection of retirement assets, head of household wage protections, and substantial protections in bankruptcy.

This shifting of risk is not absolute, however, and Rule 9.310(b)(1) currently provides a way to eliminate the risks to both sides. By posting a supersedeas bond, the defendant guarantees that the plaintiff will be made whole if the judgment is

¹ “Plaintiff” and “defendant” are used in the sense of the party seeking damages and the party against whom damages are sought, respectively. Especially in commercial litigation where there are often counterclaims or counterclaims, these labels may be misleading.

affirmed, but also ensures that the defendant will not be out of pocket if it prevails on appeal. Both parties are limited in their ability to access or spend the funds in question, but they are both protected.

In recognition of this balance, the primary purpose of requiring a supersedeas bond as a condition for obtaining a stay of a money judgment is “to insure payment of the full amount of the order ... if the review is dismissed or order affirmed.” *Makowski v. Makowski*, 578 So. 2d 737, 737 (Fla. 3d DCA 1991) (quoting *Dice v. Cameron*, 424 So. 2d 173, 174 (Fla. 3d DCA 1983)); *accord Pabian v. Pabian*, 469 So. 2d 189, 191 (Fla. 4th DCA 1985); *Knipe v. Knipe*, 290 So. 2d 71, 72 (Fla. 2d DCA 1974). The rule currently serves this interest by requiring that a supersedeas bond be equal to the principal of the judgment plus two years worth of interest. Fla. R. Civ. P. 9.310(b)(1). This should fully protect the plaintiff because very few appeals take longer than two years.

The selection of the time of the final judgment as the time of shifting the risk recognizes that final orders of the trial court are presumed to be correct. The wisdom of this principle is fully supported by the statistics. According to the Office of State Courts Administrator, approximately 84% of circuit court judgments were affirmed in 2005.

The proposed amendments are unwise because they empower trial courts to upset this delicate balance. By definition, any time the amount of the supersedeas

bond is reduced, the prevailing plaintiff is put at risk that he will not be able to fully recover if he prevails on appeal. Especially where only a small percentage of judgments are reversed on appeal, the plaintiff – who has been found by judge and often a jury to have been wronged by the defendant – should not be forced to bear this substantial risk.

B. The contemplated amendments will promote the filing of non-meritorious appeals.

In addition to protecting the appellee’s right of recovery, the other main purposes of requiring a supersedeas bond to stay a money judgment is “to discourage frivolous appeals.” *City of Lauderdale Lakes v. Corn*, 1270, 1274 (Fla. 1982) (Adkins, J., dissenting) (citing *City of Miami v. Murphy*, 137 So. 2d 825 (Fla. 1962)). This policy recognizes that a belief that it will ultimately prevail is not the only motivation a defendant may face in deciding whether to appeal. An appeal delays the ultimate resolution of the case, and this delay can have at least two substantial benefits to the defendant that have nothing to do with the merits of its legal position. First, the extra time can give the defendant time to spend or conceal the money that it knows it is 84% likely to be required to pay in the end. Second, unless the plaintiff is independently wealthy, a delay in payment can put tremendous pressure on a plaintiff to accept less than he deserves in exchange for getting quick and certain payment.

By requiring the defendant to either pay the judgment (subject to the myriad of debtor protections where there is no ability to pay) or post a supersedeas bond, these incentives to delay are substantially ameliorated. The contemplated amendment should therefore be rejected as it would weaken this policy and tend to encourage defendants to appeal even where the appeal is frivolous or at least unlikely to succeed.

C. The contemplated amendments would burden the courts and litigants with additional mini-trials and mini-appeals.

Not only would the contemplated amendments undermine the policies behind rule 9.310, they would create substantial additional problems for the courts. If adopted, litigation would multiply. Trial courts will be faced with motions to reduce supersedeas bonds, which will require discovery and evidentiary hearings to resolve. Not only will mini-trials on this issue proliferate, but the appellate courts will be burdened by having to review motions by the unsuccessful parties. Such review, of course, will require not only analyzing any reasons given by the trial court for its decision, but also reviewing the transcripts and evidentiary record for support.

These additional proceedings are not the end of it. At any time (and possibly on multiple occasions) during the pendency of the appeal, the appellee has the right to take discovery and bring supplemental proceedings in the trial court, subject to review in the appellate court, to determine whether the appellant “has dissipated or

diverted assets outside the course of its ordinary business or is in the process of doing so.” Thus, the litigation will not truly end until the appeal is finally determined.

Florida’s already burdened court system does not need this additional strain. The time it will take to resolve these matters will mean longer waits for litigants seeking to be heard in the trial and appellate courts.

D. The contemplated amendments are not necessary to protect the right to appeal.

In contrast to the negative consequences addressed above, the contemplated amendments should be rejected because they are a solution in search of a problem. The Appellate Court Rules Committee report reveals that the committee has examined this issue three times in recent years, most recently after passage of section 45.045. The committee is made up of “attorneys and judges with extensive experience and training in the area of practice of the committee calling for the regular, frequent use of the rules.” Fla. R. Jud. Admin. 2.130(b)(6). These experts face the consequences that the balance currently struck in rule 9.310 has on day-to-day practice in the trial and appellate courts. Not only has the committee found that there was no problem requiring attention three times, but their most recent rejection of the proposed amendment was by an overwhelming 45-7 vote.

Moreover, the committee provided the Court with its work product on the issue, including the minutes of numerous subcommittee meeting on the issue. The

committee's record is entirely devoid of actual evidence that current rule 9.310(b)(1) is causing any real problems. At least as of the time of the preparing of these comments, no such evidence has been presented to this Court either.

More importantly, it is important to keep in mind that the obligation to post a bond only affects the ability of a party to obtain a stay pending appeal. In no way does it impact the constitutional right to appeal because Florida courts have long held that an appellant cannot be required to post a bond in order to appeal. *E.g.*, *Campbell v. Jones*, 648 So. 2d 208, 209 (Fla. 3d DCA 1994); *Palm Beach Heights Dev. & Sales Corp. v. Decillis*, 385 So. 2d 1170, 1171 (Fla. 3d DCA 1980). Again, Florida and federal debtor protection laws provide ample protection to a defendant who is unable to satisfy a judgment.

IV. THE CONTEMPLATED AMENDMENTS FAIL TO PROVIDE ANY STANDARDS TO GUIDE THE COURTS AND, AT THE VERY LEAST, SHOULD BE AMENDED TO PROVIDE THAT A SUPERSEDEAS BOND CAN ONLY BE REDUCED WHERE IT IS CLEAR THAT THE APPELLEE WILL BE ABLE TO SATISFY THE JUDGMENT, IF AFFIRMED.

Even if the Court were to decide to amend rule 9.310 to allow trial court's the discretion to reduce the amount of supersedeas bonds, it should not accept the rule currently under consideration. For one thing, the form of the rule has not been fully examined or approved by the Appellate Court Rules Committee. A review of the minutes to that committee's September 15, 2006 minutes reveals that many members had concerns about the form of the rule.

The most glaring deficiency in the contemplated amendments is that they fail to provide any guidance as to the circumstances in which a reduction in the bond amount would be appropriate. There are two main reasons why a defendant might seek to have the amount of the supersedeas bond reduced: (1) it cannot afford a bond, or (2) a bond should not be necessary because its ability to pay the judgment cannot reasonably be questioned.

Florida courts have repeatedly rejected the notion that an impecunious defendant should be able to obtain a reduced supersedeas bond. For example, although the Second District is the only court of appeals to find that trial courts have some authority to reduce supersedeas bonds,² even that court holds, “A trial court should not grant a stay that prejudices a judgment holder’s realistic opportunities to collect upon the judgment or that prevents a creditor from establishing a lien and priority to collect upon the judgment in the event that the debtor eventually has assets.” *Platt v. Russek*, 921 So. 2d 5, 8 (Fla. 2d DCA 2004). Thus, that court holds that the amount of a supersedeas bond should not be reduced unless other security is present, and even then, it requires the trial court not to “grant a stay that prevents a judgment holder from establishing liens against real and personal property or that prevents a judgment holder from obtaining priority

² Other courts have expressly rejected this notion, and as argued below, the Court should consider amending rule 9.310 to disapprove of the Second District’s interpretation of the rule.

over subsequent creditors.” *Id. Cf. Hollo v. Northern Trust Bank, N.A.*, 562 So. 2d 730, 731 (Fla. 3d DCA 1990) (holding that an appellee has the right to challenge the sufficiency of a supersedeas bond if the surety may be unable to fulfill its obligations because the “purpose [of requiring a supersedeas bond] would not be served if the sureties could not satisfy the judgment”).

Moreover, the plain legislative intent is that a bond can only be reduced where it is clear that the appellant has sufficient resources to satisfy the judgment. The statute provides a potential remedy to the plaintiff if the defendant is found to have “dissipated or diverted assets outside the course of its ordinary business,” but it does not provide for any remedy if the defendant is found to have underreported its assets or to have acquired sufficient assets to allow it to obtain a supersedeas bond. Thus, the very structure of the statute indicates a reduced bond is only contemplated in situations where the defendant has ample assets and is not trying to secrete them.

For these reasons, a court should not be allowed to reduce a bond due to a defendant’s inability to obtain a bond. Given the fact that it is often impossible to know that even the wealthiest blue-chip corporation will be able to satisfy a large judgment, the Association does not believe that supersedeas bonds should ever be subject to reduction. After all, who would have questioned the ability of Enron, MCI, Tyco, or Winn Dixie to pay their debts not so long ago. However, if this

Court disagrees, then it should at least clarify that the only ground for reducing a bond is where the appellant clearly has sufficient means to pay the ultimate judgment and that, even then, the appellee should not be prohibited by the stay from perfecting liens to establish priority over subsequent debtors.

V. IF ANYTHING, RULE 9.310 SHOULD BE AMENDED TO MAKE CLEAR THAT TRIAL COURTS DO NOT HAVE THE AUTHORITY TO REDUCE THE AMOUNT OF SUPERSEDEAS BONDS.

Just because the Association opposes the contemplated amendments does not mean that rule 9.310 should not be amended for other reasons. There is currently a split among the district courts of appeal as to whether the rule prohibits a trial court from reducing the amount of a supersedeas bond. *Compare Campbell v. Jones*, 648 So. 2d 208, 209 (Fla. 3d DCA 1994) (holding that the trial court lacks authority to reduce the bond amount), *and Taplin v. Salamone*, 422 So. 2d 92, 93 (Fla. 4th DCA 1982) (same), *with Platt v. Russek*, 921 So. 2d 5, 8 (Fla. 2d DCA 2004) (holding that trial court may reduce bond amount). For the reasons explained above, trial courts should not have discretion to reduce supersedeas bonds. Because of the conflict, the Court should consider amending the relevant portions of Rule 9.310 as follows:

(b) Exceptions.

(1) Money Judgments. If the order is a judgment solely for the payment of money, a party may obtain an automatic stay of execution pending review, without the necessity of a motion or order, by posting a good and sufficient bond ~~equal to the principal amount of the judgment plus~~

~~twice the statutory rate of interest on judgments on the total amount on which the party has an obligation to pay interest.~~ Multiple parties having common liability may file a single bond satisfying the above criteria.

....

(c) Bond.

(1) Defined. A good and sufficient bond is a bond with a principal and a surety company authorized to do business in the State of Florida, or cash deposited in the circuit court clerk's office. To the extent the bond secures a monetary judgment, the bond must be equal to the principal amount of the judgment plus twice the statutory rate of interest on judgments on the total amount on which the party has an obligation to pay interest. The lower tribunal shall have continuing jurisdiction to determine the actual sufficiency of any such bond, but it may not reduce the amount determined by this subparagraph.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by first class mail upon to **Edward M. Mullins, Esq.**, Astigarraga Davis Mullins & Grossman, P.A. 701 Brickell Avenue, 16th Floor, Miami, Florida

33131-2847, Chair of Appellate Court Rules Committee, by U.S. mail this 1st day
of May, 2007.

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