

IN THE SUPREME COURT OF FLORIDA

**IN RE: CONSIDERED AMENDMENT TO FLORIDA
RULES OF APPELLATE PROCEDURE**

9.310

Case No.: SC07-299

**APPELLATE COURT RULES COMMITTEE
MAJORITY RESPONSE TO COMMENTS**

Pursuant to this Court’s order of March 9, 2007, proponents of the majority position of the Florida Appellate Court Rules Committee (“ACRC”) hereby respond to the three comments filed in this rule proceeding as well as the ACRC’s minority response to those comments.

Trial Lawyers’ Comments

In Part II of its comments, the Florida Justice Association (“FJA”) argues that section 45.045, Florida Statutes (2006), is unconstitutional. The Miami-Dade Justice Association (“MDJA”) makes the same argument. After reviewing arguments for and against the constitutionality of section 45.045, the ACRC determined that it was beyond the scope of its mission to determine its own collective view of the constitutional issue. Although many members expressed grave doubts as to the constitutionality of the statute, the prevalent view was that this is a matter best determined by the courts in the context of a specific case challenging the validity of the statute. Thus, the majority ultimately took no position on whether the statute is constitutional.

All agreed that if the Court ever ultimately determined the statute was constitutional, an amendment to rule 9.310 is required.

The points made in Part III of the FJA's comments are reflective of various reasons given by individual members of the ACRC that voted against the proposed amendment. The ACRC voted 45-7 against amending rule 9.310 to comport with section 45.045. In other words, unless the Court ultimately determines that the statute is constitutional, an overwhelming majority of the ACRC thinks that the proposal should not be adopted. The ACRC gave serious consideration to the issue and accorded the Legislature's position substantial respect. The ACRC took into account a general belief that, out of respect for the democratic process and the legislative branch in particular, it should not lightly decline to propose amending the rules to codify duly enacted legislation.

While a substantial majority voted against an amendment, the members of the majority did not all agree on the reasons. All of the ACRC's participating judicial members voted against the proposal, although many of them expressed concerns more about the burden the rule change would place on the judicial system than whether it was fair to appellees.

Many, but not all, of the members of the majority of the ACRC expressed sentiments consistent with Part IV of the FJA's comments and

paragraph 5 of the MDJA's comments regarding the lack of standards in the proposed rule, and some also expressed agreement with the policies militating against allowing a bond to be reduced because a defendant cannot afford it. However, the specific motion that was defeated by the majority was a motion to amend the rules in the abstract. In other words, it was not a vote against the specific proposal made by the ACRC's civil rules subcommittee; it was a vote against any change at this point in time. Thus, the ACRC has not taken a position as to the specific language in the contemplated amendments. Therefore, if the Court determines that rule 9.310 should be amended to comply with section 45.045, it may wish to refer the matter back to the ACRC to develop the specific language.

With regard to Part V of the FJA's comments, which propose amending rule 9.310 to clarify that a trial court may not reduce the amount of supersedeas bonds, it should be noted that the ACRC has previously considered similar amendments to resolve the split among the district courts, but elected not to attempt to resolve the split by rule either way. Thus, while a sizable majority voted against the contemplated amendments, it cannot be said that a majority of the ACRC would endorse the opposite proposal by the FJA.

Mr. Nettleton's Comments

The comment submitted by attorney Paul L. Nettleton presupposes that the Court will amend rule 9.310, so the proponents of the majority position clearly disapprove of the comment. Furthermore, however, it should be noted that Mr. Nettleton's comment is directly contrary to the language of section 45.045. It also presupposes that the "obvious intent of the legislature" was to allow reductions when a defendant was unable to procure a bond. As set forth in the comments of the FJA, an argument can be made that the intent behind the statute was just the opposite — to authorize reduced or no bonds when the defendant has other means to secure payment. Some members of the ACRC majority position expressed opinions consistent with Mr. Nettleton's assumption, and others took a position more in line with that of the FJA.

In sum, a substantial majority of the ACRC voted not to modify rule 9.310 to comply with section 45.045. While members of this majority had different reasons for their vote, the undersigned representative of the majority is prepared to address all of them at oral argument.

ACRC Minority Response

All of the arguments raise by the ACRC proponents of the minority position (the "Minority") were thoroughly debated by the entire ACRC and

rejected overwhelmingly, including by each of the judicial members of the ACRC. The Minority does not address or accommodate the very real concerns that granting trial courts discretion, subject to review by the appellate courts, will substantially expand the time and expense of civil litigation in the courts.

Nor does the Minority response address the fact that the proposed rule provides absolutely no guidance as to the factors that should guide the courts in applying the rule. As noted above and by the Trial Lawyers groups, the legislation itself appears on its face to allow a reduction only when the defendant/appellant has substantial assets sufficient to make the posting of a bond unnecessary. The Minority assumes, without citation to any legislative history or language in the statute, that the Legislature instead intended to allow impecunious appellants/defendants to obtain a stay pending appeal with a reduced bond that, by definition, will not fully protect the appellees/plaintiffs.

The Minority fails to acknowledge or come to grips with the clear fact that a bond is never required as a condition to appeal. The amount of a supersedeas bond simply does not have any impact whatsoever on the right to appeal.

The Minority also fails to recognize the practicalities facing the parties when a judgment has the potential of forcing the defendant into bankruptcy or liquidation, although it does correctly recognize that this result is not in the plaintiff's best interest. But it is exactly for this reason that the sky has not fallen over the past decades during which trial courts have not been able to reduce supersedeas bonds. As argued by the Trial Lawyers, appellate counsel and the parties they represent frequently negotiate alternative means of protection when it is truly necessary. The Minority fails to point to a single case in which a defendant was forced into bankruptcy, or litigation, or decided not to appeal because of the supersedeas requirement. Absent evidence that there is a problem, the Court should not change the status quo.

Indeed, not a single interest group or defense lawyer organization filed a comment in this case. The only comments were filed by organizations representing plaintiff's lawyers across the state explaining the damaging impact the proposed rule would have on the litigation system. In contrast, only the comments of a single practitioner in his own capacity, and a tiny minority of the ACRC, were filed supporting the proposed rule change. If the status quo were truly a problem, the Court can be sure that comments would have been filed by groups such as Associated Industries, the Florida

Defense Lawyers Association, the Chamber of Commerce, and the Florida Medical Association. Nor did a single legislator or advocate of the statute file a single comment in support of the rule.

Finally, the proponents of the majority position specifically request that, if the Court determines that a rule should be promulgated to provide discretion to trial courts to reduce supersedeas bonds, the matter be resubmitted to the ACRC to craft the language of the rule. The proposed rule is substantially different, for example, from the amendment that the ACRC decided and rejected by a narrow margin in 2005, as discussed in the Minority's Response and the June 24, 2005 Minutes attached to their response as Appendix A. There are many serious flaws in the language of the proposed rule that merit attention by the full ACRC, not just the nine members of the minority.

For all of the foregoing reasons, the Court should decline to adopt the proposed amendment.

Dated: June 21, 2007

Respectfully submitted

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Representing the Majority Position of the ACRC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to **Edward M. Mullins, Esq.**, ACRC Chair, Astigarraga Davis Mullins & Grossman, P.A. 701 Brickell Avenue, 16th Floor, Miami, Florida 33131-2847; **Steven L. Brannock, Esq.** Incoming ACRC Chair, Holland & Knight, LLP, P.O. Box 1288, Tampa, Fl. 33601-1288; **Dorothy F. Easley, Esq.**, Easley Appellate Practice, PLLC, 4000 Ponce de Leon Blvd., Ste. 470, Miami, Fl. 33146, ACRC (representatives of minority position), **Roy D. Wasson, Esq.**, 5901 SW 74th Street, Suite 205, Miami, Florida 33143, counsel for Florida Justice Association and Miami-Dade Justice Association, and **Paul L. Nettleton, Esq.**, and **Erin Kinney, Esq.**, Carlton Fields, P.A., 4000 International Place, 100 S.E. Second Street, Miami, Florida 33131-2114, counsel for Paul L. Nettleton, by U.S. mail this ___ day of June, 2007.

Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing complies with the typeface and font size, 14 point Times New Roman, proportionately spaced, as set forth in Rule 9.210, *Fla. R. App. P.*

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