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The Record

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Chair's Message:

Participating in the Appellate Practice Section: What It Gets You

This Section is here to serve you. But to make it run, we need your help. Why, you may wonder, should you assist?

Besides having great fun, numerous intangible benefits attach to participating in Section activities. Here they are (in no particular order of importance):

Camaraderie: You've probably noticed a lot of trial attorneys in Florida, but relatively few appellate ones. Unless you are in a large or boutique firm with several appellate attorneys, there is little chance to meet and get to know them. Participating in Section committees or activities overcomes this obstacle.

Judicial Interaction: Are you a judge? I'm not, and chances are you're not either. Face it, appellate judges decide our clients' fate. Show these judges what a tremendous person you are by working side-by-side with them in Section activities. The appellate judiciary is very active in our Section. Appellate judges participate in our seminars, and sit on our Executive Council. Don't miss a golden opportunity to connect with judges from other regions of the state that you would otherwise have little chance to meet.

Resumé Building: Are you a judge? Oops, I already asked that question! My point is this: when clients have to deal with appeals they crave a well-known appellate attorney. Unless you were a former appellate judge, how will you establish a reputation as a great appellate attorney? Unparalleled work is too obvious. Besides, we all do great work. What your peers think of you is equally important. You may not have the chance to work with all that many appellate attorneys. But if you work with 10 appellate attorneys on a Section committee or project, you can demonstrate your talent and establish a reputation for excellence.

Personal Growth: Be as involved as you want (or at least as much time as permits) in the Section. But the more involved you become, the more you personally gain. If you lectured at the Appellate Practice Board Certification Review Course, you might spend considerable time preparing an outline on an advanced appellate topic. Perhaps you would be asked to review legislation affecting appellate practitioners and report your findings back to the Section. You could also edit one of our publications, which might encompass reading and re-

See "Chair's Message," page 2

INSIDE:

08/01

Brief Thoughts

Let's All Do the Tighten Up"

by Amy S. Farrior

Back in the good ol' day, one of my favorite dance tunes was the "Tighten Up," by Archie Bell and the Drells. (As an interesting side note, I have it on fairly reliable authority that Archie's younger brother was Ricky Bell, a former tailback for the Tampa Bay Buccaneers.) What does the "Tighten Up" have to do with appellate practice, you ask? Tightening up is one of the best ways to improve any brief, particularly these days.

Brevity has never been a hallmark of the legal profession. (How many non-lawyers have joked about briefs being anything but?) Four hundred years ago, an English court imprisoned a lawyer for filing a 120-page pleading. As an additional punishment, the court ordered the warden to cut a hole in the pleading, put the writer's head through it and lead him around Westminster Hall while the courts were sitting.

Tempted though they may be, appellate courts today are unlikely to resort to this method of discouraging unnecessarily long briefs. However, the need for brevity has become acute as the demands on our legal system have exploded along with Florida's population. In 1980, Florida's population was under 10 million, and that year appellants filed 11,775 cases in the district courts of appeal. By 2000, the population increased to nearly 16 million, and appellants filed 22,884 cases. The following table breaks those figures down by court.

District	Filings	Dispositions
First	5,118	5,156
Second	5,546	5,433
Third	3,665	3,626
Fourth	4,751	4,933
Fifth	3,804	3,760

To put these numbers in perspective, let us consider the workload of an individual appellate judge. If we multiply the number of dispositions in a given court by three (the number of judges on an appellate panel) and divide by the total number of judges on that court, we get a reasonable approximation of the number of cases assigned to each DCA judge last year. These numbers range from 989 cases per judge in the Third District to1253 per judge in the Fifth District. Of course, some of these cases were subject to summary disposition, but the numbers are still staggering.

As appellate practitioners, we need to be sensitive to the judges' phenomenal workloads, primarily because it is in our and our clients' best interests. Intuitively, making judges work too hard to find for our clients sounds like a bad idea. Reading a long brief is harder than reading a short one. For that reason, briefs should be, well, brief! We should also place a premium on precision. In other words, get to the point or risk having it missed.

While reading a shorter brief is easier, writing one is more difficult. Judges who may feel as if they are drowning in a sea of briefs will undoubtedly appreciate our efforts and, consequently, so will our clients. While Archie Bell may not go down in history as a great legal scholar, those of us practicing appellate law would do well to heed his advice and do the "Tighten Up!" when we write our next briefs.

Amy S. Farrior *practices with the law firm of Schropp, Buell & Elligett, P.A., in Tampa, Florida, and is board certified as a specialist in appellate practice.*

Note: BRIEF THOUGHTS is a running column in The Record *that comments– briefly– on various matters pertaining to appellate advocacy. Your own "brief" thoughts and suggestions for future columns are requested and should be directed to Bonnie Brown (at Fowler, White, Gillen, Boggs, Villareal & Banker, P.A. in Tampa), fax: 813/229-8313; e-mail: bbrown@fowlerwhite.com.*

CHAIR'S MESSAGE
from page 1

viewing the rules of each appellate court. Each of these tasks would likely teach you things that you did not know (or possibly forgot).

These are four great– but not exclusive– reasons to get involved in the Appellate Section. Attend our September 2001 committee meetings, and get involved.

Your career will thank you.

— Hala Sandridge, Chair

Do you like to WRITE?
Write for *The Record!!!*

The Record relies on submission of articles by members of the Section. Please submit your articles on issues of interest to appellate practitioners to Susan Fox, Editor, P.O. Box 1531, Tampa, FL 33601, or e-mail to *SusanFox@ macfar.com.*

Judge Rosemary Barkett: 2001 Recipient of James C. Adkins Award

by Paul A. Avron and Ilyse M. Homer

Judge Barkett has been selected to receive the James C. Adkins Award, the highest recognition given to an attorney or judge who has made significant contributions to appellate practice and law in the State of Florida. The award was presented on June 21, 2001 by the Appellate Practice Section of The Florida Bar. Chair Benedict Kuehne announced the award was "in recognition of Judge Barkett's long and distinguished career . . . unmatched by any present federal appellate judge."

In accepting the award, Judge Barkett reminisced about the reassuring welcome Justice Adkins gave her when she first arrived at the Florida Supreme Court and how he sat with her in the early morning hours of her first execution of the death penalty. "It's a great honor to receive an award named for Jimmy Adkins," Barkett said. "He was a maverick and had a wonderful ability for resurrection and redemption."

Judge Barkett was born on August 29, 1939 in Ciudad Victoria, Mexico. She became a naturalized citizen in 1958. Judge Barkett received her bachelor's degree, graduating summa cum laude, from Spring Hill College in Mobile, Alabama in 1967. After receiving her undergraduate degree, Judge Barkett left the Sisters of St. Joseph, where she was a nun, to become an attorney. Judge Barkett received her J.D. from the University of Florida School of Law in Gainesville, Florida in 1970.

Judge Barkett's career is extraordinary in many respects. From 1970 to 1979, Judge Barkett was in private practice in West Palm Beach Florida. In 1979, Judge Barkett was appointed as a circuit judge and in 1984 Governor Robert Graham appointed her to the Fourth District Court of Appeal. In 1985, Governor Graham appointed Judge Barkett to the Supreme Court of Florida. Judge Barkett was the first woman to sit on the Florida Supreme Court. Judge Barkett became the Chief Justice of the Court in 1992. Judge Barkett's influence on the Supreme Court and development of the law in Florida continues today.

Judge Barkett poses with past Section Chair, Benedict Kuehne, at the Bar's Annual Meeting in June.

During her tenure as Chief Justice of the Supreme Court of Florida, President William J. Clinton appointed Judge Barkett to become a member of the United States Court of Appeals for the Eleventh Circuit. Judge Barkett was confirmed by the U.S. Senate and currently sits on the Eleventh Circuit Court of Appeals.

Judge Barkett has received many honors and awards and has been recognized for her contributions to the legal profession. In 1984, Judge Barkett was recognized by the American Academy of Matrimonial Lawyers for her contributions to the field of matrimonial law. In 1992, the Academy of Florida Trial Lawyers established the annual Rosemary Barkett Award which goes "to a person who has demonstrated outstanding commitment to equal justice under the law in honor of the first woman justice of the Florida Supreme Court and an independent and fierce defender of equity of all." In 1995, Judge Barkett received the Mississippi State University Pre-Law Society's Distinguished Jurist Award.

In 1999, the Florida Association for Women Lawyers named its highest honor, the Rosemary Barkett Outstanding Achievement Award after Judge Barkett. Judge Barkett has also received the American Bar Association's Margaret Brent Women Lawyers of Achievement Award, the Women of Achievement Award from Palm Beach County's Commission of the Status of Women and was the keynote speaker at a recent annual conference of the North Carolina Association of Women Attorneys. She was selected as one of the 50 Most Important Floridians of the Twentieth Century by the *St. Petersburg Times*.

Prior recipients of the Adkins award include the late Justice James Adkins, Justice Stephen Grimes, District Judges Tom Barkdull and John Scheb, Bill Haddad (long-time Clerk of the Second DCA), and Bruce Rogow.

This newsletter is prepared and published by
the Appellate Practice and Advocacy Section of The Florida Bar.

Practicing in the Eleventh Circuit Court of Appeals: Avoiding Common Pitfalls[1]

by Paul A. Avron and Ilyse M. Homer

For those who have not practiced in the United States Court of Appeals for the Eleventh Circuit, or who haven't in some time, the authors strongly recommend reading the most recent version of the Eleventh Circuit Rules (Rules)[2], which are available on the Internet.[3] Knowledge of the Rules, the Federal Rules of Appellate Procedure (FRAP) and the court's Internal Operating Procedures (IOP), can help practitioners avoid permanent dismissal of appeals. Such dismissals can have adverse results above and beyond losing the right to challenge an order or judgment. Where a finding of fact or conclusion of law becomes the law of the case, it is binding on future related proceedings. As discussed below, recent amendments to the Rules provide for, among other things, the **automatic** dismissal of appeals for failure to timely file an initial brief or failure to attach record excerpts. Practitioners should cautiously follow the Rules to avoid dismissal of an appeal for procedural grounds, precluding their case from being heard on the merits. The Rules supplement the provisions of law and FRAP.

Notice of Appeal: An appellant must timely file the notice of appeal; **failure to do so is a jurisdictional defect that precludes appellate review**.[4] Refer to FRAP 4(a)(4) for a list of post- trial motions, the adjudication of which is deemed the date from which the time to file notice of appeal begins to run. A frequent pitfall arises when counsel seeks and relies on extensions of time to file post-trial motions, and then assumes this extension will toll the time for taking the appeal. **The time for filing post-trial motions is generally not extendable, and an unauthorized extension does not toll the appeal time**.[5]

Rule 3(c) provides the contents required of a notice of appeal.[6] Persons involved with bankruptcy-related appeals from U.S. District Courts[7] should refer to FRAP 6 and those involved in tax-related appeals should refer to FRAP 13.

Record on Appeal: When composing the record on appeal practitioners must comply with FRAP 10 and 11. Rule 10(a) provides the contents of the record on appeal and Rule 10(b) governs transcripts of proceedings below. FRAP 10(a) and (b). Rule 10(e) contemplates corrections or modifications to the record on appeal as created by the parties.[8]

Appearance of Counsel Form and Civil Appeal Statement: Upon docketing of the appeal in the Eleventh Circuit, the Clerk of the Court will mail to counsel identified in the Notice of Appeal, or parties if they are appearing *pro se*, an Appearance of Counsel Form and a Civil Appeal Statement, both of which must be completed and timely returned to the Clerk at the main courthouse in Atlanta, Georgia.[9]

Extraordinary Writs, Habeas Corpus and Proceedings in Forma Pauperis: FRAP 21 governs writs of mandamus and prohibition and other extraordinary writs; subsection (a)(2)(B) provides the required contents for a petition for a writ of mandamus or prohibition.[10] FRAP 22 governs habeas corpus and proceedings brought pursuant to 28 U.S.C. ' 2255. FRAP 22(b) sets forth the requirements for a Certificate of Appealability arising from process issued by a state court or in a Section 2255 proceeding.[11]

Filing and Service: FRAP 25(a)(2)(B) provides that a brief or appendix is timely filed if it is mailed to the clerk by first class mail or other class of mail that is at least as expeditious, postage prepaid, or dispatched to a third-party commercial carrier for delivery to the clerk within three calendar days. The Eleventh Circuit's IOP (1) to FRAP 25 provides that except as provided for briefs and record excerpts, **all other papers**, including petitions for rehearing, shall **not be timely** unless they are actually received in the clerk's office within the time fixed for filing. For practitioners in South Florida the Eleventh Circuit maintains a downtown Miami office located at 99 N.E. 4th Street, 12th Floor. The South Florida office is available to receive filings and responds to in-person and telephone inquiries, but most filings and inquiries should be directed to the Court's principal office in Atlanta, Georgia.[12]

Computing and Extending Time: FRAP 26(a) governs computation of any time period specified in FRAP or in any local rules of the court. For "good cause" shown the court can extend the time for filing certain papers, except for a notice of appeal, unless otherwise authorized by FRAP 4 or a petition for permission to appeal.[13] Rule 26-1 requires that a motion for extension of time must contain a statement that movant's counsel has contacted opposing counsel and either opposing counsel has no objection or will or will not promptly file an objection. FRAP 26(c) provides that when a party is required or permitted to act within a prescribed period after a paper is served on that party, three calendar days are added to that period unless the paper is delivered on the date of service stated in the certificate of service.**The Eleventh Circuit's IOP to FRAP 26 provides that "[t]he court expects the timely filing of all papers within the period of time allowed by the rules, without granting extensions of time."** As discussed below, this IOP provides that motions seeking extension of time to file briefs or record excerpts must set forth "good cause" and that failure to timely prosecute an appeal may cause it to be dismissed for want of prosecution.[14]

Corporate Disclosure Statement: Eleventh Circuit Rule 26.1-1 requires appellants, appellees, intervenors and amicus curiae, including governmental parties, to furnish a Certificate of Interested Persons and Corporate Disclosure Statement which lists the trial judge(s), attorneys, and other persons and entities "that have an interest in the outcome of the particular case or appeal." In bankruptcy appeals the

Certificate shall also identify the debtor, the members of the creditor's committee, any entity which is an active participant in the bankruptcy proceedings and other entities whose stock or equity value may be substantially affected by the outcome of the proceedings. Rule 26.1-2 provides that the Certificate "shall be included within the principal brief filed by any party and shall also be included within any petition, answer, motion or response filed by any party" except for motions for procedural orders contemplated by Rule 27-1(c). Rule 26.1-3 provides the format of the Certificate, which should immediately follow the cover page of all papers filed with the court. The IOP applicable to this rule provides that the court will not act on any paper requiring the Certificate, including emergency filings, until the Certificate is filed, except to prevent injustice.

Motions: FRAP 27 and Eleventh Circuit Rule 27-1 govern the filing of motions in the Eleventh Circuit. The mechanics and requirements, including the form for motions, including emergency motions is found in Eleventh Circuit Rules 27-1(a) and (b). IOP (3) provides for expedited appeals for "good cause" shown.

Briefs: FRAP 28 and Eleventh Circuit Rule 28-1 contain the requirements of appellate briefs. Eleventh Circuit Rule 28-1(i) provides that in the statement of the case, as in all other sections of a party's brief, all assertions regarding matters in the record on appeal shall be supported by citation to that record. "A[p]roper statement of facts reflects a high standard of professionalism. It must state the facts accurately, those favorable and those unfavorable to the party. Inferences drawn from facts must be identified as such."[15] A party's brief must contain a Certificate of Compliance, if required by rule.[16] If an appellee is satisfied with the appellant's statement of certain portions of the initial brief, such as the statement of jurisdiction, issues and case, the appellee need not include those sections in her brief.[17]

Record Excerpts: Appeals from district courts and tax courts shall be on the original record without the requirement of an appendix as set forth in FRAP 30(a)(1).[18] However, when an appellant files its initial brief, it must file five copies of Record Excerpts, the contents of which are set forth in Eleventh Circuit Rule 30-1. See IOP (1) to 11th Cir. R. 30-1 for the requirements regarding tabs to the Record Excerpts. **Failure of an appellant to file record excerpts with its initial brief may result in dismissal of the appeal.[19]**

Serving and Filing Briefs; Extensions: Eleventh Circuit Rule 31-1(a) sets forth the parties' briefing schedule, which may be modified based on the pendency of certain motions set forth in Rule 31-1(c). When the court issues a "jurisdictional question" which seeks written submissions as to whether it has jurisdiction the time for filing briefs is not stayed. Eleventh Circuit Rule 31-2 does provide for ex-

continued, next page

Some Horror Stories . . .

by Susan W. Fox, Editor

This article, by Paul Arron and Ilyse Homer, is designed to warn you of some traps for the unwary in current practice in the 11th Circuit. This sidebar will relay a few real-life anecdotes so our readers will see what can happen when the 11th Circuit rules are not carefully followed. Unfortunately, the only way to learn of these is first-hand since published opinions usually do not explain procedural dismissals.

Almost anyone who has practiced in the 11th Circuit has seen appeals dismissed for failure to timely file briefs or record excerpts. The only instance in which I have seen the Court grant an exception to its rules was a 7-day extension by telephone requested on the date the brief was due, where the counsel had been in an automobile accident.

In contrast, a pro se claimant (who previously had *won* an 11th Circuit appeal granting a motion to dismiss his § 1983 case) filed a 35 page Initial Brief, but failed to file record excerpts in his appeal of an adverse summary judgment. Upon receiving the order of dismissal, he filed record excerpts and moved to reinstate his appeal, pointing out he believed the court still had the record due to the prior appeal. Motion denied; appeal stood as dismissed.

An attorney in another case assumed the court's *sua sponte* issuance of jurisdictional questions tolled the time for filing briefs. The cover letter from the court clearly stated that brief deadlines are *not* tolled. The appeal was dismissed.

An appellant with California counsel called us to ask our help in getting a three week extension of time in an 11th Circuit appeal. We advised the California lawyer that up to seven days is available by telephone if approved by the clerk, but otherwise the11th Circuit frowned on extensions and all efforts should be made to submit a timely brief. California counsel rejected our suggestion, asked for three weeks extension, which the Court granted much to our surprise (we suspect they were swayed by names of celebrity lawyers making the request). After three weeks, the California counsel wanted our help to get a second extension. We strongly advised against such a motion, but he filed it anyway. The court did not dispose of the motion, but did dismiss the appeal. Motion to reinstate was denied.

A few words to the wise: read all of the appeal instructions sent out by the 11th Circuit, as well as their IOPs; check the website for rule changes; call the clerk assigned to your case if you have questions; and follow the filing deadlines closely and religiously.

tensions of time to file briefs and record excerpts. The Clerk is authorized to grant extensions of up to seven days by telephone, if requested prior to the due date, but requests for longer extensions must be filed more than seven days before the due date (unless the cause for the extension did not exist or could not have been communicated to the court earlier).[20] **However extensions are generally disfavored, especially second requests, and parties are advised to do their level best to request extensions only when truly needed.** Second requests are "extremely disfavored and are granted rarely" and will only be granted upon a party having demonstrated "extraordinary circumstances."[2] Motions seeking extensions must be made prior to the due date for the brief or record excerpts.[22]

Citation to Unpublished Opinions: Unpublished opinions of the Eleventh Circuit are not considered binding precedent.[23] However, they may be cited as persuasive authority, provided that the opinion is attached or incorporated into the subject pleading. IOP(5) to this Rule provides that reliance on unpublished opinions is not favored by the court.

Petition for Rehearing: A petition for rehearing pursuant to FRAP 40 must be filed within 21 days of entry of the judgment on the Court's docket.[24] However, where the United States or an officer or agency thereof is a party, a petition for rehearing may be filed within 45 days of entry of the judgment on the Court's docket. A petition for rehearing is timely filed only if **received by the clerk** within the time specified in Eleventh Circuit Rule 40-2.

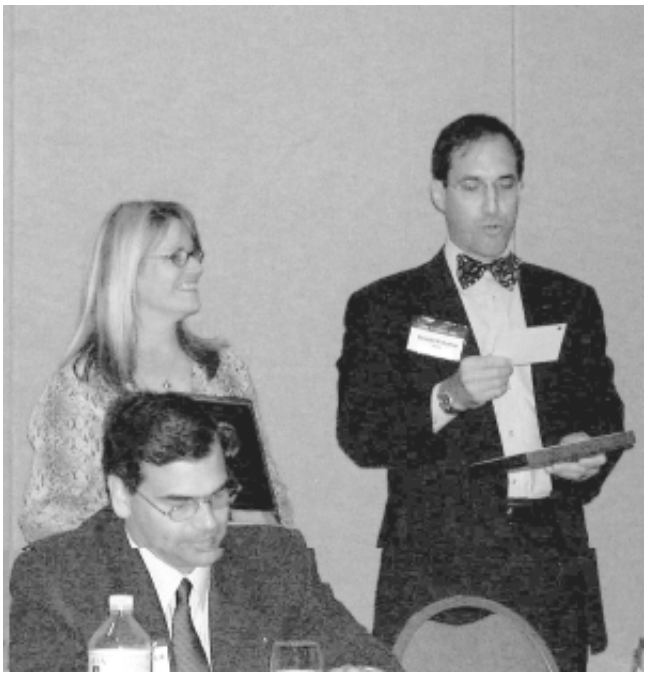
Dismissal of Appeals: As noted above, a civil appeal will be dismissed for failure to timely file briefs and record excerpts.[25] Rule 42-2(c) provides that such dismissals are automatic: an appeal shall be treated as dismissed for failure to prosecute on the first business day following the due date. Motions seeking to set aside such dismissals must be filed within 14 days of the date the clerk enters the order dismissing the appeal and must demonstrate "extraordinary circumstances."[26]

Endnotes:

[1] This article will focus solely on civil appeals.
[2] Cited as 11th Cir. R. __.
[3] http://www.ca11.uscourts.gov
[4] Fed. R. App. P. 3(a)(1), 4(1); see also *Pinion v. Dow Chemical, U.S.A.*, 928 F.2d 1522, 1525 (11th Cir. 1991); *Campbell v. Wainwright*,726 F.2d 702, 703 (11th Cir. 1984).
[5] Fed. R. Civ. P. 6(b); *Pinion*, 928 F. 2d at 1525.
[6] Fed. R. App. P. 3(c).
[7] Appeals from bankruptcy courts go first to the U.S. District Court for the district in which the bankruptcy court sits. The U.S. District Court functions as an appellate court and the Eleventh Circuit Court of Appeals functions as the second reviewing court. *In re Glados*, 83 F.3d 1360, 1362 (11th Cir. 1996); *In re Haas*, 31 F. 3d 1081, 1083 (11th Cir. 1995).
[8] Fed. R. App. P. 10(e); see also 11th Cir. R. 10-1 (Ordering the Transcript - Duties of Appellant and Appellee).
[9] See Fed. R. App. P. 12(b).
[10] See also 11th Cir. R. 21-1 (Writs of Mandamus and Prohibition and Other Extraordinary Writs).
[11] See also 11th Cir. R. 22-1 (Certificate of Appealability); Fed. R. App. P. 23 (Custody or Release of a Prisoner in a Habeas Corpus Proceeding).
[12] IOP (4) (Miami Satellite Office).
[13] Fed. R. App. P. 26(b)(1).
[14] See also 11th Cir. R. 42-1, 42-2 and 42-3.
[15] 11th Cir. R. 28-(i)(ii).
[16] See Fed. R. App. P. 32(a)(7).
[17] 11th Cir. R. 28-2; see also Fed. R. App. P. 32; 11th Cir. 32-1, 32-2 and 32-3 (Forms of Briefs).
[18] 11th Cir. R. 30-1.
[19] 11th Cir. R. 42-2.
[20] 11th Cir. R. 31-2 (b) and (c).
[21] 11th Cir. R. 31-2(d).
[22] 11th Cir. R. 31-2(e).
[23] 11th Cir. R. 36-2.
[24] 11th Cir. R. 40-2.
[25] 11th Cir. R. 42-2.
[26] 11th Cir. 42-2.

Section Gathers at Annual Meeting, June 2001

Justices of the Supreme Court take questions from the audience at the annual “Discussion with the Court.”



Outgoing Chair, Ben Kuehne congratualtes Susan Fox for her work on *The Record.*

Judge Rosemary Barkett addresses the crowd at the Dessert Reception after receiving the Adkins Award.

Ben Kuehne chairs his last meeting as Chair of the Section.

Incoming Chair, Hala Sandridge thanks Ben Kuehne for his outstanding leadership in the last year.

Pat Kelley, “V.” Hendricks, and Susan Fox listen attentively to the proceedings.

Section Gathers for Annual Meeting Reception, June 2001

Photos, top to bottom:

1. (L-R): ____, ____, and ___
2. Kim Ashby.
3. ____ presents a plaque to Ben Kuehne.
4. Judge Joseph Lewis and Tony Musto with Hala Sandridge.

Section Schedules CLE Activities

by Steven L. Brannock

Need some CLE credit to complete your application for Appellate Certification next year? Opportunities abound! The Appellate Section CLE Committee is presenting several upcoming seminars on a variety of topics of interest to the appellate practitioner. Our next seminar will be co-sponsored by the trial lawyers section and is set for the Fall 2001, probably in South Florida. Potential topics include preservation of error, the mechanics of an appeal, brief writing, oral argument, stays and bonds, the mandate, fees and costs, and review in the Florida Supreme Court.

Jonathon Matzner is the Chairman of the steering committee for this seminar and is being assisted by Pat Kelly, Karol Williams and Tom Elligett. We are finalizing discussions about the appropriate site for the seminar (South Florida vs. Tampa). We are leaning toward South Florida but await input from the trial lawyers section. If you have any thoughts on the location or additional ideas or suggestions, send them to either Jonathon at *jmatzner@cmlbro.com*.

We are also planning a Spring 2002 seminar on appellate issues in family law cases to be co-sponsored by the family law section. Karol Williams (*igotappeal@aol.com*) and Evan Langbein (*EJLJD@aol.com*) will serve as co-chairs.

Next January, of course, is our appellate certification review course which, after several years in Tampa, will be held in South Florida next year. This seminar always gets good reviews and is an excellent way to prepare for the certification exam and earn CLE credit.

Many of you are current on your appellate CLE because you attended one of our seminars earlier this year. To bring you up to date on what you may have missed, the Appellate Section as already sponsored two successful seminars this year, the Appellate Certification Review Course, held on February 2, 2001 in Tampa and the Federal Practice Section Seminar held on June 1, 2001 in Orlando. Forty attended the Appellate Certification Review Course. The average Evaluation Rating was 4.4 out of 5. The Section made $773.00. Inside the Eleventh Circuit had 58 attendees, an overall rating of 4.2 and projected income of $560.00. Many thanks to Rick Nelson and his steering committee (Becky Steele, Beverly Pohl, Heidi Bettendorf, Jim Minix, Leslie Wulfsohn Loftus, Paul Avron, and Richard Fee) for their excellent work in organizing the seminar which received enthusiastic reviews. Our thanks to the Eleventh Circuit for its active participation in this CLE opportunity. Also, thanks to Pat Kelly for her hard work as co-chair of the 2001 Appellate Certification Review Course and for volunteering to chair the 2002 Course.

Tom Hall, Chairman of the steering committee handling the upcoming Appellate Practice Workshop at Stetson,had a strong turnout for this excellent seminar July 27-29, 2001 in St. Petersburg. As many of you know, the Appellate Practice Workshop will now be held every other year. Stetson is interested in working with our section to sponsor an Eleventh Circuit-oriented seminar on alternate years. I will keep you posted on further developments in this regard.

Looking to become more involved in The Appellate Section? Volunteer opportunities also abound. We need steering committee members to assist with the Spring, 2002 family law appellate seminar. We are also establishing a committee to consider additional seminar ideas and to pursue co-sponsorships of seminars with other Florida Bar sections. Please let me know if you would like to join the CLE Committee. You can contact me at *sbrannoc@hklaw.com*. If you'd like to join us and have a particular subcommittee preference, let me know and I will try to accommodate you.

***Steven L. Brannock** is an appellate practitioner with Holland & Knight LLP in Tampa.*

A Few Words with Judge Silberman

by Tom Elligett

Judge Morris Silberman joined the Second District Court of Appeal in January, 2001. He graciously agreed to the following interview in March, with Tom Elligett of Schropp, Buell & Elligett.

Your appointment to the Second District is somewhat of a homecoming, since you clerked there in the early 1980s with Judge Ryder. What changes did you see upon returning?

It is a real honor for me to come back to the court as a Judge. It is an exciting opportunity for me.

Computerization is one of the biggest changes at the court, much as it has changed the practice of law since the early 1980's. Technology has allowed the court to prepare and circulate documents, including opinions, much more quickly. Also, access to computerized research is a big change. I remember when I clerked at the court that the library was much larger than it is now, and judges would regularly be in the court library doing manual research. While it is still nice to go through a real book, having computerized access to research tools and materials is a big plus.

The court has also grown and changed since I clerked for Judge Ryder. There are now fourteen judges; all of the judges who were there when I clerked have retired, although Judges Scheb, Danahy and Campbell sit regularly as senior judges.

You were President of the Clearwater Bar Association and then served on The Florida Bar Board of Governors. How can the organized bar help to foster professionalism, a subject on which you have spoken?

The Florida Bar as well as many of the local bar associations work to help members learn and meet the ethical requirements of our profession, and to aim for the higher standards of professionalism. Continuing to offer educational programs on ethics and professionalism will help us meet the goal of a higher, better level of practice.

The organized bar can also help to educate the public as to what should be expected from lawyers and the justice system. The more we do in the area of education, hopefully we will see fewer grievances and an improvement in the public's perception of the role of lawyers.

Judge Silberman and Gabrielle in Quebec City

You had a varied civil practice, emphasizing business and contract matters. How are you adjusting to criminal law, family law, and other "new" subjects?

I am enjoying the broader nature of what I deal with at the court. While there is a learning curve for any new judge, to have the opportunity to deal with the issues that are presented in the appellate arena is a wonderful challenge.

One of the great things about our profession is that we continue to learn and grow throughout the course of our careers. For me, it is exciting to face the challenges of "new" areas of law, to deal with the research and exploration that goes with those areas, and to learn even more about the areas in which I practiced.

Have you found your Tulane University major in philosophy of any assistance in coping with appeals, when you were in private practice or now on the bench?

One of the benefits of having been a philosophy major is the development of analytical skills. These skills were important to me in practice, and will perhaps even be more important now that I am on the bench.

I also had to write quite a few papers as a philosophy major. In fact, I was a double major, also majoring in political science. In both disciplines, I spent a great deal of time doing analyses and writing. Hopefully, some of that background will translate into readable, logical opinions.

For those who do not know, your wife is Circuit Judge Nelly Khouzam, sitting in Pinellas County. Have there been many changes around the house now that there are two judges in the family?

That is a dangerous question. A number of people have asked whether my appointment means that I get to overrule Nelly at home. I can only laugh. Remember, she has bailiffs ...

What non-law related activities do you enjoy for recreation?

Nelly and I both enjoy travelling, although it is sometimes difficult to get our calendars together to take longer trips. Now that we have a young child, travel is also a bit more difficult, but the family time is a wonderful part of our lives. I also enjoy cooking, bicycling and reading. Nelly and I both love food, and the bicycling helps us burn it off.

Thanks for visiting with us.

Four New Judges and Other Changes at the Fifth DCA

by Kelton Farris, Matthew Conigliaro, and Kimberly Ashby

After being static for many years, the Fifth District Court of Appeal has recently undergone substantial changes in its membership. Judge Gilbert S. Goshorn, Jr. and founding judge James C. Dauksch, Jr. retired, paving the way for new judges Robert J. Pleus and Richard B. Orfinger. Judge John Antoon II accepted a federal judgeship in the Orlando Division of the Middle District of Florida, which led to the appointment of Judge William D. Palmer, and the legislature created a tenth position on the court, which has been filled by Judge Thomas D. Sawaya.

The Fifth District has undergone physical changes as well. Expansion to the existing court building will be complete in August 2001 and will add six new judicial suites to the court, bringing the total to 16. A two-tiered parking garage will also open in August.

The Fifth District has also launched its own web site: <*www.5dca.org*>. The site contains general information regarding the court, an oral argument calendar, and weekly updates of court opinions and per curiam affirmances listed by case number and name. A search engine permits opinions to be searched for key words.

Richard B. Orfinger

Judge Orfinger was appointed to the Fifth District Court of Appeal in November, 2000. Prior to his appointment, Judge Orfinger was an attorney in the felony division of the Office of the State Attorney, Seventh Judicial Circuit, and was a shareholder in the firm of Orfinger and Stout, P.A. and its successor Monaco, Smith, Hood, Perkins, Orfinger and Stout, P.A. in Daytona Beach. Judge Orfinger practiced primarily in the areas of corporate, commercial and health care law. In 1991, Judge Orfinger was appointed Circuit Judge of the Seventh Judicial Circuit and served as Chief Judge of that Circuit from 1996 until 1999.

Judge Orfinger was born in Daytona Beach in 1952 and received a Bachelor of Arts degree in history from the Tulane University, New Orleans, in 1974. He obtained a Juris Doctor degree from the University of Florida College of Law in 1976, where he graduated with honors.

Judge Orfinger has served as an instructor of the Florida College of Advanced Judicial Studies and has been selected by the Florida Supreme Court as a mentor judge. Judge Orfinger has also been the chairperson or a participant in numerous state court committees, including the Florida Conference of Circuit Judges, the State Court System Equal Opportunity Employment Committee, the State Court System Weighted Caseload System Committee, the Family Law Steering Committee and the Seventh Circuit Committee on Professionalism. Judge Orfinger has been an officer and director of the Volusia County Bar Association and the Volusia County Civil Trial Attorneys Association. He has also participated in the Volusia-Flagler Association of Women Lawyers, the Florida Prosecuting Attorneys Association, the American Hospital Attorneys Association and the National Health Lawyers Association.

In addition to his professional activities, Judge Orfinger is a volunteer in the Volusia County Schools and is active in many civic and charitable organizations, including the Tiger Bay Club of Volusia County, Daytona Beach Rotary Club, Volusia County Drug Abuse Task Force, Museum of Arts and Sciences, YMCA, Temple Beth-El, Ormand Beach, ACT, Inc. (community mental health association), Central Florida Legal Services, Hailfax Area Chamber of Commerce and Florida Blue Key.

Judge Orfinger has won awards for his judicial leadership and is a lecturer for continuing legal education programs for the Florida Bar. He is the author of the *ABC's of Criminal Discovery* published in 1999, the husband of Ellen J. Orfinger and the father of two children.

William D. Palmer

Judge Palmer was appointed to the Fifth District Court of Appeal in October, 2000. Prior to his appointment, Judge Palmer spent twenty-four years in private practice, primarily in the areas of civil litigation, family and adoption law, appellate law and antitrust litigation. Most of his years in private practice were spent as a shareholder in the Orlando office of Carlton, Fields, Ward, Emmanuel, Smith and Cutler, P.A. His last three years in private practice were spent with his wife, Nancy, at Palmer & Palmer, P.A.

Judge Palmer was born in 1952 in Adrian, Michigan. He received a Bach-

continued, next page

Appellate Practice Section
Executive Council
to meet at

The Florida Bar's General Meeting

Thursday, September 6, 2001
Tampa Airport Marriott

Executive Council: 1:30 - 4:30 p.m.
CLE Committee: 9:00 a.m.
Publications Committee: 10:00 a.m.
Networking Lunch: Noon - ???

CHANGES AT THE 5TH DCA
from page 7

elor of Science degree in management science, with honors, from Rensselaer Polytechnic Institute in 1973 and his Juris Doctor degree, cum laude, from Boston College Law School in 1976.

Judge Palmer has served The Florida Bar in many ways. He was the Chairman of the Florida Bar Judicial Nominating Procedure Commission, the Ninth Circuit Grievance Committee and the Ninth Circuit Judicial Nominating Commission, and was the Director of the Pro Bono Appellate Project. Judge Palmer also participated in the Judicial Nominating Commission Institute, the Judicial Administration, Selection, and Tenure Committee, the *Florida Bar Journal* Editorial Board, the Fee Arbitration Committee, the Appellate Practice and Advocacy Section and the Family Law Section of the Florida Bar.

Judge Palmer served the Orange County Bar Association for many years as Chairman of the Arbitration Service, the Bar Briefs and Publication Committee and the Fee Arbitration Committee. He was twice named Outstanding Committee Chair for this work. Judge Palmer also chaired a sub-committee of the Alternative Dispute Resolution Committee of the Litigation Section of the American Bar Association. Judge Palmer has also participated in numerous other committees of those organizations.

Judge Palmer was selected by the Florida Bar to argue before the Florida Supreme Court in opposition to proposed amendments to the Florida Code of Judicial Conduct in 1994. He has written and lectured extensively about judicial selection, family law and litigation. He is also a certified arbitrator, civil mediator and family mediator.

In addition to his professional activities, Judge Palmer is a member of the Board of Directors of the Boys and Girls Club of Central Florida, the husband of Nancy Palmer and the father of five children.

Robert J. Pleus, Jr.

Judge Pleus was appointed to the Fifth District Court of Appeal in March, 2000. Prior to his appointment, Judge Pleus was an Orlando attorney for 39 years, specializing in the real estate law and civil litigation. He was first employed by Rush, Reed and Marshall and later became a shareholder at Carlton Fields. Judge Pleus was a partner or shareholder at Orlando lawfirms bearing his own name, most recently known as Pleus Adams and Spears. Immediately prior to his appointment, Judge Pleus was of counsel at Akerman Senterfitt & Eidson.

Judge Pleus was born in Orlando in 1936 and received a Bachelor of Arts degree in political science from Notre Dame University in 1957. He obtained a Juris Doctor degree from the University of Florida in 1962, and a masters degree in pastoral ministries from Loyola University, New Orleans, in 1999.

Judge Pleus is a past President of the Orange County Bar, a member of the Florida Bar Board of Governors, past President of the Young Lawyer's Division of the Florida Bar, and a member of the Executive Counsel of the Real Property, Probate and Trust Law Section of the Florida Bar.

In addition to his Bar activities, Judge Pleus has been the Mayor of the town of Windermere, a member of the Windermere Town Council, a member of the Aviation Zoning Board of the City of Orlando, an Interim Municipal Judge of the City of Orlando, President of the Orange County Historical Society, President of the Tiger Bay Club of Orlando, President of the Windermere Rotary Club, President of the Tri-County League of Cities, and Past Grand Knight & District Deputy of the Knights of Columbus. Judge Pleus is also an ordained permanent Deacon of the Catholic Church.

Judge Pleus is a Board Certified Real Property Attorney and a certified civil mediator. He is the son of a judge and has been married to his wife, Terry, for 37 years. Judge Pleus has six children and two grandchildren, at last count.

Thomas D. Sawaya

Judge Sawaya was appointed to the Fifth District Court of Appeal in February, 2000. Prior to his appointment, Judge Sawaya maintained a practice in Ocala from 1978 to 1986 and also worked as a part time assistant state attorney. He was elected as a Marion County Judge in 1986. In 1990, he was elected to a Circuit Court judgeship in the Fifth Judicial Circuit in Marion County, where he served for ten years. For four of those years, Judge Sawaya was the Presiding Judge of the Appellate Division of the Fifth Judicial Circuit Court.

Judge Sawaya was born in Ocala in 1952 and received a Bachelor of Arts degree from the University of South Florida in 1974. He graduated fourth in his class from Stetson University College of Law in 1977.

Judge Sawaya was a founding member and past President of the D.R. Smith Inn of Court in Ocala and a member of the faculty of the Conference of Circuit Court Judges and the College of Advanced Judicial Studies. Judge Sawaya recently wrote a book titled *Florida Personal Injury and Wrongful Death Actions*, published by West Group 2000. Judge Sawaya has also written and published numerous articles *in The Florida Bar Journal*, *The ABA Journal* and *University of Florida Law Review*, *Litigation* and *For the Defense*. He was awarded the Erskine Mayo Ross Award by the *American Bar Association Journal* for an article published in 1990 and received the 1993 Distinguished Service Award from the Florida Council on Crime and Delinquency for outstanding service in the judicial field.

In addition to his professional activities, Judge Sawaya has served as Vice President of the Marion District of the North Florida Regional Council of Boy Scouts of America and on the Board of Directors for the West Central Florida Driver Improvement School. He was awarded the 1997 Distinguished Graduate Award from the Department of Elementary Schools for the National Catholic Educational Association for rendering distinguished service to the Catholic Church and the United States.

Judge Sawaya is the husband of Jeanne Sawaya and has three children.

Kelton Farris is an Associate General Counsel at SunTrust Banks, Inc. in Orlando. Matthew Conigliaro is an associate at the St. Petersburg office of Carlton Fields. Kimberly Ashby is a shareholder at Akerman Senterfitt in Orlando.

State Civil Case Law Update

by Kelton Farris

The following are case summaries of Florida decisions decided after October 1, 2000 and prior to June 15, 2001 that have an impact on civil appellate practice in Florida.

ATTORNEYS' FEES:

Party seeking attorney's fees in appellate court must specify substantive basis for award of fees in motion.
Shuler v. Darby, 26 Fla. L. Weekly D1481 (Fla. 1st DCA June 12, 2001). A motion for appellate attorney's fees and costs was filed citing Florida Rule of Appellate Procedure 9.400, but omitting the grounds on which recovery was sought as required by subsection (b) of that Rule. The First DCA denied the motion based upon the Florida Supreme Court's' recent ruling in *United Services Automobile Ass'n v. Phillips*, 775 So.2d 921 (Fla. 2000). The First DCA found that since the motion for fees was filed a few weeks after the *Phillips* opinion was issued, the movant was on notice that the Supreme Court had receded from its prior ruling on this issue in *Sally v. City of St. Petersburg*, 511 So.2d 975 (Fla. 1987). *See also*, *Rados v. Rados*, 26 Fla. L. Weekly D932 (Fla. 2d DCA April 6, 2001).

Prevailing party not entitled to attorneys' fees against party brought into appeal through supplementary proceedings.
Speer v. Mason, et al 25 Fla. L. Weekly D2375 (Fla. 4th DCA October 4, 2000). The prevailing party in an action for unpaid wages sought appellate attorney's fees from a defendant that was made a party to the appeal through supplementary proceedings pursuant to §56.29 of the Florida Statutes. The Fourth DCA relied on *Rosenfeld v. TPI Int'l Airways*, 630 So.2d 1167 (Fla. 4th DCA 1993) in finding that Florida law does not allow for an award of prevailing party attorney's fees against such a party.

Award of appellate attorney's fees under §57.105 must be determined by appellate court, not trial court.
Alvarez, Armas & Borron, P.A. et al. v. Heitman, 25 Fla. L. Weekly D2455 (Fla. 3rd DCA October 18, 2000). An award of appellate attorney's fees entered by a trial court pursuant to §57.105 was overturned by the Third DCA, citing cases in the Third and Fifth Districts finding that appellate attorney's fees could only be determined by the appellate court. The Court also found that an award of attorney's fees against a firm that had withdrawn from the case before the fees were awarded was void on due process grounds, because the law firm did not receive notice and was not allowed to participate in the proceedings.

Untimely offer of settlement under §768.79 does not entitle party that prevailed on appeal to appellate attorney's fees.
Glanzberg v. Kauffman et al, 25 Fla. L. Weekly D2476 (Fla. 4th DCA October 18, 2000). A plaintiff served an offer of settlement after final judgment was entered in defendant's favor but before she filed her notice of appeal. After the plaintiff prevailed on appeal, she sought appellate attorney's fees pursuant to §768.79 of the Florida Statutes. The Fourth DCA found that §768.79 does not entitle appellants or appellees, as opposed to plaintiffs and defendants, to utilize its provisions. The Court found that to allow the statute to be used to recover appellate attorney's fees would defeat its purpose of encouraging litigants to resolve cases before trial.

CERTIORARI:

Supreme Court finds that certiorari jurisdiction of DCA to review circuit court reversal of county court decision does not include mere disagreement with circuit court's interpretation of applicable law.
Ivey v. Allstate Insurance Co., 25 Fla. L. Weekly S1103 (Fla. December 7, 2000). The Supreme Court of Florida reaffirmed its decision in *Haines City Community Development v. Heggs*, 658 So.2d 523 (Fla. 1995), in which it narrowed the scope of certiorari jurisdiction to reviewing whether the circuit court afforded procedural due process and applied the correct law. The Supreme Court stated that district courts of appeal should exercise certiorari jurisdiction only when there has been a violation of clearly established principles of law resulting in a miscarriage of justice. The Supreme Court found that the Third DCA created a new category of appellate review when it found an erroneous interpretation of the law to be important enough for certiorari. The Court stated that district courts may not review decisions under the guise of certiorari jurisdiction simply because they are dissatisfied with the decision of a circuit court sitting in its appellate capacity.

See also, *Broward County v. G.B.V. International, Ltd.*, (26 Fla. L. Weekly S389 Fla. June 7, 2001), in which that the Supreme Court stated that a writ of certiorari was never intended to address mere legal error, but only to halt the miscarriage of justice, in a case involving review of a county commission denial of application for plat approval; and *Dusseau v. Metro. Dade Co. Board of Co. Commissioners*, (26 Fla. L. Weekly S329 Fla. May 17, 2001).

Second DCA withdraws opinion granting certiorari because petitioner not deprived of due process and no miscarriage of justice.
Progressive Specialty Insurance Co. v. BioMecanical Trauma, Assn., Inc., 26 Fla. L. Weekly D1194 (Fla. 2d DCA May 9, 2001). The Second DCA had previously published an opinion in which it granted certiorari review after a circuit court, acting in its appellate capacity, affirmed a county court's erroneous ruling. The Second DCA reconsidered its opinion in light of the Florida Supreme Court's opinion in *Ivey v. All State Insurance Co.*, *supra.*, and concluded that the peti-

tioner was not deprived of due process in the circuit court and that the circuit court's error in affirming the case was not a miscarriage of justice. Therefore, although still convinced that the county court erred, the Court withdrew its previous opinion and denied certiorari.

Departure from the essential requirements of law to allow discovery on merits before class certification determined.
Policastro v. Stelk, 26 Fla. L. Weekly D818 (Fla. 5th DCA March 23, 2001). The Fifth DCA found that a trial court departed from the essential requirements of law by denying a motion to stop discovery on the merits of a case until class action certification had been determined. The Court found that Florida Rule of Civil Procedure 1.220(d)(1) provided for discovery prior to class certification only as to the issue of whether the claim a class action is maintainable.

No irreparable harm to allow discovery of irrelevant material.
Aspex Eyewear Inc. v. Ross, 26 Fla. L. Weekly D548 (Fla. 4th DCA February 21, 2001). The Fourth DCA determined that a petitioner's claim that a trial court required it to produce irrelevant documents does not rise to the level of irreparable arm required for certiorari jurisdiction.

Notice of appeal does not provide jurisdiction to review nonfinal order imposing sanctions when no timely petition for writ of certiorari was filed.
Fleet Services Corp. v. Reise, 25 Fla. L. Weekly D2759 (Fla. 2d DCA November 29, 2000). A plaintiff voluntarily dismissed its suit pursuant to Florida Rule of Civil Procedure 1.420 (a) (1) on the same day that a motion was granted striking plaintiff's pleadings. The plaintiff appealed the order imposing sanctions, as well as an order dismissing the action with prejudice that was entered four days after the notice of voluntary dismissal was served. The Second DCA reversed the order dismissing the action with prejudice because the notice of voluntarily dismissal deprived the trial court of jurisdiction. However, the Second DCA found that it lacked jurisdiction to review the sanctions order because it was not an appealable, non-final order and no timely petition for writ of certiorari was filed. The Court did not designate the notice of appeal as a certiorari petition, perhaps because the Court noted that the sanctions order was moot.

Denial of motion to strike punitive damages claim is reviewable by certiorari.
McGuire, Woods, Battle & Boothe, L.L.P., et al v. Hollfelder, et al., 25 Fla. L. Weekly D2637 (Fla. 1st DCA November 9, 2000). The First DCA relied on the Florida Supreme Court's decision in *Globe Newspaper Co. v. King*, 658 So. 2d 518 (Fla. 1995), in finding that certiorari review is available to determine whether a trial court followed the procedural requirements of a statute in deciding a plaintiff's right to claim punitive damages. The First DCA concluded that the plaintiff in a shareholder derivative action could not state a claim for punitive damages.

COSTS OF APPEAL:

Abuse of discretion to award appellate costs judgment to appellant who did not prevail on merits.
Varveris v. Alberto M. Carbonell, P.A., 26 Fla. L. Weekly D995 (Fla. 3rd DCA April 11, 2001). The Third DCA found that an appellant who sought dissolution of an injunction, but obtained an order finding that she had been improperly brought before trial court and requiring her to be served, was not a prevailing party entitled to entry of a costs judgement under Florida Rule of Appellate Procedure 9.400.

FINAL ORDERS:

Partial summary judgement on counterclaim was not final and appealable and could not be followed by judgment awarding attorney's fees.
Specialty Insulation & Waterproofing Co., Inc. v. R & C of Orlando, Inc., etc. et al, 25 Fla. L. Weekly D2393 (Fla. 5th DCA October 6, 2000). A defendant obtained partial summary judgment on a multi-count counterclaim, together with an award of attorney's fees allowing immediate execution. The Fifth DCA found that the award of attorney's fees was improper because an attorney's fee award could not be entered pursuant to a summary judgment that was not final and appealable.

Order setting aside default is not final or appealable.
Bruno v. A.E. Handy & Associates, Inc., 26 Fla. L. Weekly D1327 (Fla. 5th DCA May, 25, 2001). Although the trial court entered an order styled "Order-Default Judgment", the Fifth DCA found that it was merely an interlocutory default. After the trial court set aside the default, the plaintiff appealed. The Fifth DCA dismissed the appeal, finding that the order setting aside the default was a non-final interlocutory order.

Post judgment orders denying attorney's fees and judgments awarding attorney's fees are appealable final orders.
BDO Seidman, LLP v. British Car Auctions, Inc., 26 Fla. L. Weekly D476 (Fla. 4th DCA February 14, 2001). The Fourth DCA found that an order denying attorneys fees entered after a final judgment was a final order when it set the amount of attorney's fees and completed the judicial labor on that matter. Although the appellant had designated its appeal as an appeal of a non-final order entered after judgment, the court redesignated the appeal as an appeal of a final order.

Order denying motion for rehearing of order denying motion for relief from final judgment is not final appealable order when motion for relief from judgment was denied without prejudice.
Palmara v. Chinnock Marine, Inc., 26 Fla. L. Weekly D1134 (Fla. 4th DCA May 2, 2001). The trial court entered a final judgment against a defendant after default. The defendant filed a motion for relief from judgment, which the trial court denied without prejudice. After the trial court denied the defendant's motion for rehearing, the defendant appealed that order. The Fourth DCA dismissed the appeal because the trial court's denial of the

motion for relief from judgment without prejudice lacked finality, due to the fact that the trial court indicating a willingness to consider the motion again.
See also, Meissner v. Moore, et al., 25 Fla. L. Weekly D2441 (Fla. 1st DCA October 12, 2000)(order dismissing complaint without prejudice is non-final and non-appealable).

ISSUE RAISED ON APPEAL:

Trial court's failure to make explicit finding of willfulness in order dismissing action for failure to obey discovery orders was an issue that could be raised for first time on appeal.
Walden v. Adekola, et al, 25 Fla. L. Weekly D2828 (Fla. 3rd DCA December 13, 2000). Plaintiff appealed a trial court order dismissing a suit due to plaintiff's failure to obey discovery orders, claiming that the trial court made no finding of willfulness. The defendant argued that Plaintiff's claim was not preserved for appellate review because the plaintiff never raised the issue with the trial judge. The 3rd DCA found that the absence of a finding of willfulness could be raised for the first time on appeal, based on an analogy to the Florida Supreme Court's finding that trial judges must make specific findings in support of orders finding spouses in contempt of court for willful nonpayment of money. (citing *Commonwealth Federal Savings and Loan Association v. Tubero,* 569 So.2d 1271 (Fla. 1990).

JURISDICTION:

Removal petition that was facially defective did not deprive circuit court sitting in its appellate capacity of jurisdiction.
Hunnewell v. Palm Beach County Code Enforcement Board, 26 Fla. L. Weekly D1178 (Fla. 4th DCA May, 2001); and 25 Fla. L. Weekly D2429 (Fla. 4th DCA October 11, 2000). A notice of removal alleging flaws in the proceedings below was filed just before oral argument of an appeal to the circuit court of a county court decision. The Fourth DCA found that the removal notice stated "absolutely no colorable claim". Although recognizing competing views, the Court found that the circuit court was not divested of jurisdiction to enter an appellate decision while the notice of removal was pending.

Non-final appeal that was dismissed for lack of jurisdiction still divested trial court of jurisdiction to enter final order.
Katz v. NME Hospitals Inc., et al, 25

continued, next page

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APPELLATE PRACTICE

The Board of Legal Specialization and Education and The Appellate Practice Certification Committee are pleased to announce the following attorneys are now Board Certified.

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Fla. L. Weekly D2785 (Fla. 4th DCA December 6, 2000). The Third DCA found that even an appeal of an order granting summary judgment that was dismissed because the order was clearly not appealable divested the trial court of jurisdiction to enter final orders pursuant to Rule 9.130(f). Appellees had argued that since the appellate court did not have jurisdiction, the trial court was not deprived of jurisdiction to enter final orders. However, the Third DCA reasoned that the appellate court had jurisdiction to determine jurisdiction, which deprived the trial court of jurisdiction to enter final orders.

PRESERVATION OF ERROR:

Party not entitled to new trial based upon unobjected-to closing argument, unless challenged argument shown to be so damaging that public interest requires new trial.
Sawczak v. Goldenberg, et al., 26 Fla. L. Weekly D649 (Fla. 4th DCA March 7, 2001). Former President of the Florida Bar, Herman Russomanno, represented an appellant whose attorney failed to object to closing arguments that appellant maintained constituted fundamental error warranting a new trial. The Florida Supreme Court ordered the Fourth DCA to review the case in light of *Murphy v. International Robotic Systems, Inc.*, 766 So. 2d 1010 (Fla. 2000).

The Fourth DCA found that the appellant was not entitled to a new trial because she failed to demonstrate that the unobjected-to arguments were "improper, harmful, incurable, and so damaged the fairness of the trial that the public's interest in our system of justice requires a new trial," as required by *Murphy*.

Trial court's failure to grant motion for directed verdict made during trial not preserved for appeal unless renewed by appropriate post-trial motion.
Industrial Affiliates, Ltd. et al v. Testa et UX, 25 Fla. L. Weekly D2378 (Fla. 3rd DCA October 4, 2000). The Third DCA ruled that a defendant's claim that evidence of negligence was legally insufficient to go to the jury was not preserved for appellate review when the defendant's motions for directed verdict were denied during trial, but not renewed by a motion to set aside the verdict after return of the verdict. The Court pointed out that the trial court's denial of the motion for directed verdict during trial constituted a reservation of the ruling, and it was necessary for the defendant to renew the motion within ten days after return of the verdict pursuant to Florida Rule of Civil Procedure 1.480(b) in order to preserve the issue.

Plaintiff's claim that trial court erred by dismissing complaint without granting leave to amend not preserved for appellate review.
Fox v. Harris, 25 Fla. L. Weekly D2859 (Fla. 1st DCA December 8, 2000). In one of the 2000 Presidential Election cases, the First DCA rejected a plaintiff's claim that the trial court erred by failing to grant him leave to amend an order dismissing the complaint, because the record did not show that plaintiff asked for and was denied the opportunity to amend his complaint.

Error in admission of evidence not preserved for appellate review when defendant's motion in limine to exclude evidence was denied, but no objection was made when evidence admitted at trial.
Horne v. Hudson, et al, 25 Fla. L. Weekly D2442 (Fla. 1st DCA October 12, 2000). A defendant filed motions in limine before trial seeking to exclude evidence. The trial court denied the motions and admitted the evidence. Although the First DCA found no authority for the trial court's decision, it affirmed because the defendant had not preserved the issue by objection during trial, despite the fact that the trial court specifically asked whether the evidence was being admitted without objection.

Failure to object to sufficiency of venire panel prior to motion for new trial failed to preserve error regarding size of panel.
Hutchinson Island Club Condominium Association, Inc. v. Degraw, et al, 25 Fla. L. Weekly D2423 (Fla. 4th DCA October 11, 2000). A motion for new trial was granted by the trial court based on an argument that the parties entered into an agreement by mutual mistake that did not provide sufficient venire members for a jury. The Fourth DCA reinstated the jury verdict because no objection to the sufficiency of the venire was raised prior to a motion for a new trial. Therefore, the Court found that the issue of sufficiency of the panel was waived.

Plaintiff who failed to specifically object to jury instruction failed to preserve issue for appellate review.
Feliciano v. School Board of Palm Beach Co., 26 Fla. L. Weekly D56 (Fla. 4th DCA December 27, 2000). The Fourth DCA found that a plaintiff who failed to specifically object to a jury instruction and did not offer written instruction of her own as required by Florida Rule Civil Procedure 1.470(b) failed to preserve her objection for appellate review. The Court also found that the failure to preserve objections could not be cured by application of the fundamental error doctrine.

RECORD ON APPEAL:

Numerous appeals dismissed due to appellants' failure to prove error by providing a transcript of hearing or trial.
Rollins v. Rollins, 26 Fla. L. Weekly D764 (Fla. 1st DCA March 14, 2001). An appellant's failure to provide a transcript of hearing or statement of evidence pursuant to Florida Rule of Appellate Procedure 9.200 precluded appellate review. The First DCA pointed out that litigants who proceed without a court reporter take a risk that if facts are determined adversely to them, they may be unable to demonstrate error on appeal.
Other Courts also refused to overturn a trial court when the appellant failed to provide a record of the trial. *See, Spevak, et al. v. Willis*, 26 Fla. L. Weekly D221 (Fla. 2d DCA January 12, 2001); *Stainless Marine, Inc. v. Cobra Sport Fishing Boats, Inc.*, 26 Fla. L. Weekly D197 (Fla. 3rd DCA January 10, 2001); *Schechterman v. Schechterman*, 26 Fla. L. Weekly

D337 (Fla. 4th DCA January 31, 2001); *Mulholland v. Mulholland*, 26 Fla. L. Weekly D1234 (Fla. 2d DCA May 16, 2001); *Voisin v. Voisin*, 26 Fla. L. Weekly D1380 (Fla. 2d DCA May 30, 2001); *Chereskin v. Chereskin*, 26 Fla. L. Weekly D1490 (Fla. 5th DCA June 15, 2001); and *Green v. Green*, 26 Fla. L. Weekly D1482 (Fla. 1st DCA June 12, 2001).

Appellant who failed to provide transcript of hearing or trial cannot prove trial court error from the face of order on appeal.
Klette v. Klette, 26 Fla. L. Weekly D901 (Fla. 1st DCA March 27, 2001). An appellant attempted to avoid the consequences of not providing a transcript by claiming that reversible error was apparent from the face of the appealed order awarding alimony. The First DCA found that the harmless error statute (§59.041 Fla. Stat.) requires an appellate court to examine "the entire case" to determine whether the error complained of resulted in a miscarriage of justice. The Court noted that this decision may conflict with the Fourth DCA's opinion in *Casella v. Casella*, 569 So. 2d 849 (Fla. 4th DCA 1990). *See also, Simpson v. Simpson*, 26 Fla. L. Weekly D816 (Fla. 5th DCA March 23rd, 2001)(appellant obtained reversal of trial court's fee award order that failed to make specific findings of fact as to the number of hours spent and a reasonable hourly rate, in spite of appellant's failure to provide a transcript of the hearing).

Final order vacated when failure to provide transcript caused by mechanical error.
Orange County School Board, et al. v. Shoemaker, 26 Fla. L. Weekly D1013 (Fla. 1st DCA April 12, 2001). The First DCA vacated the final order appealed from and remanded the case for a new hearing when the appellant's failure to provide a transcript was due to mechanical error.

Appellant that did not include transcript of trial court's proceedings in record waived compliance with Rule 9.200(f)(2) when appellee pointed out the failure to provide transcript in answer brief.
Sullivan v. Sullivan, 25 Fla. L. Weekly D2779 (Fla. 4th DCA December 6, 2000). Appellee pointed out in its answer brief that appellant failed to include the transcript of the trial court proceedings in the record on appeal. The Fourth DCA affirmed the trial court without directing appellant to supply the omitted transcript because the appellant waived compliance with Rule 9.200(f)(2) by failing to move to supplement the record after appellee pointed out the deficiency.

Motion to supplement record to include a complaint that was not part of record in trial court was flagrant violation of Rule 9.200(f).
Poteat et al. v. Guardianship of Willie Florence Poteat, 25 Fla. L. Weekly D2421 (Fla. 4th DCA October 11, 2000). Appellant's attorney filed a motion to supplement the record one day before oral arguments to include a complaint his clients had recently filed. The purpose of the motion was to demonstrate the likelihood that "endless litigation" would result if the Fourth DCA did not reverse the trial court. The Court found this to be a flagrant violation of Rule 9.200(f) and found the attorney's actions to be "highly unprofessional".

MOTION FOR REHEARING:

Motion for rehearing denied when it cited issues not raised in briefs or oral argument.
Blinn v. Florida Department of Transportation, et al., 26 Fla. L. Weekly D624

continued, next page

(Fla. 1st DCA October 18, 2001). An appellee's motion for rehearing was denied because it failed to convince the First DCA that its original opinion misconstrued or misapplied the law or facts involved in the appeal. The Court stated that its decision was required by "the long-established rule that authorities not cited and issues not raised in the briefs or on oral argument cannot be raised for the first time on motion for rehearing."

TIMELINESS:

Original writs and notices of appeal filed with Fourth DCA prior to 9a.m. cannot be accepted as filed on previous day.
Capone v. Florida Board of Regions, 26 Fla. L. Weekly D43 (Fla. 4th DCA December 27, 2000). Petitioner delivered a petition for writ of certiorari to the clerk's office of the Fourth DCA before 9:00 a.m. on the thirty-first day after rendition of the order to which the petition pertained. The clerk's office date stamped the petition for the previous day, pursuant to its policy of accommodating lawyers filing briefs and other non-jurisdictional papers. The Fourth DCA explained that the clerk cannot extend the jurisdictional time limit for filing petitions for certiorari or notices of appeal by considering such papers to be filed the day before the clerk received them.

Notice of appeal filed within thirty days of amended judgment but more than thirty days after original judgment was untimely.
Degale, et al v Krongold, Bass & Todd, et al, 25 Fla. Law Weekly D2835 (Fla. 3rd DCA December 13, 2000). A trial court entered final summary judgment in favor of defendants on September 27, 1999, and amended the final judgment on October 7, 1999, making only minor changes to the original summary judgment. Plaintiffs filed a notice of appeal within thirty days of the amended judgment, but more than thirty days after the original judgment. The Third DCA dismissed the appeal because the amended judgment made no substantive change to the original judgment, but merely corrected clerical errors. Therefore, the time for appeal expired thirty days from filing original judgment.

Notice of appeal filed more than thirty days after final summary judgment but within thirty days of subsequently entered final judgment was untimely.
State Farm Mutual v. Open MRI of Orlando, Inc., 26 Fla. L. Weekly D879 (Fla. 5th DCA March 30, 2001). A final summary judgment was entered by the county court in favor of State Farm. MRI filed a motion for entry of final judgment and obtained a final judgment almost six months after the summary judgment. MRI then filed a notice of appeal of the final judgment, which was untimely as to the summary judgment. State Farm moved to strike the notice of appeal and the Circuit Court, acting in its appellate capacity, denied the motion. State Farm then filed a petition for a writ of certiorari, which was granted. The Fifth DCA found that the summary judgment was a final appealable order because it entered judgment in favor of State Farm and did not contemplate any further judicial labor with regard to the rights of the parties. The Circuit Court was directed to dismiss the appeal as untimely.

Filing notice of appeal within thirty days of notice of withdrawal of motion for rehearing sufficient.
Simpson v. Simpson, 26 Fla. L. Weekly D816 (Fla. 5th DCA March 23rd, 2001). The Fifth DCA dealt with the issue of whether filing a notice of appeal within thirty days of withdrawal of a motion for rehearing is timely under the 1992 amendments to Florida Rule of Appellate Procedure 9.020(h)(1). Although the Rule defines "rendition" of an order as occurring upon the filing of a order disposing of a motion for rehearing, the Court concluded that the Rule did not change the prior law and found a notice of appeal filed within thirty days of withdrawal of a motion for rehearing was timely. The Court reasoned that to strictly construe the Rule by finding that a motion for rehearing that was voluntarily withdrawn did not toll the time for filing a notice of appeal would extinguish the right of both parties to appeal if a motion for rehearing were withdrawn after the thirty days for filing a notice of appeal expired.

Notice of appeal filed thirty days after date trial judge put on the order, but thirty-one days after the order was filed with the clerk, was not timely.
Blackstock v. Blackstock, 26 Fla. L. Weekly D355 (Fla. 1st DCA January 31, 2001). The First DCA dismissed an appeal for lack of jurisdiction because the notice of appeal was filed thirty-one days after the order appealed from was filed with the clerk, even though the notice was filed thirty days after the order was dated by the trial judge. However, the appeal was dismissed without prejudice to the appellant's right to move the trial court for relief from judgment so that the trial court could reissue the order and allow appellant to appeal in a timely manner if appellant had no notice of the actual rendition date of the order.

Time for filing notice of appeal or petition for certiorari not extended to allow for mailing.
Excel Auto Group, Inc., etc. v. Ford Motor Credit Co., 26 Fla. L. Weekly D492 (Fla. 5th DCA February 16, 2001). The Fifth DCA found that mailing a certiorari petition to the court within thirty days of rendition of an order did not suffice, because Florida Rule of Appellate Procedure 9.402(d) does not extend the time to allow mailing of certiorari petitions or notices of appeal.
In *Hall v. Florida Department of Corrections*, 26 Fla. L. Weekly D556 (Fla. 1st DCA February 20, 2001) the First DCA also found that Florida Rule of Appellate Procedure 9.420(d) does not allow five days for mailing a notice of appeal. In that case, however, the Court encouraged the appellant to ask the trial court to set the original order aside, due to appellant's assertion that his delay in filing the petition was due to the fact that the order was not mailed to him at the correct address.

Ten day time limit for filing notice of joinder as appellant is not jurisdictional.

Super Transport, Inc., et al v. Department of Insurance, 25 Fla. L. Weekly D2741 (Fla. 1st DCA November 28, 2000). The 1st DCA ruled that a notice of joinder filed by an appellant more than ten days after the original notice of appeal was allowed because there was no demonstration of prejudice by the appellee. The court found that the ten day requirement of Florida Rule of Appellate Procedure 9.360 is not jurisdictional and that a party may be added after ten days, unless the opposing party shows that it was substantially prejudiced by the delay. The court based its decision on *Westfield Insurance Company v. Sloan* 671 So.2d 881(Fla. 5th DCA 1996).

When jury verdict is an appealable order, due process requires that parties receive notice when jury verdict form is filed with the clerk.

Hialeah Hotel, Inc., et al v. Ramada Franchise Systems, Inc., et al, 25 Fla. L. Weekly D2773 (Fla. 3rd DCA December 6, 2000).

After the plaintiffs obtained a jury verdict in their favor in a bifurcated trial on liability only, the clerk filed the verdict one day after it was announced, without giving notice to the parties. The trial court entered an order finding liability in favor of the plaintiffs thirty-four days after the clerk filed the verdict. A defendant then filed its notice of appeal. Plaintiffs moved to dismiss the appeal as untimely because the thirty day period for filing a notice of appeal expired before the order on liability was signed.

The Third DCA noted that in *Myers v. Metropolitan Dade County*, 748 So.2d 920 (Fla. 1999), the Florida Supreme Court held that the jury verdict form in a bifurcated jury trial on liability serves as a appealable, non-final order when it is filed with the clerk. The Court relied on cases holding that when a party does not receive a court order until after a time for appeal has run, due process requires that the order be reentered so that the affected party can file a notice of appeal. The Court quashed the order finding liability and directed that the original filing of the verdict be vacated and that the trial court order the jury verdict to be refiled, with notice of filing to the parties. Further reasons for this decision were articulated in *Hialeah Hotel, Inc., et al v. Ramada Franchise Systems, Inc., et al*, 26 Fla. L. Weekly D1302 (Fla. 3rd DCA May 23, 2001).

Motion for rehearing of order denying motion for relief from judgement did not toll time for filing notice of appeal.

Frantz v. Moore, 25 Fla. L. Weekly D2738 (Fla. 1st DCA November 28, 2000). The appellant filed a motion for rehearing of an order denying motion for relief from judgment. The 1st DCA found that because such a motion is not authorized it did not toll the time for filing a notice of appeal. Therefore, the appeal was dismissed. *See also, Silver Shells Corp v. Dale*, 26 Fla. L. Weekly D1203 (Fla. 1st DCA May 9, 2001); *Frantz v. Moore*, 25 Fla. L. Weekly D2738 (Fla. 1st DCA November 28, 2000), which both found that an unauthorized motion for rehearing did not toll the time for filing a notice of appeal.

Untimely appeal of order denying motion for rehearing construed as timely appeal from final judgment.

Chrysler Corp. v. Long, 25 Fla. L. Weekly D2452 (Fla. 5th DCA October 13, 2000). Chrysler Corporation filed an untimely notice of appeal of a county court order denying Chrysler's motion for rehearing of an order denying attorney's fees and costs. Final judgment was entered by the county court a few days before the notice of appeal was filed. On appeal to the circuit court, Chrysler argued that its notice of appeal should be construed as a timely appeal of the final judgment. The circuit court dismissed Chrysler's appeal as untimely. The Fifth DCA relied on previous cases holding that when it is clear from the record that a party is appealing a final order, but the notice of appeal is defective and designates the wrong order, the appeal should not be dismissed unless prejudice would result to the opposing party. Therefore, the Fifth DCA found that the trial court departed from the essential requirements of law in not considering the appeal on the merits.

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