

IN THE SUPREME COURT OF FLORIDA

**IN RE: AMENDMENT TO FLORIDA
RULE OF APPELLATE PROCEDURE 9.130**

SC21–

**REPORT OF THE
APPELLATE COURT RULES COMMITTEE**

The Honorable Stephanie W. Ray, Chair of the Appellate Court Rules Committee (“Committee”), and Joshua E. Doyle, Executive Director of The Florida Bar, file this report under Florida Rule of Judicial Administration 2.140(f)(1). As directed by the Court, the Committee submits a proposed amendment to Florida Rule of Appellate Procedure 9.130 to authorize appeal of nonfinal orders that grant or deny a motion for leave to amend a complaint to assert a claim for punitive damages. Additionally, in an effort to assist the Court, the Committee offers its independent evaluation of whether these new rights for interlocutory review should be created and recommends against such action.

The proposed amendment is included in full-page format (Appendix B) and two-column format (Appendix C). Pursuant to Florida Rule of Judicial Administration 2.140(b), the amendment was published for comment in the November 1, 2020, edition of *The Florida Bar News*. (See Appendix D). Two comments were received and evaluated by the Committee. (See Appendix E). Included with this report are excerpts of the Committee’s October 9, 2020, meeting agenda and approved meeting minutes (Appendix F), at which the Committee initially voted to approve the proposed amendment; and excerpts of the Committee’s January 15, 2021, meeting agenda (Appendix G) and draft meeting minutes (Appendix H), at which the Committee considered the comments.

I. Source of Referral

By letter dated July 6, 2020, the Clerk of the Florida Supreme Court asked the Committee “to propose rule amendments to provide for the interlocutory appeal of nonfinal orders granting or denying leave to amend a complaint to assert a claim for punitive damages.” (See Appendix A). The Court noted that there is currently no avenue for the immediate review of the trial court’s determination of whether there has been a showing by record evidence that would provide a reasonable basis for recovery of punitive damages. Instead, a party must petition for writ of certiorari to seek

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review of a nonfinal order granting or denying leave to assert a claim for punitive damages, which is limited to consideration of whether the trial court followed the procedural requirements of section 768.72, Florida Statutes.

II. Proposed Amendment to Rule 9.130

Upon receipt of the Court's referral in July 2020, the matter was first evaluated by the Committee's civil practice subcommittee. (See Appendix F-4-11). By a vote of 13-2 in September 2020, the subcommittee recommended adding subdivision (a)(3)(G) to rule 9.130 to authorize review of nonfinal orders that "grant or deny a motion for leave to amend to assert a claim for punitive damages." The subcommittee tried to obtain statistics on the number of certiorari petitions that had been filed on this issue, but could not do so because such statistics were not readily maintained by the Office of the State Courts Administrator or the state e-portal system. The subcommittee acknowledged that the Committee had previously voted to not recommend an amendment to rule 9.130 based on similar referrals in recent years but believed the Court's referral was a directive to propose an amendment. The majority, therefore, approved language recommending the amendment. The majority view reasoned that rule 9.130 should authorize immediate appellate review of both orders granting and denying leave to amend because it was fair and equitable to both plaintiffs and defendants. The minority view reasoned that only orders granting leave to amend a complaint to add a claim for punitive damages should be immediately appealable because of constitutional and due process principles, which the minority did not believe applied to orders denying leave to amend.

The full Committee considered the subcommittee's recommendation at its October 2020 meeting (See Appendix F-12-15). Both the majority and minority views were discussed at length, including the fact that the Court had directed the Committee to propose an amendment rather than merely requesting it to consider the issue. After robust discussion, the Committee unanimously approved the subcommittee's proposed language by a vote of 33-0.

A. Board of Governors' Review and Comments

As required by Florida Rule of Judicial Administration 2.140, the Florida Bar Board of Governors considered the proposal and voted 33–2 to recommend acceptance. The amendment also was published for comment in the November 1, 2020, edition of *The Florida Bar News*. (See Appendix D). The Committee received two comments on the proposed amendment, one from the Florida Justice Association (“FJA”) and another from Bryan Gowdy, Esquire, and Maegen Peek Luka, Esquire. (See Appendix E).

The FJA submitted a comment requesting that the Committee reject the proposed amendment for two reasons. (See Appendix E–1-3). The FJA argued that certiorari is a fair and efficient remedy, which promotes a faster resolution of cases. The FJA also argued that the amendment would impose an immense burden on an overloaded court system that would lead to substantially more appeals and delays in nearly every civil case in which punitive damages were sought.

Mr. Gowdy and Ms. Luka submitted a comment expressing similar concerns. (See Appendix E–4-5). The comment argued that certiorari is a sufficient and expedited way to seek appellate review of orders on motions for leave to amend to add a claim for punitive damages. Conversely, disposition of nonfinal appeals under rule 9.130 takes longer than certiorari as a result of the applicable deadlines for filing briefs and the generous agreed-upon extensions that apply to nonfinal order appeals in three of the five district courts of appeal, which will only result in longer delays in the proceedings pending in the trial court. They noted that the list of appealable nonfinal orders in rule 9.130 has been expanded in recent years to twenty different types, which is substantially more expansive than the types of interlocutory appeals authorized under the federal rules. They agreed, however, that if rule 9.130 were amended, it would be more equitable to allow immediate review of orders that either grant or deny motions for leave. Lastly, in order to reduce the disposition time of nonfinal appeals under rule 9.130 and reduce attendant delays in the trial court, they contended that the appellate rules should be amended to shorten the time that parties currently have to file their respective briefs and impose a 180-day deadline for disposition of nonfinal appeals.

B. The Committee's Reaction to Comments

The Committee's civil practice subcommittee evaluated the comments during a meeting in December 2020, at which representatives of the two commenters presented their positions. (See Appendix G–13-17). By a vote of 15–2, the subcommittee determined that the Court's referral directed the Committee to propose a rule amendment and that, but for that directive, the subcommittee would not have approved the amendment. The majority view reasoned that the Committee had previously voted not to recommend an amendment when similar referrals had been made in the past few years, that the amendment would lead to delays in pending litigation, and that it would unnecessarily increase the case load of the district courts of appeal. The minority view reasoned that the rule should be amended for reasons consistent with the opinions of several district courts of appeal judges within the last four years. See *Life Care Ctrs. of Am., Inc. v. Croft*, 299 So. 3d 588, 591–92 (Fla. 2d DCA 2020); *E.R. Truck & Equip. Corp. v. Gomont*, 300 So. 3d 1230, 1231–32 (Fla. 3d DCA 2020) (Scales, J., concurring and Gordo, J., concurring specially); *Sapp v. Olivares*, 288 So. 3d 714, 716 n.1 (Fla. 4th DCA 2020); *The Event Depot Corp. v. Frank*, 269 So. 3d 559, 563-64 (Fla. 4th DCA 2019) (Kuntz, J., concurring); *Levin v. Pritchard*, 258 So. 3d 545, 548 n.4 (Fla. 3d DCA 2018); *TRG Desert Inn Venture, Ltd. v. Berezovsky*, 194 So. 3d 516, 520 n.5 (Fla. 3d DCA 2016). The subcommittee also recommended treating the request by Mr. Gowdy and Ms. Luka to amend the appellate rules to impose stricter deadlines for briefing and disposition of nonfinal appeals as a new referral by a vote of 16–1.

The full Committee considered the subcommittee's recommendation at its January 2021 meeting, at which the commenters were given an opportunity to present their positions (See Appendices G and H). The Committee did not reconsider its previous vote to approve the amendment. But, by a vote of 25–9, the Committee approved the subcommittee's recommendation that it would not have supported an amendment absent the Court directing it to do so. (See Appendix H–2). Proponents of the majority view noted that the Committee had previously voted not to recommend an amendment when considering similar referrals in recent years, that the amendment would lead to delays in pending litigation, and that it would unnecessarily increase the case load of the district courts of appeal. Notwithstanding these reasons for not amending rule 9.130, the majority felt constrained to approve the amendment—consistent with

section IV(c)(3) of its Internal Operation Procedures and rule 2.140(f)(2)—because the Court directed the Committee to propose an amendment as opposed to merely requesting the Committee to consider the issue. The minority view would have approved the proposed amendment even without the Court’s directive.

III. Conclusion

In sum, the Committee voted (33–0) to approve the proposed amendment to rule 9.130 to add new subdivision (a)(3)(G) to authorize nonfinal appeals of orders that: “grant or deny a motion for leave to amend to assert a claim for punitive damages.” At the same time, the Committee also voted (25–9) that, but for the Court’s directive to propose such an amendment, it would not have done so. In other words, if the Court ultimately concludes that rule 9.130 should not be amended, that result would be supported by a majority of the Committee. The Committee felt it important to provide this additional information to the Court as it evaluates the proposal.

WHEREFORE, the Committee respectfully requests that the Court consider the information provided herein and attached hereto in determining whether to amend Florida Rule of Appellate Procedure 9.130 and, if it decides to amend rule 9.130, that it do so consistent with the language unanimously approved by the Committee.

Respectfully submitted on February 1, 2021.

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

I certify that this rule is unable to be read against *Thomson Reuters' Florida Rules of Court—State* (2020 Revised Edition). I certify that this report was prepared in compliance with the font requirements of Florida Rule of Appellate Procedure 9.045.

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