Filing # 125976243 E-Filed 04/30/2021 06:11:25 PM

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC21-129

IN RE:

AMENDMENT TO FLORIDA
RULE OF APPELLATE
PROCEDURE 9.130
_____/

COMMENT OF MAEGEN PEEK LUKA AND BRYAN S. GOWDY

NEWSOME MELTON

Maegen Peek Luka
Florida Bar No. 549851
luka@newsomelaw.com
201 S. Orange Avenue
Suite 1500
Orlando, Florida 32801
Telephone: (407) 648-5977

CREED & GOWDY, P.A.

Bryan S. Gowdy
Florida Bar No. 176631
bgowdy@appellate-firm.com
filings@appellate-firm.com
865 May Street
Jacksonville, Florida 32204
Telephone: (904) 350-0075

RECEIVED, 04/30/2021 06:13:27 PM, Clerk, Supreme Court

STATEMENT OF INTEREST

This comment is filed on behalf of attorneys Maegen Peek Luka and Bryan S. Gowdy.

COMMENT

We comment on the proposed amendment to rule 9.130 that would add determinations regarding punitive damages amendments to the list of immediately appealable, non-final appeals. The thrust of this comment is that adding another item to the interlocutory appeals list will not resolve the issues with which the proponents of the amendment take issue. Adding another interlocutory appeal option will only delay cases at the trial level and increase appellate dockets. We propose an alternative in the Civil Rules Committee to address the concerns raised by proponents of an amendment. Alternatively, we call to the Court's attention the perhaps uncontemplated side-effects of approving this amendment and ask that the Court address those side-effects.

I. More than 70 percent of the committee voted it would not have approved the proposed amendment but for this Court's directive.

We acknowledge that the Court itself directed this rule amendment. Historically, however, the Appellate Court Rules

Committee consistently has rejected prior motions to amend rule 9.130 to allow for appeals of orders on punitive damages. In this proceeding, the Appellate Rules Committee voted 25-9 that, *but for the Court's directive*, the Committee would not have recommended the rule amendment to the Court. (Committee Report 4.) Likewise, the civil subcommittee voted 15-2 that, *but for the Court's directive*, the subcommittee would not have recommended the rule amendment to the Court. (*Id.*) As is customary, the Committee's report does not reflect how individual members voted. The undersigned attended the committee meeting and can represent that this 70% majority included committee members of varied backgrounds—DCA judges, attorneys who normally represent civil defendants, and attorneys who normally represent civil plaintiffs.

II. Before burdening the DCAs with another category of non-final appeals, the Court should follow the examples of some federal courts and instruct the Civil Procedure Rules Committee to craft more efficient solutions to protect a defendant's private financial information.

The Committee's minority cited several judicial opinions to support its position that interlocutory appeal of punitive damages decisions should be available. (*Id.*) In fact, however, only three DCA judges—Judges Scales, Gordo, and Kuntz—have given an

unqualified endorsement to amending rule 9.130 to allow non-final appeals of orders on punitive damages. *See 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); *The Event Depot Corp. v. Frank*, 269 So. 3d 559, 563-64 (Fla. 4th DCA 2019) (Kuntz, J., concurring).[1] These concurring opinions advocate to amend rule 9.130 because granting leave to add a claim for punitive damages: (i) is a "game changer," (ii) "subjects the defendant to financial discovery that would otherwise be off limits,"

[1] Three opinions cited by the minority merely suggested that the Committee *consider* an amendment. *See Life Care Ctrs. of Am., Inc. v. Croft*, 299 So. 3d 588, 591–92 (Fla. 2d DCA 2020) ("[W]e suggest . . . that the Florida Bar's Appellate Court Rules Committee *consider* amending [rule 9.130] to allow the immediate appeal from a nonfinal order granting leave to amend a pleading to add a claim for punitive damages . . . ."(emphasis added)); *TRG Desert Inn Venture, Ltd. v. Berezovsky*, 194 So. 3d 516, 520 n.5 (Fla. 3d DCA 2016) ("We urge the Florida Bar's Appellate Court Rules Committee to review rule 9.130(a)(3) . . . to *consider* whether to include in the rule's catalogue of appealable, non-final orders a trial court's order granting a motion for leave to add a punitive damages claim." (emphasis added).); *Levin v. Pritchard*, 258 So. 3d 545, 548 n.4 (Fla. 3d DCA 2018) (quoting *Berezovsky*'s recommendation and stating "review by interlocutory appeal rather than by way of a petition for writ of certiorari would *perhaps* be more appropriate" (emphasis added)). A final opinion cited by the minority merely observed that "several appellate courts and individual judges have . . . suggested an amendment,"but it did not take any position on the wisdom of such an amendment. 288 So. 3d at 716 n.1. *Sapp v. Olivares*, 288 So. 3d 714, 716 n.1 (Fla. 4th DCA 2020).

and (iii) "potentially subjects the defendant to uninsured losses." *E.g., Frank*, 269 So. 3d at 563. One commenter, the Florida Defense Lawyers Association, supports the amendment primarily to protect defendants from discovery of their financial information.

To address the perceived problem of financial-information discovery, we propose the Court explore a different solution that will be more efficient for Florida's overall court system. The Committee's proposed solution (given at the Court's directive)—allowing more non-final appeals—will increase burdens on the appellate courts and slow the resolution of litigation in the trial courts.

One possible solution, as crafted by some federal courts, is to restrict discovery of financial information even when claims for punitive damages are pled. Exercising their powers to regulate discovery under the rules of civil procedures, these courts permit such discovery only later in the litigation—not at the pleadings stage—after some type of determination has been made about the defendant's liability for punitive damages. *See, e.g., Copantitla v. Fiskardo Estiatorio, Inc.*, 09 CIV. 1608 RJH JCF, 2010 WL 1327921, at *16 (S.D.N.Y. Apr. 5, 2010) (discussing how some courts permit discovery of financial information at the pleadings stage while

others do not permit such discovery until later in the litigation, only if appropriate); *Friskney v. Am. Park & Play, Inc.*, 04-80457-CIV, 2005 WL 8156081, at *3 (S.D. Fla. Nov. 2, 2005) (to protect the defendants' privacy interest in their financial information, plaintiffs would be permitted to such discovery only after prevailing on their entitlement to punitive damages).

The solution for the problem identified by Judges Scales, Gordo, and Kuntz should not be the installation of yet another obstacle—that is, another non-final appeal—to the just, speedy, and inexpensive resolution of litigation at the trial court. Instead, to protect against unnecessary discovery of financial information, the Court should ask the Civil Procedure Rules Committee to fashion a discovery rule—similar to the rulings of the aforementioned federal courts and other federal courts.

Moreover, orders granting leave to add a claim for punitive damages do not inevitably lead to intrusive requests for discovery of financial information. Often, plaintiffs do not need such discovery because public corporations are required to disclose lots of financial information under federal laws or regulations. *See, e.g.,* U.S. Securities and Exchange Commission, *Fast Answers*

(https://www.sec.gov/fast-answers/answersreada10khtm.html) ("The 10-K and 10-Q offer a detailed picture of a company's business, the risks it faces, and the operating and financial results for the fiscal year or quarter.") For non-public companies, trial courts—exercising their powers under the civil rules (just like the federal courts do)—should be able to limit and safeguard a defendant's financial information.

III. Adding another non-final order adds more delay to litigation in the trial court.

In addition to not addressing the real "nut" of issue when an order grants leave to amend to add a claim for punitive damages, adding another item to the list of non-final appeals will lead to longer delays of cases at the trial court level while such non-final appeals are pending. With the addition of orders on punitive damages, rule 9.130 will have approximately twenty different categories of non-final orders that are appealable immediately. By comparison, the federal judicial system does not allow non-final appeals for many of the orders listed in rule 9.130.

Orders on punitive damages are currently reviewable (albeit in a limited fashion) by way of a petition for writ of certiorari. *See, e.g.,*

Globe Newspaper Co. v. King, 658 So. 2d 518, 520 (Fla. 1995). In our experience, the district courts of appeal handle a petition more expeditiously than they do an interlocutory appeal.

Moving the review of punitive damages orders from the DCAs' certiorari jurisdiction to their rule 9.130 jurisdiction, in effect, will lengthen the time to complete litigation. With the (hopeful) passing of the pandemic and this Court's directive to push long delayed civil cases ahead, creating another non-final appeal will delay a resolution of cases in the trial court and, by its very nature, is counterproductive to this Court's goal of bringing cases to a speedy resolution.

IV. The Court needs to craft a solution to expedite the handling of non-final appeals to ensure a just, speedy, and inexpensive resolution of cases in the trial courts.

If the Court is inclined to add another type of non-final appeal to rule 9.130, then it should also consider requesting that the Appellate Court Rules Committee create an appellate rule that would assist in achieving the "just, speedy, and inexpensive determination of every action." *See* Fla. R. Civ. P. 1.010 (quoting). As appellate practitioners, we appreciate extensions of time as much as anyone. But, if the Court decides that even more non-final

orders should be immediately reviewable by the DCAs, then we urge the Court to curtail the time it takes for such appeals to be processed.

Specifically, the Court should direct the Committee to draft an amendment to rule 9.130 that would result in a speedier disposition of all appeals that fall under rule 9.130. Currently, rule 9.130 gives an appellant 30 days after rendition of the order to file a notice of appeal and then an additional 15 days to file a brief. That amounts to 45 days to complete the initial brief, compared to the 30-day period for preparing a petition for certiorari under rule 9.100. On top of this 45 days, the district courts regularly grant extensions of time pursuant to either their generous administrative orders or court-allowed extensions on a case-by-case basis.

Similar to extraordinary writs, non-final appeals should move at a faster pace than final appeals. In much the same way that practitioners must take into account the tighter time limits involved in an extraordinary writ, practitioners who are unprepared to meet that expedited pace of a non-final appeal (which is its own form of extraordinary) should consider whether or not they truly need to file a non-final appeal.

In the same vein, it would further the purposes of rule 9.130 to include time limitations on the courts themselves. Specifically, we suggest an amendment delineating that all motions filed within non-final appeals must be disposed of within a certain time frame and that all non-final appeals must be brought to conclusion within a certain time frame, absent an explanation. As a starting point, we propose the following amendment to rule 9.130:

> (j) Deadlines for Decision and Extensions. Excluding proceedings under rules 9.330 and 9.331, the court must decide all appeals under this rule by no later than 180 days after the notice of appeal was filed, unless the court enters an order with specific findings as to why the court was unable to comply with this deadline and the circumstances causing the delay. The court must dispose of all motions filed under rules 9.330 and 9.331 by no later than thirty and sixty days, respectively, from when the motion was filed, unless the court enters an order with specific findings as to why the court was unable to comply with this deadline and the circumstances causing the delay. Each year, the chief judge of the court shall report to the chief justice of the supreme court, on a case-by-case basis, all cases where the court entered an order regarding its inability to comply with these deadlines. Absent a showing of extraordinary or emergency circumstances, the court shall not grant any extensions on reply or cross-reply briefs or on motions and responses under rules 9.330 and 9.331, and it shall not grant any extensions on initial or answer briefs that exceed fifteen days.

******

In summary, we recommend the Court decline to adopt the Committee's proposed rule. The Court should refer this matter to Civil Procedure Rules Committee to craft a more efficient solution, like some federal courts have, to safeguard confidential financial information. The Court also should ask the Appellate Court Rules Committee to craft a rule to expedite non-final appeals. We thank the Court for consideration of this comment.

NEWSOME MELTON

/s/*Maegen Peek Luka*
Maegen Peek Luka
Florida Bar No. 549851
luka@newsomelaw.com
201 S. Orange Avenue
Suite 1500
Orlando, Florida 32801
Telephone: (407) 648-5977

CREED & GOWDY, P.A.

/s/*Bryan S. Gowdy*
Bryan S. Gowdy
Florida Bar No. 176631
bgowdy@appellate-firm.com
filings@appellate-firm.com
865 May Street
Jacksonville, Florida 32204
Telephone: (904) 350-0075

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing document complies with the word count limitation of Rule 9.210, Florida Rules of Appellate Procedure, in that it contains 2,022 words (including words in headings, footnotes, and quotations), according to the word-processing system used to prepare this document. This document also complies with the line spacing, type size, and typeface requirements of Rule 9.045, Florida Rules of Appellate Procedure.

/s/Bryan S. Gowdy
Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed with the Clerk of Court on April 30, 2021, via the Florida Courts E-Filing Portal, which will serve a notice of electronic filing to all counsel of record and to:

Honorable Stephanie Williams Ray
Committee Chair
First District Court of Appeal
2000 Drayton Drive
Tallahassee, Florida 32399-0001
rays@1dca.org

Krys Godwin
Bar Staff Liaison to the Committee
651 East Jefferson Street
Tallahassee, Florida 32399-2300 kgodwin@floridabar.org

/s/ Bryan S. Gowdy
Attorney