**Florida Appellate Practice and Advocacy Sixth Edition - Updates** (June 1, 2015)

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**Note: electronic filing and service**. Beginning September 1, 2012 service by email among attorneys is required. Courts now have electronic filing, which impacted some of the appellate rules (for example, for rules requiring filing the notice of appeal and a copy). Consult the website of the particular court.

Effective January 1, 2014, the time for serving trial court motions for new trial, rehearing and judgment in accordance with the motion for directed verdict were extended from 10 to 15 days.

Effective January 1, 2015, numerous changes resulting from the regular cycle of rule review take effect, including changes to rendition, and the time for requesting oral argument and appellate costs. These are not included below (they are covered in the Seventh Edition).

**§2.3** *Wells v. State*, 132 So. 3d 1110 (Fla. 2014), holds the supreme court lacks jurisdiction to review a district court of appeals' per curiam dismissal of a petition (subject to the exceptions where the order dismissing cites a case pending review in the supreme court).

**§3.3** *Special v. West Boca Medical Center*, 160 So. 3d 1251 (Fla. 2014), holds the harmless error rule requires the beneficiary of the error in the trial court to prove the error did not contribute to the verdict. Alternatively stated, the beneficiary of the error must prove there is no reasonable possibility that the error complained of contributed to the verdict.

**§3.11** The Amendment of Fla. R. Civ. P. 1.480 has effectively overruled *Prime Motor Inns, Inc. v. Waltman*, 480 So. 2d 88 (Fla. 1985). The following is a revised section 3.11:

**Directed Verdict**

Fla. R. Civ. P. 1.480(a) provides a party may move for a directed verdict at the close of evidence offered by the adverse party.

Pursuant to Fla. R. Civ. P. 1.480(b), when a motion for directed verdict is not granted, within fifteen days of the verdict, the movant may move for judgment in accordance with motion for directed verdict if it wishes to appeal the denial of the d.v. *or* the sufficiency of the evidence. *See, Murray v.* State, 27 So. 3d 781 (Fla. 3d DCA 2010). A 2010 amendment to subpart (b) eliminated the requirement that the movant renew a motion for directed verdict at the close of all the evidence.

*Fulton County Administrator v. Sullivan*, 753 So. 549 (Fla. 1999), holds that while a party should renew its motion for directed verdict after the verdict, a motion for new trial on the same ground empowers the appellate court to direct the entry of a judgment in the movant's favor. The motion for judgment may be joined with the motion for new trial. Rule 1.480(c).

If the defendant was entitled to a directed verdict at the close of the plaintiff's case, but the trial court denied it, any deficiencies that existed in the plaintiff's case may be cured by evidence admitted in the defendant's case, because the trial court's ruling on a d.v. motion at the end of the case is based on all of the evidence. *McCain v. Florida Power Corp.*, 593 So. 2d 500 (Fla. 1992).

Fed. R. Civ. P. 50(a)(2) provides a party may move for a judgment as a matter of law at any time before the case is submitted to the jury. If the motion is not granted, Fed. R. Civ. P. 50(b) permits moving party to renew the motion after the verdict, and join a motion for judgment as a matter of law with a new trial motion.

Fed. R. Civ. P. 50(a)(2) provides the motion shall specify the law and facts on which the moving party is entitled to the judgment. *Rankin v. Evans*, 133 F.3d 1425 (11th Cir. 1998), holds a motion that did not specify the grounds is not procedurally barred where the trial court and plaintiff's counsel were aware of the asserted basis for the motion. *Ross v. Rhodes Furniture, Inc.*, 146 F.3d 1286 (11th Cir. 1998), emphasizes the need for a record of the party's motion for judgment as a matter of law. Absent a record of the grounds, the appellate court will not look for substantial evidence to sustain the verdict, but for any evidence that would sustain it. Counsel should ensure the court reporter transcribes the hearing on their motion for judgment as a matter of law.

*Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000), holds the Court should review all evidence when considering a motion for directed verdict, and draw all reasonable inferences in favor of the nonmoving party.

**§3.14** Cite update: *Wald v. Grainger*, 64 So. 3d 1201 (Fla. 2011).

**Chapter 4** - Rule 9.020(h) on rendition has been re-lettered to 9.020(i).

**4.12** As noted above, the 10 day periods to move have been enlarged to 15 days, effective January 1, 2014.

**§4.21** Effective January 2012, Rule 9.110(a)(2) is deleted and Rule 9.170 adopted. Rule 9.170 addresses probate and guardianship appeals.

**§4.28** Effective January 2015, Rule 9.130(a) adds subsections permitting review of orders determining as a matter of law that a party is not entitled to sovereign immunity.

**§4.33** The Florida Supreme Court held an order denying summary judgment based on an individual defendant's claim of sovereign immunity should be immediately reviewable, and directed the Florida Bar Appellate Rules Committee to submit a proposed amendment to Fla. R. App. P. 9.130, in *Keck v. Eminisor*, 104 So. 3d 359 (Fla. 2012).

**§4.37** Subsequent cases recognize an exception to *Parker Tampa Two* where the trial court sets a low bond in an ex parte proceeding for a temporary injunction, and the defendant moves promptly to dissolve the injunction. *E.g., Andrist v. Spleen*, 142 So. 3d 950 (Fla. 4th DCA 2014).

**§4.50** *Ortiz v. Jordan*, 562 U.S. 180, 131 S. Ct. 884, 178 L.Ed. 2d 703 (2011), holds a party may not appeal an order denying its motion for summary judgment after a full trial on the merits.

**§6.6** *Capone v. Philip Morris USA, Inc.*, 116 So. 3d 363 (Fla. 2013), addresses the procedure for substituting the personal representative.

**§6.7** Effective 2012, Rule 9.370( c ) is amended to provide the amicus must serve its brief no later then ten days after the first brief of the party it supports.

**§7.3** *QBE Ins. Corp. v. Chalfonte Condo. Apt. Assoc., Inc.*, 94 So. 3d 541 (Fla. 2012), says the trial court has no discretion to change the amount of the bond prescribed by Rule 9.310(b), or deny a stay when the bond requirements have been met.

**§7.13** Rule 9.050 requires that motions and other documents filed with the court comply with the privacy of personal data requirements of Fla. R. Jud. Adm. 2.425.

**§8.10** Cite update: *Custer Medical Ctr. v. United Auto. Ins. Co.*, 62 So. 3d 1086 (Fla. 2010).

*Nader v. Fla. Dept. Hwy Safety & Motor Vehicles*, 87 So. 3d 712 (Fla. 2012), reiterates the narrow scope of DCA review of circuit court appellate decisions. But it then holds the DCA can use second-tier certiorari to review a circuit court decision where the circuit court followed a controlling decision from another DCA, which the reviewing DCA found violated a clearly established principle of law that resulted in a miscarriage of justice.

**§8.11** Cite update: *Williams v. Oken*, 62 So. 3d 1129 (Fla. 2011).

**§8.12** The Florida Supreme Court reiterated that overbreadth is not a basis for certiorari review of discovery orders in *Bd. of Trustees v. Am. Educ. Enters., LLC*, 99 So. 3d 450 (Fla. 2012).

The Fifth DCA en banc majority opinion cited *Sardinas* in holding certiorari would not be available to review a pretrial order striking witnesses in *Bill Kasper Constr. Co., Inc. v. Morrison*, 93 So. 3d 1061 (Fla. 5th DCA 2012).

**§8.13** *Rodriguez v. Miami-Dade County*, 117 So. 3d 400 (Fla. 2013), holds certiorari is not available to review a denial of the merits of a state sovereign immunity claim.

*Innovision Practice Group, P.A. v. Branch Banking and Trust Co.*, 135 So. 3d 501 (Fla. 2d DCA 2014), granted certiorari to review a final summary judgment that resolved only some of the claims plead in a complaint, but erroneously allowed execution of the partial summary judgment while interrelated claims remained pending in the trial court.

**§8.17** In *Citizens Property Ins. Corp. v. San Perdido Assoc., Inc.*, 104 So. 3d 344 (Fla. 2012), the court held neither prohibition or certiorari were available to review a non-final order denying a claim of sovereign immunity by Citizens Property Insurance Corporation.

**§8.21** *Whiley v. Scott*, 79 So. 3d 702 (Fla. 2011), says unless there is a compelling reason for invoking the jurisdiction of a higher court, a quo warranto proceeding should be commenced in circuit court. The supreme court accepted this case on original jurisdiction because it presented a serious constitutional question relating to the authority of the Governor and Legislature respectively in rulemaking proceedings, and there did not appear to be any substantial disputes of material facts.

**§9.2** *Van v. Schmidt*, 122 So. 3d 243 (Fla. 2013), holds that a de novo standard of review applies to a trial court's conclusions of law in an order granting a new trial based on the manifest weight of the evidence.

**§10.6** Rule 9.050 requires that briefs and other documents filed with the court comply with the privacy of personal data requirements of Fla. R. Jud. Adm. 2.425.

**§10.13** There is a conflict among the federal circuits, with the Eleventh Circuit holding an appellee cannot later seek to affirm on a nonjurisdictional ground that it did not present in its answer brief. *Hamilton v. Southland Christian Sch.*, 680 F.3d 1316 (11th Cir. 2012).

**§10.24** By 2014 all appellate courts have moved to electronic filing. Consult the website of the particular court.

**§10.26** Rule .9.900(j) provides a form for a notice of supplemental authority, and calls for identifying the issue for which the authority is pertinent.

**§10.27** The Eleventh Circuit now requires efiling as well as a hard copy of briefs and the appendix, and requires and appendix, rather than record excerpts. 11th Cir. R. 30-1specifies the contents. The additional three days for mailing by service applies to electronic filing as well.

**§10.28** M. Cooney, *Style Is Substance: Collected Cases Showing Why It Matters*, 14 The Scribes J. of Legal Writing 1 (2011-2012).

**§12.8** Effective July 2013, the adoption of Fla. R. Crim. P. 3.801 on Correction of Jail Credit resulted in minor appellate rule revisions to included references to Rule 3.801.

**§12.9** Effective July 2011, Rule 9.141 on review proceedings in collateral or post-conviction criminal cases was revised, including placing a four year limit for a petition for belated appeal where the petitioner asserts facts excusing filing within the prescribed two-year period after the expiration of time for filing the notice of appeal. Rule 9.141(d) added procedures for petitions alleging ineffective assistance of appellate counsel.

*Blandin v. State*, 128 So. 3d 235 (Fla. 2d DCA 2013), reiterates that an affirmance without a written opinion of a direct appeal where the defendant raised ineffective assistance of counsel in a new trial

motion does not act as res judicata or collateral estoppel of the defendant's motion for post-conviction relief claiming ineffective assistance (regardless of whether or not raised in the direct appeal).

**§12.10** Rule 9.140(c)(1)(I) has been revised to substitute the term "intellectually disabled" for "mentally retarded."

**§13.2** *Advanced Chiropractic and Rehabilitative Ctr., Corp. v. United Auto. Ins. Co.*, 140 So. 3d 529 (Fla. 2014), holds that a request for fees in an original proceeding must be made by a timely motion under Rule 9.300 (not in the petition, response or reply, as the DCA had held). The supreme court agreed Rule 9.400(b) does not apply.

A trial court cannot award appellate fees unless the appellate court has authorized such an award. *E.g., Bartow HMA, LLC v. Kirkland*, 146 So. 3d 1213 (Fla. 2d DCA 2014).

**§13.5** *Gov't Employees Ins. Co. v. King*, 68 So. 3d 267 (Fla. 2d DCA 2011), holds the court will not award attorney's fees to the insured conditioned on later prevailing in a bad faith action. The court said the trial court could award fees for the appeal in the bad faith case if it determined they were an element of damages or otherwise awardable, without any order from the appellate tribunal.

**§14.3** Responding to a show cause order, new counsel for an agency conceded its defense to an appeal was frivolous in *M.B. v. Agency for Persons with Disabilities*, 122 So. 3d 504 (Fla. 3d DCA 2013).

The First DCA ordered §57.105 fees solely against counsel, stating the fee was based on the lack of legal, rather than factual, merit. *Florida Houndsmen Assoc., Inc. v. State of Fla., Fish & Wildlife Conservation*, 134 So. 3d 999 (Fla. 1st DCA 2012).

**§14.10** *Hagood v. Wells Fargo, N.A.* 125 So. 3d 1012 (Fla. 5th DCA 2013), sanctions counsel for filing a brief based on a false assertion of fact, which made the brief frivolous. The opinion warned "the left-hand-did-not-know-what-the-right-hand-was-doing defense is not acceptable." It went on to say that each attorney who appears in a proceeding and authorizes his or her name to be affixed to an appellate brief or other pleading cannot avoid responsibility for the content by later claiming limited or no involvement in its preparation.

**§14.13** Wisotsky, *Professional Judgment On Appeal* (2d ed. 2009).

**§16.8** In a four-to-three decision, *Pino v. Bank of New York Mellon* 76 So. 3d 927 (Fla. 2011), refused to dismiss a case certified as containing a question of great public importance where the petitioner had filed his initial brief, and the parties then filed a stipulation for dismissal saying they had settled the case. The opinion on the merits is *Pino v. Bank of New York*, 121 So. 3d 23 (Fla. 2013).

**§16.17** Effective January 1, 2014, the statutes on the "terms" of court are abolished. On Judge Altenbernd's initiative, the legislature created §43.44, Florida Statutes, which permits an appellate

court to recall its own mandate for up to 120 days after it has been issued. Effective January 1, 2014, Fla. R. App. P 9.340 to provide "the court may direct the clerk to recall the mandate, but not more than 120 days after its issuance."