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Procedure -- Rendition of Judgment

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the interest of the plaintiff which had been invaded by the defendant's tortious act, the court explained: "[W]e feel that the affection of a master for his dog is a very real thing and provides an element of damage for which the owner should recover. . . ."[36]

In the instant case, the court was very cautious in its approach and failed to pinpoint the theory of liability it had applied. The court could have justified its decision either on the theory of "malicious trespass to personal property" resulting in mental damage to the owner, or of an "intentional interference with peace of mind." From the language of the court, it seems evident that it was concerned with the affectionate relationship between a person and his dog.

In the aftermath of the court's decision, a crucial question still remains unanswered: Will the Florida courts now permit recovery for similar conduct directed at inanimate property or at a person, when no property is involved and mental anguish results? The fact that the court placed great emphasis on the effect of the defendant's conduct on the plaintiff's mental security lends great weight to the proposition that Florida has silently adopted the intentional interference with peace of mind theory as a basis for the recovery of damages for mental suffering without injury or physical impact.

BARRY KUTUN

PROCEDURE—RENDITION OF JUDGMENT

A decree was entered against the defendant and four days later he filed an appeal. An additional four days elapsed and the plaintiff petitioned for a rehearing. The trial court granted the rehearing and subsequently modified the decree. The plaintiff then moved the district court of appeal to dismiss the appeal on the basis that the appeal had been taken from a final decree which had not been *rendered* and it was therefore not a final decree for the purpose of appeal.[1] This motion was denied. The plaintiff then petitioned the supreme court for a writ of prohibition directing the district court to cease from further entertain-

supra note 30; Smith v. Palace Transp. Co., 142 Misc. 93, 253 N.Y. Supp. 87 (1931); Young's Bus Lines, Inc. v. Redmon, 43 S.W.2d 266 (Tex. Civ. App. 1931); Annot., 94 A.L.R. 729 (1935); 3 C.J.S. *Animals* § 234 (1936).

36. *Supra* note 34, at 269.

1. FLA. APP. R. 1.3. The last paragraph speaks on the question of *rendition* of judgments: Rendition of a judgment, decision, order or decree means that it has been reduced to writing, signed and made a matter of record, or if recording is not required then filed. A paper is deemed to be recorded when filed with the clerk and assigned a book and page number. *Where there has been a timely and proper motion or petition for* a new trial, *rehearing* or reconsideration *by the lower court, the* decision, judgment, order or *decree shall not be deemed rendered until such motion or petition is disposed of.* (Emphasis added.)

ing the appeal. On appeal, *held*, writ granted: The filing of a petition for rehearing negates the jurisdiction of the appellate court which vested under a notice of appeal previously filed, leaving it only the power to dismiss the appeal. *State ex rel Owens v. Pearson*, 156 So.2d 4 (Fla. 1963).[2]

The federal courts' position is diametrically opposed to this view. Prior to the adoption of their "New Rules," they maintained that once the jurisdiction of the appellate court attached it was exclusive.[3] This position was reasserted in the rules, wherein it was indicated that the jurisdiction of the appellate court attaches when the notice of appeal is filed with a federal district court,[4] thereby negating the power of the trial court to affect materially the exercise of appellate jurisdiction.[5] Subsequent to the adoption of these rules, this position was again reaffirmed by case law.[6]

Suppose, as in the instant case, a party to the original action moves or petitions a federal court to grant relief from its judgment, decree or order. The Federal Rules specifically state that when a motion for such relief is made pursuant to the rules, it will not affect the finality of judgment for purposes of appeal.[7] Indeed, the federal decisions emphatically state that this concept of exclusive jurisdiction of the appellate court is based on common-sense considerations.[8] This is to say that the effect of allowing the lower court to divest the appellate court of jurisdiction would be to render the party's appeal futile. "Whereas, the parties to the appeal are entitled to have the status quo maintained during its pendency."[9] In addition, effect would not be given to the plain meaning of Rule 73,[10] which states that a party may appeal from a judgment by filing with the district court his notice of appeal. The Federal Rules, as

2. The instant case was an equity action. Prior to the 1962 amendments to the Florida Rules of Civil Procedure, there was no provision for rehearing at law. Therefore, the courts consistently stated that this motion would be without effect, *e.g.*, Counne v. Saffan, 87 So.2d 586 (Fla. 1956); Albert v. Carey, 120 So.2d 189 (Fla. 3d Dist. 1960). See generally Barns and Mattis, *1962 Amendments to the Florida Rules of Civil Procedure*, 17 U. MIAMI L. REV. 276, 297 (1963).

3. Hovey v. McDonald, 109 U.S. 150 (1883); Keyser v. Farr, 105 U.S. 265 (1881); Bankers Indem. Ins. Co. v. Pinkerton, 89 F.2d 194 (9th Cir. 1937); Simmons v. United States, 89 F.2d 591 (5th Cir. 1937); In re Bills of Exceptions, 37 F.2d 849 (6th Cir. 1930).

4. FED. R. CIV. P. 73.

5. Miller v. United States, 114 F.2d 267 (7th Cir. 1940).

6. Hirsch v. United States, 186 F.2d 524 (6th Cir. 1951); Miller v. United States, 114 F.2d 267 (7th Cir. 1940), *cert. denied*, 313 U.S. 591 (1941); Smith v. Pollin, 194 F.2d 349 (D.D.C. 1952); Switzer v. Marzall, 95 F. Supp. 721 (D.D.C. 1951); Daniels v. Goldberg, 8 F.R.D. 580 (S.D.N.Y. 1948); Schram v. Safety Inv. Co., 45 F. Supp. 636 (E.D. Mich. 1942).

7. FED. R. CIV. P. 60.

8. Switzer v. Marzall, 95 F. Supp. 721, at 723 (D.D.C. 1951).

9. *Ibid.*

10. FED. R. CIV. P. 73 states that "A party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any further steps to secure the review of the judgment appealed from does not affect the validity of the appeal. . . ."

do the Florida Rules of Civil Procedure, recognize both the right of appeal[11] and the right to relief from judgment.[12]

Certainly, these rights afforded to both litigants should be given effect. The procedure followed by the federal bench provides for the party desiring a rehearing to request the appellate court to release its jurisdiction and remand the case to the trial court.[13] By logically construing the rules as they apply to the appellate process, this procedure appears to recognize the rights of both litigants as well as the solidarity of the appellate structure.

Prior to the instant case, with the exception of *obiter dicta* in the *Ganzer v. Ganzer* case,[14] Florida's position was much akin to that of the federal courts.[15] The rationale supporting this view was clearly set forth by the Florida Supreme Court in *Wiley v. W. J. Hoggson Corp.*:[16]

> [W]here an appeal is duly taken, whether with or without a supersedeas, so as to transfer the cause to the appellate court, the trial court is without power to finally dispose of the cause by dismissal or otherwise so as to in form or effect interfere with the power and authority of the appellate court, under the Constitution, to make its jurisdiction and orders or decrees effective in the cause to which its organic appellate jurisdiction has attached by due course of appellate procedure.[17]

The Florida Supreme Court reaffirmed this position in 1955 when it stated that: "[it] was never the intention of the rules to confer upon the trial judges the power to dismiss appeals in cases where the jurisdiction . . . attached by the filing of the notice of appeal . . . ."[18] Thus, until the instant case, the Florida courts had consistently held that once the appellate jurisdiction attached, it was exclusive.[19]

In the instant case, the Florida Supreme Court relied heavily on the aforementioned dicta of the *Ganzer* case[20] and the terminology of

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11. Right to appeal: FED. R. CIV. P. 73; FLA. APP. R. 3.2.

12. Relief from judgment: FED. R. CIV. P. 60; FLA. R. CIV. P. 1.38.

13. Baruch v. Beech Aircraft Corp., 172 F.2d 445 (10th Cir.), *cert. denied*, 338 U.S. 900 (1949); Zig Zag Spring Co., 200 F.2d 901 (3d Cir. 1953); Smith v. Pollin, 194 F.2d 349 (D.D.C. 1952); Daniels v. Goldberg, 8 F.R.D. 580 (S.D.N.Y. 1948); 7 MOORE, FEDERAL PRACTICE ¶ 60.30[2], at 335 (2d ed. 1955).

14. 84 So.2d 591 (Fla. 1956).

15. Winn & Lovett Grocery Co. v. Luke, 156 Fla. 638, 24 So.2d 310 (1946); Gill v. Smith, 117 Fla. 176, 157 So. 657 (1934); Crichlow v. Maryland Cas. Co., 116 Fla. 226, 156 So. 440 (1934); Thursby v. Stewart, 103 Fla. 990, 138 So. 742 (1931); Moody v. Volusia County, 90 Fla. 864, 107 So. 185 (1925); Wiley v. W. J. Hoggson Corp., 89 Fla. 446, 105 So. 126 (1925).

16. 89 Fla. 446, 105 So. 126 (1925).

17. *Id.* at 128-29.

18. All Fla. Sur. Co. v. Coker, 79 So.2d 762, 764 (Fla. 1955).

19. Jamerson-Lawson Corp. v. Central State Dev. Co., 121 So.2d 680 (Fla. 2d Dist. 1960); Mandrachia v. Ravenswood Marine Inc., 118 So.2d 817 (Fla. 2d Dist. 1960).

20. *Supra* note 14.

Rule 1.3.[21] In so doing it emphasized that until the timely petition for rehearing was ruled upon, the judicial labor had not been completed and thus, the decree was not final for purposes of appeal. The court stated that any other rule would result in complete confusion in the disposition of the litigation and would nullify the provisions in the rules and statutes authorizing a party to file a petition for rehearing whenever the filing is made subsequent to a filing of appeal. In addition, the court noted that any other rule would result in many instances of needless appellate litigation. Thus, the court concluded that appellate jurisdiction can only be vested subsequent to the hearing of the petition for rehearing by again filing a notice of appeal.

The defendant contended that when a timely notice of appeal is filed after the rendition of an appealable decree, but within the time for rehearing, it is the appellate court that has the jurisdiction to pass upon the question of whether the petition for rehearing has been timely and properly filed. While in light of the aforementioned federal position[22] and prior Florida case law[23] this argument would appear to have merit, the supreme court quickly disposed of the denfendant's contention. Rather than discussing the merits of the contention, it clearly indicated that the ruling on a petition for rehearing is a trial court decision which may be the subject of review by an appellate court only in appropriate circumstances.

Thus, there are two divergent approaches to the problem. The "federal view" permits a timely filing of appeal without permitting a subsequent petition for rehearing to negate the filing. Therefore, a trial court may not entertain a petition for rehearing since the timely filing of a notice of appeal divests it of jurisdiction. The proponent of a petition for rehearing is thereby required to petition the appellate court to release its jurisdiction and remand the case to the lower court. Conversely, in Florida, an appellant must either wait for the time for rehearing to expire before he files his appeal or file within the period for rehearing with the knowledge that if a subsequent petition is filed he will have to refile his notice of appeal or lose his right of appeal.[24]

21. FLA. APP. R. 1.3. See rule stated in note 1 *supra*.

22. See text accompanying notes 5 (Federal) and 17 (Florida) *supra*. Note: Florida often considers how the Federal courts have dealt with similar procedural problems.

23. Winn & Lovett Grocery Co. v. Luke, 156 Fla. 638, 24 So.2d 310 (1946); Gill v. Smith, 117 Fla. 176, 157 So. 657 (1934); Crichlow v. Maryland Cas. Co., 116 Fla. 226, 156 So. 440 (1934); Thursby v. Stewart, 103 Fla. 990, 138 So. 742 (1931); Moody v. Volusia County, 90 Fla. 864, 107 So. 185 (1925); Wiley v. W. J. Hoggson Corp., 89 Fla. 446, 105 So. 126 (1925).

24. To alleviate the procedure promulgated in the intant case, Paul D. Barnes, Justice of the Florida Supreme Court (retired), has suggested that the last paragraph of Florida Appellate Rule 1.3, which is presented in note 1 *supra*, be substituted by the paragraph below:

> Entry of Judgment. When an order, judgment, decree or decision is not required to be recorded its entry is complete when it is filed, otherwise when recorded; but recording is not a prerequisite to the right to seek review by appeal or certiorari.

This writer feels that the court should have construed and applied Rule 1.3 in such a manner as to enable orderly procedure according to the "Rules"[25] and not to frustrate this procedure when by "happenstance" a motion of petition is made to the trial court by a litigant subsequent to the timely filing of an appeal. The court stressed the importance of the right to a rehearing pursuant to the "Rules," but seemed to relegate to a position of minimal importance the party's inviolate right of appeal.

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EQUITY—PARTIAL ENFORCEMENT OF CONTRACT NOT TO COMPETE

The defendant was employed as a district manager in the plaintiff's building maintenance business. After nine years of employment, the defendant signed a contract wherein he agreed not to engage in competition with the plaintiff for a three year period subsequent to the termination of his employment. Five months later, the defendant was discharged and subsequently engaged in business which was competitive with the plaintiff. The plaintiff obtained a decree which enjoined the defendant from competing with the plaintiff for the contract term of *three* years. The chancellor, on rehearing, modified the decree so as to preclude competition for a *one* year period. On appeal, the third district court of appeal *held* affirmed: the chancellor must look not only to the reasonableness of such an agreement on its face, but also to whether the agreement, as to the particular defendant, yields harsh, oppressive, or unjust results, and he may modify the restrictions in accordance with what would be a reasonable term in each case. *American Bldg. Maintenance Co. v. Fogelman*, 167 So.2d 791 (Fla. 3d Dist. 1964).

Covenants restricting employment were early objects of judicial disfavor;[1] however, the more modern view tends towards the accept-

Note: When recording required, see section 28.29 F.S.A.
Tolling of Time. The running of the time for appeal or to petition for certiorari is terminated by a timely motion permitted under any court rule or applicable statute and the full time for appeal commences to run and is to be computed from the entry of any of the following orders made upon a timely motion:
(1) granting or denying a motion for judgment in accordance with a motion for a directed verdict;
(2) denying a motion for a new trial;
(3) denying a motion or petition for rehearing in a non-jury matter;
(4) denying or granting a motion to alter or amend judgment as to substance.

25. "Right to appeal." FED. R. CIV. P. 73; FLA. APP. R. 3.2. "Relief from judgment." FED. R. CIV. P. 60; FLA. R. CIV. P. 1.38.

1. The first recorded case of an attempt to gain enforcement of such a covenant was greeted with the chancellor's threat to incarcerate the plaintiff. "In my opinion you might have demurred upon him, that the obligation is against the common law, and, by God, if the plaintiff was here he should go to prison till he paid a fine to the king!" Dyer's Case,