

Appellate Practice and Advocacy

Attorneys' Fees on Appeal: Basic Rules and New Requirements

by Tracy Raffles Gunn

There have been a number of recent changes in the law regarding recovery of attorneys' fees on appeal. Some courts have become stricter in enforcing procedural requirements, while other case law creates new opportunities for fee recovery on appeal. Additionally, some of the unique procedures in appellate fee recovery are unknown to many lawyers, who may inadvertently waive a fee claim if they are not familiar with those procedures. This article will outline both the basic rules and the new issues involved in claiming prevailing party attorneys' fees for handling an appeal in Florida state court.¹

Time for Filing the Motion

The most important lesson for both trial counsel and appellate counsel regarding appellate attorneys' fees is that they must be requested during the appeal. Specifically, counsel must request a fee award by motion filed in the appellate court; the motion must be in a separate document;² and the motion must be served within the time for service of the reply brief.³ This is somewhat counter-intuitive for most trial lawyers, who are accustomed to filing a motion for attorneys' fees only after they have prevailed in the case. The key lesson for the trial lawyer is to make sure that the appellate lawyer knows at the beginning of the appeal whether there is any basis (or potential basis) for a fee claim, so that the proper motion can be filed.

A timely motion must be filed in

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order to preserve the claim for appellate attorneys' fees, even if the award of fees is mandatory by statute.⁴ The existence of a statute providing that the court "shall" award fees does not excuse a party from filing the motion required under the appellate rules.⁵

Any response to the motion must be served within 10 days.⁶ Failure to serve a response to a motion for attorneys' fees may amount to a waiver of the right to oppose the fees claim.⁷ An award of attorneys' fees at the trial court level is not essential to the award of fees on appeal.⁸

Florida's Rules of Appellate Procedure describe the procedure for filing of a motion for attorneys' fees, but the rules do not provide a substantive basis for an attorneys' fees claim.⁹ A party is entitled to fees for

an appeal only if there is an independent basis for such recovery.¹⁰ The motion must state the basis for the fee claim, or the motion will be denied.¹¹ If the claim is based on statute, the statute and relevant case law should be cited. If the claim is based on a contract, the contract should be attached to the motion or a record citation provided. F. S. §59.46 provides that a contract or statute generally allowing for payment of attorneys' fees to the prevailing party is presumed to include fees for an appeal.

Although Rule 9.400 ties the time for service of the fees motion to the time for service of the reply brief, the rule allows motions for attorneys' fees in original proceedings in appellate courts as well.¹²

Who Is the "Prevailing" Party?

There has been a change in the law, and there may be a conflict among the district courts of appeal, as to the "prevailing party" aspect of a prevailing party fee award for appeals.

It is clear that a party must "prevail" at the end of the case in order to recover fees for an appeal.¹³ In many cases, such as those involving interlocutory appeals, parties must request (and the appellate court must grant or deny) fees for the appeal before the ultimate outcome of the case is determined. In such cases, the appellate court will enter a "provisional" or "conditional" fee order, granting attorneys' fees for the appeal to the requesting party if he prevails at the

end of the case.¹⁴ Even if the appellate court's order does not specifically state that it is provisional, the provisional nature of the order is implied, and it is error to assess fees for the appeal until the outcome of the case has been determined.¹⁵

The long-standing rule is that a party must also prevail on the appeal to be entitled to attorneys' fees for that appeal; prevailing at the end of a case does not resurrect a fees claim for the lost appeal.¹⁶ As Judge Padovano explained: "Although it is not expressly stated in Rule 9.400(b), the right to recover an attorney's fee for services rendered in an appellate proceeding is limited to the prevailing party."¹⁷

However, the Fourth District has recently changed this rule, apparently creating a new theory of appellate fee recovery. In *Aksomitas v. Maharaj*, 771 So. 2d 541 (Fla. 4th DCA 2000), the court held that parties prevailing on the "significant issues" in a case, who are entitled

to recover attorneys' fees under a prevailing party attorneys' fee provision, may recover fees for appeals in which they had not prevailed. In so holding, the Fourth DCA considered *Moritz v. Hoyt Enter., Inc.*, 604 So. 2d 807 (Fla. 1992), in which the Florida Supreme Court adopted the "significant issues" test for determining which party prevails in a prevailing party fee dispute.¹⁸ Although *Moritz* deals solely with the issue of which party prevails, the Fourth DCA in *Aksomitas* interprets *Moritz* to mean that a lost appeal can be included in the fees assessed as long as the party prevails on the "significant issues" at the end of the case. The *Aksomitas* court stated that the new rule was intended to make prevailing parties "whole," ostensibly even for appellate proceedings which they lost during the case.

There are some potential limitations on the *Aksomitas* analysis. The *Aksomitas* court acknowledged the

long-standing rule that fees would not be recoverable for an "unnecessary" appeal.¹⁹ Counsel opposing a fees claim for a lost appeal should argue that the appeal was unnecessary. Furthermore, *Aksomitas* involved a mutual contractual right to prevailing party fees, and therefore was controlled by *Moritz*. The *Moritz* analysis does not apply to at least some one-sided attorneys' fee provisions.²⁰ If *Moritz* does not apply to a given claim or case, counsel should question whether *Aksomitas* applies.²¹

Courts following the *Aksomitas* decision will have to adopt a new procedure. The court will basically be required to grant any party's motion for fees under a prevailing party standard, which means that in many cases both sides will obtain a provisional fee award from the appellate court. The trial court will then apparently decide which party should be awarded appellate fees, as part of its assessment of which party prevailed on the "significant issues" in the case. This will shift to the trial courts the historical role of the appellate courts in determining entitlement to fees for the appeal. Whether fees for the appeal should be included may ultimately become a question of "amount" rather than entitlement.²²

In fact, allowing recovery for a lost appeal to be included in a prevailing party fee award seems to be a reversion to the "net recovery" rule rather than the "significant issues" test, since it would allow a party who does not prevail in an appeal to recover for the lost appellate proceeding solely because of the "net" outcome of the case. Until these issues are resolved, at least in the Fourth DCA, counsel can now expect provisional attorneys' fees awards even in favor of the party who loses on appeal if the ultimate outcome of the case is yet to be determined.

Fees Under §57.105

F. S. §57.105 can be used to award appellate attorneys' fees against a party taking a frivolous appeal.²³ The Florida Supreme Court has explained:

A frivolous appeal is not merely one that is likely to be unsuccessful. It is one that is so readily recognizable as devoid of merit on the face of the record that there is little, if any, prospect whatsoever that it can ever succeed. It must be one so clearly untenable, or the insufficiency of which is so manifest on a bare inspection of the record and assignments of error, that its character may be determined without argument or research. An appeal is not frivolous where a substantial justiciable question can be spelled out of it, or from any part of it, even though such question is unlikely to be decided other than as the lower court decided it. . . .²⁴

Most courts previously held that fee awards could not be made against an appellee under §57.105 because an appellee's position on appeal was, as a matter of law, not

frivolous.²⁵ The reasoning was that since the trial court's decision is presumed to be correct, the winning argument necessarily presents a justiciable issue of law or fact.

Recently, however, at least one court has awarded attorneys' fees under §57.105 to an appellant. In *Forum v. Boca Burger, Inc.*, 788 So. 2d 1055 (Fla. 4th DCA 2001), the court awarded both trial court and appellate fees under §57.105 to the appellee where the appellant "plainly attempted to lead the trial judge to a result that plaintiff was needlessly forced to appeal," one "that they know—or should know—is contrary to existing law,"²⁶ and then "persisted in trying to uphold

this patently erroneous decision."²⁷ The court did not directly address much of the prior case law disallowing §57.105 awards to appellees, but explained that the 1999 amendments to §57.105 would allow attorneys' fee awards where they were previously unavailable.²⁸ Thus, it appears that appellees can validly request and be awarded attorneys' fees under the post-1999 version of §57.105.

The *Forum* case also indicates that the previous standard for defining when a position on appeal is frivolous is no longer controlling after 1999. Under *Forum* and the 1999 statute, both appellants and appellees are more likely to be ex-

posed to attorneys' fee liability under §57.105 for their positions on appeal.

Proposals for Settlement on Appeal

Offers of judgment or proposals for settlement properly served during the trial court proceedings can serve as the basis for an award of appellate attorneys' fees.²⁹ However, a proposal for settlement or offer of judgment cannot be made after judgment or during an appeal.³⁰

Attorneys' Fee Contracts

A new case from the Fourth District holds that appellate attorneys' fees may be deemed part of the original contingency fee contract if the contract does not clearly provide otherwise. In *Arabia v. Siedlecki*, 789 So. 2d 380 (Fla. 4th DCA 1995), the court held that a contract to handle "court proceedings" for the plaintiff for 25 percent of the recovery was ambiguous as to whether appeals were included and would therefore be construed against the attorney.³¹ The court concluded that the trial attorneys' fee would be reduced by the amount awarded to the appellate attorneys.³²

The lesson of *Arabia* is that attorney fee agreements should explicitly define the scope of the representation, whether it includes appellate representation, and how appellate fees are to be paid. While *Arabia* is a contingency fee case, the analysis could potentially be applied to any fee agreement providing a given payment for "court proceedings" or a similarly ambiguous term.

Review of Appellate Attorneys' Fee Awards

While the trial court has no jurisdiction to award entitlement to appellate attorneys' fees, appellate courts often remand the determination of the amount of fees to the trial court.³³ Review of the trial court's order after remand is by motion for review filed in the appellate court in the same appellate case, not by separate appeal.³⁴ The motion must be filed with the appellate court within 30 days of rendition of the

lower court's attorneys' fee order.³⁵

Some courts have been lenient in allowing review of an appellate fee assessment by separate appeal.³⁶ Some of these courts applied the general rule that the court will treat an improper mechanism of review as if the proper method of review had been sought, as long as the procedure used complies with the time deadlines and substantive requirements applicable to the proper procedure.³⁷ In other cases, it appears that the issue may not have been raised.³⁸ There is also a limited exception for review by plenary appeal if a single judgment disposes of issues other than appellate attorneys' fees.³⁹

However, several cases have strictly construed the requirements and refused to review an attorneys' fee order by plenary appeal.⁴⁰ Once the improper appeal is dismissed, the time for filing the motion for review will have passed and the party will be left without review of the attorneys' fee determination. At least one court has recently refused to treat a timely notice of appeal as a motion for review because the bare notice of appeal did not state any grounds for reversal.⁴¹ Of course, notices of appeal cannot contain argument, so a notice of appeal will virtually never suffice under this new case law. Likewise, several courts allowing plenary appeals have warned that counsel should use the proper procedure in the future.⁴² Thus, it is crucial to use the proper procedure for review. The standard of review of a trial court order setting the amount of fees for an appeal is abuse of discretion.⁴³

Appellate Costs Recovery

Counsel should be aware that costs recovery is different than fee recovery in appeals. A motion to tax appellate costs is filed in the trial court, within 30 days of issuance of mandate by the appellate court.⁴⁴ The "prevailing party" for purposes of awarding costs is "the party who prevailed in the appellate proceeding that was the subject of the motion to tax costs, and not necessarily the party who ultimately

prevail[s] after the completion of all of the litigation."⁴⁵

Conclusion

There are a number of new issues to be considered in protecting a claim for appellate attorneys' fees. New cases may open the door to fees claims which have previously been unavailable, while other new cases require strict compliance with the Rules of Appellate Procedure to ensure recovery. Appellate counsel should be aware of these new issues in order to maximize the benefit to the client. □

¹ This article does not specifically address attorneys' fee awards in family law cases, which are controlled by a different standard. See *Rados v. Rados*, 791 So. 2d 1130 (Fla. 2d D.C.A. 2001).

² *Florida Dep't. of Commerce, Div. of Risk Mgmt. v. Davies*, 379 So. 2d 1313 (Fla. 1st D.C.A. 1980) (request made in brief on cross-appeal).

³ Florida Rule of Appellate Procedure 9.400(b); *N. Chamber Dev. Co. v. Weaver*, 508 So. 2d 390, 390 (Fla. 4th D.C.A. 1987); *Lobel v. Southgate Condo. Ass'n, Inc.*, 436 So. 2d 170, 171 (Fla. 4th D.C.A. 1983). In the 11th Circuit, parties seeking fees for an appeal must file a petition for fees with the clerk within 14 days of the issuance of the appellate opinion. See *Mills by Mills v. Freeman*, 118 F.3d 727, 734 (11th Cir. 1997); *Davidson v. City of Avon Park*, 848 F.2d 172, 174 n.4 (11th Cir. 1988).

⁴ *Salley v. City of St. Petersburg*, 511 So. 2d 975, 977 (Fla. 1987), *receded from on other grounds, United Services Auto. Ass'n v. Phillips*, 775 So. 2d 921, 922 (Fla. 2000). See also *Sch. Bd. of Alachua County v. Rhea*, 661 So. 2d 331, 332 (Fla. 1st D.C.A. 1995).

⁵ See *Salley*, 511 So. 2d at 977.

⁶ Florida Rule of Appellate Procedure 9.300(a).

⁷ *Homestead Ins. Co. v. Poole, Masters & Goldstein*, 604 So. 2d 825, 827 (Fla. 4th D.C.A. 1991).

⁸ See *Spencer v. Barrow*, 752 So. 2d 135, 138 (Fla. 2d D.C.A. 2000) ("We can perceive of many reasons why a right to fees in the trial court might be waived or not be sought, through either inadvertence or change of attorneys, or change of attitude or positions of the parties or otherwise, and such failure to seek fees at the trial level should not preclude a right to fees at the appellate level.")

⁹ *Lewis v. Lewis*, 689 So. 2d 1271, 1273 (Fla. 1st D.C.A. 1997).

¹⁰ Fees may be awarded only if there is a statutory or contractual basis for the claim, or if the attorney's services

create a common fund from which the fee can be paid. See *Kittel v. Kittel*, 210 So. 2d 1, 3 (Fla. 1967); *Israel v. Lee*, 470 So. 2d 861, 862 (Fla. 2d D.C.A. 1985).

¹¹ Florida Rule of Appellate Procedure 9.400(b); *United Servs. Auto. Ass'n v. Phillips*, 775 So. 2d 921 (Fla. 2000) (interpreting Rule 9.400 "to require that a party seeking attorney's fees in an appellate court must provide substance and specify the particular contractual, statutory, or other substantive basis for an award of fees on appeal. It is simply insufficient for parties to only refer to rule 9.400 or to rely on another court's order in support of a motion for attorney's fees for services rendered in an appellate court."). The court in *Phillips* specifically receded from *Salley v. City of St. Petersburg*, 511 So. 2d 975 (Fla. 1987), to the extent that it suggested that appellate fees may be awarded even if a party fails to comply with the substantive requirements of Florida Rule of Appellate Procedure 9.400(b).

¹² See *Branch v. Charlotte County*, 627 So. 2d 577 (Fla. 2d D.C.A. 1993); *Dooley v. Culver*, 370 So. 2d 1154 (Fla. 4th D.C.A. 1978) (denying the motion because it did not state the grounds upon which the fees were claimed).

¹³ *Allstar Builders Corp. v. Zimmerman*, 706 So. 2d 92 (Fla. 3d D.C.A. 1998); *Stringer v. Katzell*, 695 So. 2d 369 (Fla. 4th D.C.A. 1997); *Publix Super Markets, Inc. v. Cheesbro Roofing, Inc.*, 502 So. 2d 484, 488 (Fla. 5th D.C.A. 1987); *Magee v. Bishop Signs, Inc.*, 458 So. 2d 1174, 1175 (Fla. 4th D.C.A. 1984). Cf. *Green Cos., Inc. v. Kendall Racquetball Inv., Ltd.*, 658 So. 2d 1119, 1121 (Fla. 3d D.C.A. 1995) (in a procedurally unusual case, allowing a party that did not ultimately prevail at trial to retain its award of appellate fees from a prior final order appeal).

¹⁴ See *Mainlands Constr. Co., Inc. v. Wen-Dic Constr. Co., Inc.*, 482 So. 2d 1369, 1371 (Fla. 1986).

¹⁵ *Allstate Ins. Co. v. De La Fe*, 647 So. 2d 965 (Fla. 3d D.C.A. 1994).

¹⁶ See *Gen. Acc. Ins. Co. v. Packal*, 512 So. 2d 344 (Fla. 4th D.C.A. 1987); *Israel v. Lee*, 470 So. 2d 861 (Fla. 2d D.C.A. 1985).

¹⁷ Phillip J. Padovano, *Florida Appellate Practice* §20.5 (2d ed. 1997). It is sometimes difficult to determine which party "prevailed" in the appeal, especially in cases where the appellate court affirms on some issues and reverses on others. See *Hallenbeck v. Rangeline Supply Corp.*, 697 So. 2d 876 (Fla. 4th D.C.A. 1997) (party who prevailed on appeal from portion of trial court order was prevailing party on appeal); *North American Van Lines, Inc. v. Ferguson Transp., Inc.*, 662 So. 2d 1275 (Fla. 4th D.C.A. 1995) (appellant who reduced its liability from \$14.3 million to \$1.3 million by procuring reversal of punitive damages award was prevailing party on appeal); *Zaremba Florida Co. v.*

Klinger, 550 So. 2d 1131 (Fla. 3d D.C.A. 1989) (holding that a party who prevailed on appeal on only one count out of nine would be entitled to appellate attorneys' fees only for the count on which he prevailed).

¹⁸ Under this test, the party who prevailed on the "significant issues" in the case is the prevailing party for purposes of attorneys fee assessment. Courts previously applied the "net judgment" or "net recovery" rule, under which a party obtaining any recovery in its favor would be deemed the prevailing party.

¹⁹ It is well-established that an appellate court may deny fees if it finds that the work performed on an appeal is unnecessary. "Unnecessary" appellate work may include fees sought by an appellant for an appeal which should never have been taken and fees sought by an appellee who should have confessed error. *Aksomitas*, 771 So. 2d at 544. See generally *Florida Patient's Comp. Fund v. Rowe*, 472 So. 2d 1145, 1150 (Fla. 1985) (prevailing party attorneys' fees can be reduced for work which is unnecessary).

²⁰ For example, *Moritz* does not apply to fees claims under FLA. STAT. §627.428. See *Danis Indus. Corp. v. Ground Improvement Techniques, Inc.*, 645 So. 2d 420, 421 (Fla. 1994); *Lumbermens Mut. Cas. Co. v. Percefull*, 638 So. 2d 1026,

1030 (Fla. 4th D.C.A. 1994) (on rehearing). Under the one-sided provision of §627.428, the insured "prevails" against an insurer if he recovers more than the insurer's last offer. *Danis*, 645 So. 2d 420; *Percefull*, 638 So. 2d 1026. Thus, there is no need to use the "significant issues" test.

²¹ The Supreme Court's disposition of the petition in *Aksomitas* may support an argument that the case should be limited. The party who lost the appeal in *Aksomitas* sought review in the Florida Supreme Court, which denied review. There was no review sought of the attorney's fee ruling. In denying review, the Florida Supreme Court also denied the petitioner's motion for attorneys' fees and granted the respondent's, contingent on the latter's prevailing at the end of the case. The Supreme Court did not follow the Fourth DCA's fees analysis since it denied the petitioner's fees claim outright, regardless of whether the petitioner prevailed on the significant issues at the end of the case.

²² Cf. *Sierra v. Sierra*, 505 So. 2d 432 (Fla. 1987).

²³ *Visoly v. Sec. Pacific Credit Corp.*, 768 So. 2d 482 (Fla. 3d D.C.A. 2000).

²⁴ *Treat v. State ex rel. Mitton*, 121 Fla. 509, 510-511, 163 So. 883, 883-884 (Fla. 1935). See also *Procacci Commercial Realty, Inc. v. Dep't of Health and Re-*

habilitative Servs., 690 So. 2d 603 (Fla. 1st D.C.A. 1997) (applying the same standard to administrative appeals); *Brahmbhatt v. Allstate Indem. Co.*, 655 So. 2d 1264, 1265 (Fla. 4th D.C.A. 1995) (awarding fees for frivolous appeal where appellant took a position contrary to controlling Florida Supreme Court precedent). Section 57.105 states that fees are to be assessed in equal amounts against the losing party and their attorney. However, courts can make the assessment solely against the attorney in appropriate cases. See *Avemco Ins. Co. v. Tobin*, 711 So. 2d 128, 130 (Fla. 4th D.C.A. 1998) (assessing \$57.105 fees solely against the attorneys where it found "the lawyers alone maintained the frivolous position in the litigation, without the knowledge or acquiescence by their client").

²⁵ See, e.g., *State, Dep't of Highway Safety and Motor Vehicles v. Salter*, 710 So. 2d 1039, 1041 (Fla. 2d D.C.A. 1998); *Carnival Leisure Ind., Ltd. v. Holzman*, 660 So. 2d 410, 413 (Fla. 4th D.C.A. 1995); *Carnival Leisure Ind., Ltd. v. Arviv*, 655 So. 2d 177, 181 (Fla. 3d D.C.A. 1995); *Fairview Props., Inc. v. Pate Constr. Co., Inc.*, 638 So. 2d 998, 1000 (Fla. 4th D.C.A. 1994); *Kahn f/u/b/o Amica Mut. Ins. Co. v. Kahn*, 630 So. 2d 223, 224 (Fla. 3d D.C.A. 1994); *Coral Springs Roofing Co., Inc. v. Campagna*, 528 So. 2d 557, 558 (Fla. 4th DCA 1988); *First v. Carver*, 504 So. 2d 50, 52 (Fla. 2d D.C.A. 1987); *Enoch Assocs., Inc. v. Moults Invs., Ltd.*, 404 So. 2d 798, 799 (Fla. 3d D.C.A. 1981). There are a few reported decisions awarding \$57.105 fees to an appellant, but it is not clear that the issue was raised in those cases. See *Rapid Credit Corp. v. Sunset Park Centre, Ltd.*, 566 So. 2d 810, 812 n.2 (Fla. 3d D.C.A. 1990) (Schwartz, J., specially concurring) (noting court's award of fees to an appellant where the appellee's counsel's egregiously unethical conduct necessitated the appeal); *Insua v. Chantres*, 665 So. 2d 288 (Fla. 3d D.C.A. 1995) (awarding fees to appellant under §57.105, then vacating the order on rehearing).

²⁶ *Forum*, 788 So. 2d at 1062.

²⁷ *Id.* at 1063.

²⁸ *Forum*, 788 So. 2d at 1060-61. See Ch. 99-225, §4, Laws of Fla. The court held that the 1999 amendments changed the statute "considerably," and explained: "No longer does the statute apply only to an entire action; it now applies to any claim or defense. No longer are awards of fees limited to "a complete absence of a justiciable issue of either law or fact raised by the losing party." The operative standard is now that the party and counsel "knew or should have known" that any claim or defense asserted was (a) not supported by the facts or (b) not supported by an application of "then-existing" law. Hence most of the old interpretations of the statute as it was drafted before 1999 are no longer authoritative.

Courts must now interpret and apply the text passed in 1999." 788 So. 2d at 1061.

²⁹ See, e.g., *Hartley v. Guetzloe*, 712 So. 2d 817, 818 (Fla. 5th D.C.A. 1998).

³⁰ *Glanzberg v. Kauffman*, 771 So. 2d 60, 61 (Fla. 4th D.C.A. 2000); *Deleuw, Cather & Co. v. Grogis*, 664 So. 2d 989, 989 (Fla. 4th D.C.A. 1995).

³¹ *Arabia*, 789 So. 2d at 383.

³² *Id.*

³³ See, e.g., *Branch v. Charlotte County*, 627 So. 2d 577, 579 (Fla. 2d D.C.A. 1993); *Berry v. Scotty's, Inc.*, 789 So. 2d 1008 (Fla. 2d D.C.A. 1998). In federal appeals, the 11th Circuit typically remands the case to the district court to determine the amount of fees to be assessed for the appeal. However, the court has awarded a sum certain where the movant's attorney filed an affidavit of amount and that amount was not disputed by the opposing party. *Taiyo Corp. v. Sheraton Savannah Corp.*, 49 F.3d 1514, 1516 (11th Cir. 1995) (making the award "in the interest of judicial economy and to avoid further expenditures by the parties necessitated by a remand").

³⁴ See Florida Rule of Appellate Procedure 9.400(c); *Pellar v. Granger Asphalt Paving, Inc.*, 687 So. 2d 282, 284 (Fla. 1st D.C.A. 1997); *Sabina v. Dahlia Corp.*, 678 So. 2d 822 (Fla. 2d D.C.A. 1996); *Dalia v. Alvarez*, 605 So. 2d 1282 (Fla. 3d D.C.A. 1992).

³⁵ Florida Rule of Appellate Procedure 9.400(c). See *Bell v. U.S.B. Acquisition Co., Inc.*, 734 So. 2d 403, 412-13 (Fla. 1999) (time runs from "rendition" of trial court order and therefore no additional time is permitted after mailing).

³⁶ See, e.g., *Pellar v. Granger Asphalt Paving, Inc.*, 687 So. 2d 282 (Fla. 1st D.C.A. 1997); *Gen. Accident Ins. Co. v. Packal*, 512 So. 2d 344 (Fla. 4th D.C.A. 1987). See generally *Bell v. U.S.B. Acquisition Co., Inc.*, 734 So. 2d 403 (Fla. 1999).

³⁷ See *Pellar*, 687 So. 2d at 284; *Zaremba Florida Co. v. Klinger*, 550 So. 2d 1131 (Fla. 3d D.C.A. 1989).

³⁸ See *G.H. Johnson Constr. Co. v. A.P.G. Elec., Inc.*, 656 So. 2d 566 (Fla. 2d D.C.A. 1995).

³⁹ See, e.g., *Starcher v. Starcher*, 430 So. 2d 991 (Fla. 4th D.C.A. 1983) (holding that trial court's attorneys' fees order after remand could be considered as a point on appeal because it was one of several points arising out of single judgment, but cautioning against the failure to follow Rule 9.400(c) when the sole point involved is appellate attorneys' fees); *Magner v. Merrill Lynch Realty/MCK, Inc.*, 585 So. 2d 1040, 1044 (Fla. 4th D.C.A. 1991) (holding "by way of careful limitation" that a timely challenge to an attorneys' fee award can be consolidated with a simultaneous plenary appeal where strict compliance with Rule 9.400(c) would "unnecessarily result in multiple actions"). See also *Underwood v. Elliott*, 601 So. 2d 317 (Fla. 1st D.C.A. 1992). The Fourth Dis-

trict has since explained: "Properly read, *Starcher* and *Magner* recognize a very limited exception to the command of rule 9.400(c) that applies only when the same parties are involved in a single judgment after remand that encompasses both an appellate fees issue and another issue, and one party seeks review of both issues at the same time . . . the exception does not apply when there are multiple and discretely different judgments entered, and the appellate fees issue involves a different party than the other issue determined on remand." *U.S.B. Acquisition Co., Inc. v. Stamm*, 695 So. 2d 373 (Fla. 4th D.C.A. 1997), *quashed on other grounds*, *Bell v. U.S.B. Acquisition Co., Inc.*, 734 So. 2d 403 (Fla. 1999).

⁴⁰ See *Browning v. New Hope South*, 785 So. 2d 732 (Fla. 1st D.C.A. 2001); *Magner v. Merrill Lynch Realty/MCK, Inc.*, 585 So. 2d 1040 (Fla. 4th D.C.A. 1991).

⁴¹ See *Browning v. New Hope South*, 785 So. 2d 732 (Fla. 1st D.C.A. 2001).

⁴² *Gen. Acc. Ins. Co. v. Packal*, 512 So. 2d 344 (Fla. 4th D.C.A. 1987); *Starcher v. Starcher*, 430 So. 2d 991 (Fla. 4th D.C.A. 1983).

⁴³ *Pellar v. Granger Asphalt Paving, Inc.*, 687 So. 2d 282 (Fla. 1st D.C.A. 1997); *G.H. Johnson Constr. Co. v. A.P.G. Elec., Inc.*, 656 So. 2d 566 (Fla. 2d D.C.A. 1995).

⁴⁴ Florida Rule of Appellate Procedure 9.400(a).

⁴⁵ *Stringer v. Katzell*, 695 So. 2d 369, 370 (Fla. 4th D.C.A. 1997) (quoting Padovano, *Florida Appellate Practice* §16.2 (1988)). See also *Lucas v. Barnett Bank of Lee County*, 732 So. 2d 405, 406 (Fla. 2d D.C.A. 1999); *Fleitman v. McPherson*, 704 So. 2d 587, 590 (Fla. 1st D.C.A. 1997); *Di Teodoro v. Lazy Dolphin Dev. Co.*, 432 So. 2d 625, 626 (Fla. 3d D.C.A. 1983); *Swan v. Wisdom*, 392 So. 2d 987, 987 (Fla. 5th D.C.A. 1981).

Tracy Raffles Gunn is a shareholder in the Appellate Practice Group of Fowler White Boggs Banker, P.A., in Tampa. She received her J.D., summa cum laude, from Stetson University College of Law in 1993. Ms. Gunn is board certified by The Florida Bar in appellate practice. She is chair of the Amicus Curiae Committee of the Florida Defense Lawyers Association and is a member of the Florida Supreme Court Committee on Standard Jury Instructions in Civil Cases.

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