

Parties on Appeal

by Raymond T. Elligett, Jr., and Judge John M. Scheb

In many appeals, especially those with only two parties, counsel do not dwell on the proper parties to an appeal. However, party issues can become more complicated in multiparty litigation, and when considering how an appeal may affect those who are not made parties to the appeal. Parties can also lose their standing to appeal.

Standing: Who Can Appeal?

Nearly half a century ago, the Florida Supreme Court summarized standing, or the question of who can appeal, by stating: "Before a person may bring an appeal he [or she] must be a party or privy to the record and must show that he [or she] is, or will be, injuriously affected by the order sought to be reviewed."¹

A Second District decision issued in 1997 discusses two lines of Florida case law on standing: one holding a party cannot appeal an order in its favor, and another holding it can appeal if it is aggrieved by some aspect of the order.² The following year, in *Cocoa Academy for Aerospace Tech. v. School Bd. of Brevard County*, 706 So. 2d 397 (Fla. 5th DCA 1998), the Fifth District dismissed an appeal from the denial of an application to form a charter school where no entity had been formed to administer the program. The court stated:

It is a basic premise that unless an *in rem* proceeding is before the court, a cause of action must be conducted by or opposed by a "person" recognized under the laws of this state. Generally, this person has the capacity to sue and be sued. In the instant matter, only one party, the appellee, School Board, is vis-

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ible to this court, and Cocoa Academy of Aerospace Technology, although designated as the appellant, is not.³

In *Khazaal v. Browning*, 707 So. 2d 399 (Fla. 5th DCA 1998), the Fifth District held the grantor of a security interest being foreclosed (a liquor license) had a sufficient stake in the litigation to appeal the default final judgment of foreclosure. The court also held the appellant's redemption of the license was an involuntary payment, and so did not preclude him from pursuing the appeal.

Standing questions can arise in multiparty cases. *Sheradsky v. Basadre*, 452 So. 2d 599 (Fla. 3d DCA 1984), addressed whether a third-party defendant could obtain relief from the third-party judgment by successfully challenging the merits of the original plaintiff's case, even though defendants/third-party plaintiffs had not taken an appeal from the original judgment.

County-Wide Commercial Laun-

dries, Inc. (the original plaintiff), obtained a judgment for wrongful eviction against the purchasers of an apartment house, Basadre and the Gorras (defendants/third-party plaintiffs), who in turn obtained a third-party judgment against the seller of the property, Sheradsky (third-party defendant).

The court held that, notwithstanding the failure of a defendant/third-party plaintiff to appeal, where there is error in the original judgment a third-party defendant may seek review of that judgment in an attempt to set aside the otherwise error-free third-party judgment. The court found persuasive a federal decision reaching the same result under an analogous federal rule of procedure that permits third-party defendants to assert any defense that a defendant could have asserted.⁴ *Sheradsky* also cited a decision approved by the Florida Supreme Court that held one codefendant could appeal a judgment exonerating another codefendant that would have destroyed the appellant's right to seek contribution from the exonerated defendant.⁵

Not only can a defendant appeal an order relieving a codefendant of liability, it must do so or lose the right to seek future contribution.

In *Holton v. H. J. Wilson Co., Inc.*, 482 So. 2d 341 (Fla. 1986), the plaintiff Collom sued the City of St. Petersburg, Jack Holton as the owner of the land, and Wilson as the builder of the storm sewer where his wife and daughter drowned. Wilson obtained a summary judgment against the plaintiff Collom in April 1980, which the appellate

court affirmed in March 1981.

Holton failed to participate in the appeal of the judgment exonerating Wilson. Instead, in August 1980, Holton filed a motion for leave to file a third-party complaint against Wilson, seeking contribution or indemnity. The trial court heard and denied this motion in July 1981, finding the district court's affirmation of the summary judgment determined Holton's claims. Finding no requisite common liability justifying a claim of contribution, and no relationship between the defendants creating a right to indemnity, the court denied the motion. Holton did not appeal.

Three years later, Holton successfully brought Wilson back into the litigation when another trial judge granted Holton's motion for reconsideration of his earlier motion seeking leave to file a third-party complaint against Wilson. With his motion, Holton filed a complaint identical to that submitted to the court three years before.

The Second District and the Florida Supreme Court held Holton was barred from seeking relief against Wilson. They concluded Wilson's summary judgment against Collom determined the liability of Wilson to Holton. Holton had failed to timely appeal the entry of the initial summary judgment exonerating Wilson. If Holton knew of material issues of fact showing Wilson's liability, Holton should have participated in the appeal. The Supreme Court indicated he could

have done so by filing a brief or cross-appealing.⁶

Summarizing the holding in *Holton*, the First District observed that a codefendant in a tort action "not only may, but must, oppose a judgment relieving a codefendant of liability, or lose any future right to contribution from that codefendant."⁷

The Third District has held one codefendant could appeal the summary judgment in favor of the other codefendant, even though the first codefendant had not yet filed a cross-claim against the second codefendant.⁸

Opinions before and after *Holton* have held a plaintiff cannot appeal a summary judgment in favor of a third-party defendant.⁹

Parties on Appeal Defined

Florida Rule of Appellate Procedure 9.020(g) defines the parties to appellate proceedings in Florida. An appellant is a party who seeks to invoke the appeal jurisdiction of a court. An appellee is every party in the proceeding in the lower tribunal other than an appellant.¹⁰

During the 1990s, Florida's district courts of appeal handed down several significant decisions on when one was a party with standing to appeal. In *Weiss v. Trust Under Will of Pollak*, 595 So. 2d 1035 (Fla. 3d DCA 1992), the Third District held that beneficiaries of a trust lacked standing to appeal where they made no motion to intervene below "and [had] not demonstrated by the pleadings that they otherwise [had] standing."

Whitehead v. Dreyer, 698 So. 2d 1278 (Fla. 5th DCA 1997), cited the Committee Note that "appellee" "has been defined to include the parties against whom relief is sought and all others necessary to the cause." The court held a plaintiff could not participate in oral argument in the appeal taken by his former lawyers from a trial court fee award based on F.S. §57.105 (for a frivolous suit), where the plaintiff had not appealed the award against him.

Naghtin v. Jones, 680 So. 2d 573 (Fla. 1st DCA 1996), review denied, 691 So. 2d 1080 (Fla. 1997), held that where an insurance company was not a party below, adding its name to the notice of appeal did not make it a party to the appeal.

In *Barnett v. Barnett*, 705 So. 2d 63 (Fla. 4th DCA 1997), Citibank moved ore tenus in a dissolution of marriage action to establish the priority of its lien over that of the parties' attorneys. Citibank was not a party to the proceedings below and did not move to intervene nor to consolidate its pending foreclosure case with the dissolution action. Citibank assigned to the wife any rights it had to appeal the trial court's order denying its lien priority. The wife (as assignee) appealed. The Fourth District granted appellees' motion to dismiss because Citibank (a stranger to the record) had no standing.

Barnett distinguished *In re Receivership of Guarantee Security Life Insurance Company*, 678 So. 2d 828 (Fla. 1st DCA 1996). There, the court

held that litigants in a separate lawsuit had standing to appeal an order in a case in which they were not parties, when the order curtailed their ability to conduct discovery in the separate suit.

Concerned Class Members v. Sailfish Point, Inc., 704 So. 2d 200 (Fla. 4th DCA 1998), dismissed an appeal by nonnamed class members who had not formally intervened in a class action, when they sought to appeal an order approving the class settlement.

Ramos v. Philip Morris Companies, Inc., 714 So. 2d 1146 (Fla. 3d DCA 1998), agrees that a class member must intervene to appeal a settlement, and holds the member can seek to intervene after the judgment approving the settlement, as long as the member does so within the time in which the named plaintiffs could have appealed.

Effect of Appeal on Others

By electing not to participate in an appeal, a party may find itself unable to take advantage of a favorable ruling, and perhaps even subject to a larger damage award.

In *Division of Alcoholic Beverages and Tobacco v. McKesson Corporation*, 643 So. 2d 16 (Fla. 1st DCA 1994), *cert. denied*, 514 U.S. 1083 (1995), the court largely relied on federal case law to hold that a party which had not sought review of an adverse Florida Supreme Court decision could not benefit from the United States Supreme Court reversal.

In *Sundie v. Haren*, 253 So. 2d 857 (Fla. 1971), the Florida Supreme Court refused to set aside a foreclosure sale pursuant to a reversed summary judgment where the third-party purchasers were not parties to the appeal.¹¹

In *Borrell-Bigby Electric Company, Inc. v. United Nations, Inc.*, 385 So. 2d 713 (Fla. 2d DCA 1980), the plaintiff had recovered a judgment against the defendant and its insurance carrier. When the insurer refused to take an appeal, the defendant appealed and obtained a reversal.¹² When the appellate court reversed the underlying judgment against the insured in the 1980 ap-

peal, the insurer was out the \$100,000 it had paid because it had not participated in the appeal. This case predated the statute on nonjoinder of insurers but this result could still occur with nonjoinder, if the insurer pays and stops defending.

The Third District held a punitive damage award it reversed as to a corporate employer would not be reversed as to the employee who did not appeal.¹³ In another case, it held an appellant whose appeal was dismissed because of failure to comply with court rules would not benefit from the mandate reversing the summary judgment in favor of another appellant.¹⁴

In *Ashraf v. Smith*, 647 So. 2d 892 (Fla. 3d DCA 1994), the plaintiff in this medical malpractice suit added the defendant's insurer as a party after obtaining a judgment. The Third District denied the defendant/appellant's motion to amend his notice of appeal to include his liability insurer. The court went on to state the proposed amendment "is entirely unnecessary" because the reversal of the judgment meant the trial court on remand must vacate the "entirely derivative" judgment against the insurer. *Ashraf* may be reconciled with the same court's earlier decisions because the plaintiff had added the insurer as a party pursuant to the Florida nonjoinder statute.

Losing Right to Appeal

Actions a party takes or fails to take may cause it to lose its standing to appeal.

A party may lose standing to appeal if it accepts the benefits of the judgment it seeks to appeal. Florida decisions recognize two exceptions to this general rule: where the relief denied is separate and severable from the relief granted; or where the appellant is entitled in any event to at least the amount received.¹⁵

Dance v. Tatum, 629 So. 2d 127 (Fla. 1993), held the issue of an irrevocable oral drainage license running to the mortgagor of property was a separate issue from the foreclosure, so that the mortgagee accepting monies in foreclosure did not

preclude his appealing the adverse license ruling.

In *Oakland East Manors Condominium Ass'n, Inc. v. La Roza*, 669 So. 2d 1138 (Fla. 4th DCA 1996), the Fourth District held the association's acceptance of payment of the judgment was an acceptance of the benefit which required affirming the trial court's denial of the association's foreclosure claim. Nevertheless, the court held the association could still appeal the trial court's denial of prejudgment interest and attorneys' fees.

In addition to the two exceptions noted above, the acceptance of benefits rule does not preclude an appeal by a party who has received or paid funds, or received or transferred property, under an order in a family law matter;¹⁶ nor does it apply to an appeal from a nonfinal order of taking in a condemnation proceeding.¹⁷

A party does not have to post a bond to appeal a money judgment.¹⁸ However, if a party has posted a bond or obtained a stay and then pays the judgment, the party loses its ability to appeal.

Frank Silvestri Investments, Inc. v. Sullivan, 486 So. 2d 20 (Fla. 5th DCA 1986), involved an appeal from

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a mortgage foreclosure. After the trial court entered final judgment for the mortgagee, the court granted appellant's motion and stayed further activity pertaining to the sale or enforcement of the collection of the judgment. The appellee moved to dismiss in the appellate court on the ground the appellants had voluntarily complied with the judgment from which the appeal was taken, paid the judgment, demanded satisfaction of the judgment, and the judgment had been satisfied. The appellants objected, claiming their payment was not voluntary because they were required to make the payment to avoid interest accruing on the judgment and to obtain a satisfaction, as well as to clear the title to the property.

The Fifth District examined case law focusing on whether the payment was voluntary. Cases held that payment of a judgment after execution and levy was not a voluntary payment so as to deprive the appellant of its appeal. In this case, where there was no threat of execution, the court dismissed the appeal.

Florida Rule of Appellate Procedure 9.410 authorizes the court to impose sanctions for violations of the rules or the filing of a motion or brief that is frivolous or in bad faith. Such sanctions can include dismissing the party's appeal.¹⁹ Where an appellant is in contempt of a trial court order, the appellate court may dismiss the appeal after providing a grace period for compliance.²⁰

Counsel need to consider steps they should take to ensure that a

client wishing to appeal has the standing to do so. Parties need to be aware of when they should appeal, and the dangers of not participating in an appeal. They also need to exercise caution so as not to lose their right to appeal. □

¹ *King v. Brown*, 55 So. 2d 187, 188 (Fla. 1951).

² *Save Anna Maria, Inc. v. Department of Transp.*, 700 So. 2d 113 (Fla. 2d D.C.A. 1997).

³ *Cocoa Academy*, 706 So. 2d at 398.

⁴ *Kicklighter v. Nails by Jannee, Inc.*, 616 F.2d 734 (5th Cir. 1980). The court noted that in adopting a rule identical to a federal rule, the Florida Supreme Court must be assumed to have intended to achieve the same results that would obtain under the federal rule. *Zuberhuhler v. Division of Admin.*, 344 So. 2d 1304, 1306 (Fla. 2d D.C.A. 1977), cert. denied, 358 So. 2d 135 (Fla. 1978).

⁵ *Christiani v. Popovich*, 363 So. 2d 2 (Fla. 1st D.C.A. 1978), approved, 389 So. 2d 1179 (Fla. 1980).

⁶ The appellate courts noted a second problem barring Holton's claim: He failed to appeal the denial of his motion for leave to file a third-party complaint. The Supreme Court noted that a party whose claim was based solely on a special relationship creating a right to indemnity need not appeal the ruling exonerating the codefendant from the plaintiff's claim.

⁷ *U-Haul Co. of East Bay v. Meyer*, 586 So. 2d 1327 (Fla. 1st D.C.A. 1991).

⁸ *Southern Bell Tel. & Tel. Co. v. Florida Dep't of Transp.*, 668 So. 2d 1039 (Fla. 3d D.C.A. 1996).

⁹ *Kennedy v. Tiki Inv. Co.*, 471 So. 2d 568 (Fla. 1st D.C.A. 1985); *Phillips v. Hoy*, 660 So. 2d 1170 (Fla. 4th D.C.A. 1995).

¹⁰ Rule 9.020(g) similarly defines petitioners and respondents for Rule 9.100 or Rule 9.120 proceedings.

¹¹ *Baum v. Heiman*, 528 So. 2d 63 (Fla. 3d D.C.A. 1988), recited the general rule

that "one who surrenders property under an erroneous judgment is entitled to be restored to all that he has lost in the event of a reversal of the judgment." The court then stated, "[S]uch restitution is appropriate against the party who prevailed under the erroneous judgment or decree, not third parties, as is *Baum*."

¹² See *Aetna Ins. Co. v. Borrell-Bigby Elec. Co., Inc.*, 541 So. 2d 139 (Fla. 2d D.C.A. 1989).

¹³ *McArthur Dairy, Inc. v. Original Kielbs, Inc.*, 481 So. 2d 535 (Fla. 3d D.C.A. 1986).

¹⁴ *T.D. Holding Corp. v. Weinkle*, 567 So. 2d 1074 (Fla. 3d D.C.A. 1990). For another example of the consequences of not appealing in a tort context, see *Hegger v. Green*, 646 F.2d 22 (2d Cir. 1981).

¹⁵ See, e.g., *Dance v. Tatum*, 629 So. 2d 127 (Fla. 1993); *Hunt v. First Nat. Bank of Tampa*, 381 So. 2d 1194 (Fla. 2d D.C.A. 1980).

¹⁶ FLA. R. APP. P. 9.600(c).

¹⁷ *Niles v. County of Volusia*, 405 So. 2d 1046 (Fla. 5th D.C.A. 1981), review denied, 412 So. 2d 471 (Fla. 1982), citing to *Niles, Barnett Bank of Martin County, N.A. v. RGA Dev. Co.*, 606 So. 2d 1258 (Fla. 4th D.C.A. 1992), holds the doctrine of acceptance of benefits applies only to final adjudications on the merits. In eminent domain proceedings, the condemning authority frequently deposits in the registry of the court a sum equal to its "good faith" estimate of value of the property to be taken and requests a "quick taking" under FLA. STAT. ch. 74. The acceptance of benefits rule does not preclude a property owner who withdraws such sums from taking a nonfinal appeal pursuant to Rule 9.130(C)(ii) from the order that determines the petitioner's right to immediate possession of the property being condemned.

¹⁸ E.g., *Campbell v. Jones*, 648 So. 2d 208 (Fla. 3d D.C.A. 1994). By not posting a bond, the judgment debtor risks execution of the judgment pending the appeal.

¹⁹ *In re Order as to Sanctions*, 495 So. 2d 187 (Fla. 2d D.C.A. 1986).

²⁰ *Davidson v. District Court of Appeal, Fourth Dist.*, 501 So. 2d 603 (Fla. 1987); *Gazil v. Gazil*, 343 So. 2d 595 (Fla. 1977).