IN THE
SUPREME COURT OF FLORIDA

CASE NO. 65,082

In re Petition of the Florida Board of Bar Examiners for Amendment of the Florida Rules of Appellate Procedure

THE MIAMI HERALD PUBLISHING COMPANY'S
COMMENT REGARDING THE PROPOSED AMENDMENTS
OF THE FLORIDA RULES OF APPELLATE PROCEDURE

Introduction

In Wait v. Florida Power & Light Co., 372 So.2d 420 (Fla. 1979), this Court held that a the portion of the Public Records Law providing that a notice of appeal in a public records lawsuit would not operate as an "automatic stay" of the trial court's judgment, section 119.11(2), Florida Statutes (1979), was an unconstitutional infringement on the Supreme Court's rule-making power. Effective August, 1983, the Legislature, in response to Wait, repealed that part of the Public Records Law. See Note following Chapter 83-214, §2, Laws of Florida.

Through this comment, The Miami Herald Publishing Company, asks the Court to reactivate this important procedural portion of the Florida Public Records Law and to make it a procedural part of the Government in the Sunshine Law, by amending Florida Rule of Appellate Procedure 9.310(b)(2) as follows:

The Existing Rule	The Rule Proposed
The timely filing of a notice of appeal shall automatically operate as a stay pending review, except in criminal cases, when the State, any public officer in an official capacity, board, commission or other public body seeks review; provided that on motion the lower tribunal or the court may impose any lawful conditions or vacate the stay.	The timely filing of a notice of appeal shall automatically operate as a stay pending review, except in public records, public meetings, and criminal cases, when the State, any public officer in an official capacity, board, commission or other public body seeks review; the lower tribunal or the court may impose any lawful conditions or vacate the stay.

The Miami Herald simultaneously has submitted this proposed rule to the Florida Bar's standing committee on the rules of appellate procedure, but submits the proposed rule as a direct comment to this Court because the rule change has been necessitated by this Court's action in the Wait decision and because this Court already is quite familiar with the substance and procedure of Florida's open government laws.

Furthermore, resolution of this problem should be expedited because it involves a matter critical to the effectiveness of the state's open government laws. Under the ordinary rule-amending procedures the next opportunity The Miami Herald would have to propose an amendment to the rules of appellate procedure would be in 1988.[1]

The Purpose of the Existing Rule

When a party obtains a money judgment against a governmental entity, rarely is there any reason that the entity should be required to post a bond as a condition to obtaining a stay pending review. The existence of the sovereign, and its treasury, serves as sufficient security to the judgment holder that he will be able to collect the judgment if the appeal is unsuccessful.

Hence, many states have enacted rules which give effect to this policy by relieving governmental entities of the bonding requirements placed upon other appellants.[2] The parallel federal provision, Federal Rule of Civil Procedure 62(e), provides, "When an appeal is taken by the United States or an officer or agency thereof or by direction of any department of

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1. If the Court elects to refer this proposal to the appellate rules committee rather than treat it directly, The Herald respectfully requests that the committee be directed to treat this matter as an emergency under its rule authority to make emergency recommendations for rule changes.

2. See, e.g., Rutcosky v. Tracy, 89 Wash.2d 606, 574 P.2d 382 (1978), cert. denied, 439 U.S. 930 (19)(holding the "theory behind the no supersedeas bond requirement for appeal by state agencies is that the treasury is an adequate guarantee to the prevailing party"); City of Del City v. Harris, 508 P.2d 264 (Okla. 1973)(holding that rule relieving state of supersedeas bond obligation is inapplicable in injunction cases); Weber v. Walker, 591 S.W.2d 559 (Tex. App. 1979)(holding no bond may be required if judgment requires appropriation of county funds).

the Government of the United States and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant." This rule, like the rules enacted by most states, gives effect to the policy consideration that there is no need to require a governmental entity to post security for a money judgment.

Florida Rule of Appellate Procedure 9.310(b)(2) is distinct from the federal rule and most state rules in that it not only relieves state agencies of bonding requirements when they appeal money judgments against them, but it also provides them with an automatic stay of other orders such as writs of mandamus and prohibition and injunctive orders. The Florida rule has, however, no ostensibly broader purpose than its federal and other state counterparts.

The disparity between the purpose of the rule and the effect of the rule has led to a variety of decisions in which the courts have sought ways to circumvent the rule where it operated not only to serve no purpose but to harm litigants.[3]

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3. For example, in Duval County School Board v. Florida Public Employees Relations Commission, 346 So.2d 1087 (Fla. 1st DCA 1977), the court refused to give effect to the automatic stay rule of Florida Rule of Appellate Procedure 5.12 (the predecessor of Rule 9.310(b)(2)) by giving it an extremely technical reading as it had done earlier in Lewis v. Career Service Comm'n, 332 So.2d 371 (Fla. 1st DCA 1976). The court explained that its narrow construction of the rule was based upon sound policy considerations. "To recognize an automatic stay in these circumstances," the Court held, "would intolerably relieve the Board, during our consideration of the case, of PERA duties independent of the unfair labor practice order." 346 So.2d at 1088-89. When the Rules of Appellate Procedure were recodified in 1977, however, the language of Rule 5.12 was changed so that the First District could no longer escape its applicability by relying upon a technical reading of it. The language of new rule 9.310(b)(2) specifically provided that a public body or officer would be entitled to an automatic stay whenever he "seeks review." The Advisory Committee's and Court's note following this new version of the rule left no doubt that "This rule supersedes Lewis v. Career Service Comm'n, 332 So.2d 371 (Fla. 1st DCA 1976)." Thus, by amending the rule in 1977, explicitly overruling Lewis, and implicitly overruling Duval County School Board, the Court prevented lower courts from refusing to recognize automatic stays even though such stays might have "intolerable" consequences. When the First District was next faced with an appeal from an order of the Public Employees Relations Commission in City of Jacksonville Beach v. Public Employees Relations Commission, 359 So.2d 578 (Fla. 1st DCA 1978), the court was forced to recognize the effectiveness of the automatic stay notwithstanding that in its Duval County School Board case, the Court had found such recognition "intolerable."

The Florida Legislature's Attempt to Eliminate Automatic Stays in Public Records Cases

The first attempt to limit the applicability of the automatic stay rule in circumstances where it served no purpose came in 1975 when the Legislature turned its attention to the procedure whereby members of the public may obtain court orders requiring public officials to allow copying and inspection of public records. The Legislature amended the Public Records Law, ch. 75-225, section 5, to provide that when individuals are wrongfully denied access to public records they are entitled to an accelerated hearing and immediate court order requiring public officials to make the records available.

Recognizing that the "automatic stay" rule might allow public officials to nullify the effectiveness of this procedure, the Legislature included the provision that "The filing of a notice of appeal shall not operate as an automatic stay." The Act further provided that "A stay order shall not be issued unless the court determines that there is a substantial probability that opening records for public inspection will result in significant damage."

Shortly after the statute's enactment, it came under attack. Not, however, because of the policy decision by the Legislature, but because of doubt regarding the Legislature's power to regulate a matter which appeared to be procedural. The Fourth District Court of Appeal in Clark v. Walton, 347 So.2d 670 (Fla. 4th DCA 1977), held that this legislative attempt to alter the automatic stay rule unconstitutionally infringed the Supreme Court's rule-making authority and therefore recognized a public official's entitlement to an automatic stay in public records cases.

When however the First District was faced with the same issue in Wait v. Florida Power & Light Co., 353 So.2d 1265 (Fla. 1st DCA 1978), it, as a matter of policy, could not reach the holding that the automatic stay rule should defeat the clear

intention of the Legislature. The First District first looked to the purpose of the automatic stay rule, commenting:

> It appears to us that Rule 5.12(1) was adopted to protect the public treasury from the payment of an appeal bond premium. We do not have a money judgment here nor would a bond be of any protection to the appellee. Thus, we conclude the rule is inapplicable here.
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> 353 So.2d at 1267.

The Court next examined how the operation of the automatic stay rule would impact the Public Records Law:

> To grant an automatic stay to a public agency under circumstances present here would permit the agency to avoid its statutory mandatory duties. Duval County School Board v. Florida Public Employees Relations Commission, 346 So.2d 1087 (Fla. 1st DCA 1977). By the mere taking of an appeal, the agency could delay a person's right to examine public records until through sheer lapse of time, the need expired. This would defeat the purpose of the Public Records Act which we cannot permit.
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> 353 So.2d at 1267 (emphasis added).

This Court reversed the First District's Wait decision, 372 So.2d 420 (Fla. 1979), not because it disagreed with the conclusion that the automatic stay rule would defeat the purpose of the Public Records Law. Rather, this Court held that it agreed with the Fourth District's analysis in Clark that the Legislature simply is without power to enact legislation which attempts to regulate the granting of stays.

Thus, through its Wait decision, this Court has allowed the automatic stay rule to undermine the orderly operation of the Public Records Law. Through the simple proposed amendment of Rule 9.310(b)(2), the Court can put the Legislature's intended procedure back in place and reconfirm its already well-recognized commitment to principles of open government. See, e.g., Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982)(access to pretrial hearings); In re Petition of Post-Newsweek Stations, Florida, Inc., 370 So.2d 764 (Fla. 1979)(electronic media access to judicial proceedings); State ex rel. Miami Herald Publishing Co. v. McIntosh, 340 So.2d 904

(Fla. 1977)(access to trials); City of Miami Beach v. Berns, 245 So.2d 38 (Fla. 1971)(access to public meetings); Board of Public Instruction v. Doran, 224 So.2d 693 (Fla. 1969)(access to public meetings).

This Court's decision in the Wait case itself, although striking down part of the Public Records Law on separation of powers grounds, demonstrated a strong commitment to uphold the concept of open government in that it refused to recognize judicially created exceptions to the Public Records Law.

The proposed rule would make the automatic stay rule inapplicable in appeals from orders enforcing both the Public Records Law and the Government in the Sunshine Law. The Court should adopt such a rule because there simply is no policy basis for affording government officials automatic stays of orders which require them to make information available to the public.[4]

Elimination of the automatic stay rule in public records and public meetings cases would not, of course, mean that public officers or public bodies never would be entitled to a stay when they sought to appeal orders requiring them to make their records available or to open their meetings. Public officers and public bodies would be entitled, as are any other litigants, to demonstrate to the trial judge and, if necessary, to the appellate court that a stay would be appropriate under the facts and circumstances of the case and the case law which has been developed for the granting of stays. There is no policy reason, however, that public officers and bodies should be entitled to a stay automatically.

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4. The history of Wood v. Marston, 442 So.2d 937 (Fla. 1983), demonstrates that the granting of an automatic stay is inappropriate in such cases. The trial court in Wood enjoined the president of the University of Florida from excluding reporters from certain meetings. 1 Fla. Supp. 2d 54 (8th Cir. 1981). The president "filed an appeal which resulted in an automatic stay of the injunction, but [the trial judge] vacated the stay upon motion of the [plaintiffs]. The First District denied a motion to reinstate the stay," finding an "insufficient basis to grant the relief sought" by the president. The appeal in that case therefore went foreward while reporters were allowed access to the meetings.

CONCLUSION

Florida Rule of Appellate Procedure 9.130(b)(2) now operates to defeat the purpose of the Public Records Law and to frustrate the effectiveness of the Government in the Sunshine Law by allowing public officials and bodies to block orders requiring disclosure of records or the opening of meetings by the mere taking of an appeal. The First District Court of Appeal recognized this in its Wait decision and the Florida Legislature recognized this in its attempt to eliminate the rule's applicability in public records cases.

Because this Court has held that the Legislature is without authority to limit the effect of the automatic stay rule, the responsibility for this task now rests with this Court. That responsibility should be exercised by amending Rule 9.310(b)(2) to make the automatic stay afforded public officials and public bodies inapplicable in actions brought to enforce the Florida Public Records Law and the Florida Government in the Sunshine Law.

Respectfully submitted,

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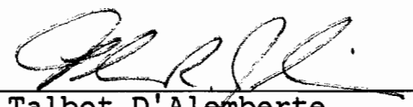
By 

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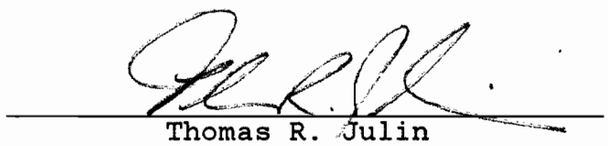
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this comment was mailed May 29, 1984, to The Honorable John R. Beranek, chairman, Florida Bar Appellate Court Rules Committee, P.O. Box A, West Palm Beach, Florida 33402, Larry Klein, vice chairman, Flagler Center, Suite 201, 501 South Flagler Drive, West Palm Beach, Florida 33401, and Gregory P. Borgognoni, vice chairman, 777 Brickell Avenue, #1000, Miami, Florida 33131.



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