IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-1227

IN RE: AMENDMENTS TO FLORIDA SMALL CLAIMS RULE 7.090

SMALL CLAIMS RULES COMMITTEE'S SUPPLEMENTAL REPORT

The Small Claims Rules Committee ("Committee"), by and through its undersigned Chair, Michele A. Cavallaro, files this supplemental report in response to this Court's order dated July 1, 2010, and states:

Procedural Background

In 1984, Florida Small Claims Rule 7.090 was amended to require the use of a pretrial procedure to create uniformity where some counties had been holding pretrial conferences while others had not.

In 1988, Rule 7.090 was again amended to mandate six specific matters that must be considered at each pretrial conference. These matters are: (1) simplification of issues; (2) possible amendments to the pleadings; (3) possible admissions and stipulations; (4) limitations on the number of witnesses; (5) settlement; and (6) any other matters that **the court** deems necessary in its discretion (emphasis added.)

On January 27, 2010, the Committee petitioned the Court to approve several rule changes as part of its regular reporting cycle. The rule changes

were published for comment. Included in that petition was a request to change Rule 7.090. *See In Re: Amendments to the Florida Small Claims Rules*, 2010 Fla. LEXIS 1457; 35 Fla. L. Weekly S 488. The proposed change to Rule 7.090 is an amendment to subparts (a) and (b) of the rule to clarify that a judge must be present at the pretrial conference to review the six matters set forth in subpart (b):

> **RULE 7.090. APPEARANCE; DEFENSIVE PLEADINGS; TRIAL DATE**
>
> (a) **Appearance.** On the date and time appointed in the notice to appear, the plaintiff and defendant shall appear personally or by counsel before a judge.
>
> (b) **Notice to Appear; Pretrial Conference.** The **summons**/notice to appear shall specify that the initial appearance shall be for a pretrial conference. The initial pretrial conference shall be set by the clerk not more than 50 days from the date of the filing of the action. At the pretrial conference, all of the following matters shall be considered by a judge:
>
> (1) The simplification of issues.
> (2) The necessity or desirability of amendments to the pleadings.
> (3) The possibility of obtaining admissions of fact and of documents that avoid unnecessary proof.
> (4) The limitations on the number of witnesses.
> (5) The possibilities of settlement.
> (6) Such other matters as the court in its discretion deems necessary.

On July 1, 2010, the Court severed the proposal to amend Rule 7.090 and ordered that it would be considered separately in the instant action. The Court

further directed the Committee to file a supplemental report, addressing the practices for conducting pretrial conferences in small claims cases in the various counties, giving particular focus to which counties use judges to conduct these conferences and which do not. Further, the Committee was asked to consider revising the proposed rule change to recognize the procedures used by counties that have "more efficient pretrial practices."

The Committee, in order to implement the Court's directive, sent a request and questionnaire out to the administrative judge of each county in July, seeking information on how pre-trial conferences were conducted. A copy of the questionnaire is attached as Exhibit A. The results received from each county[1] have been compiled onto the Survey of Small Claims Pretrial Procedures by County (the "Survey"), attached as Exhibit B.

On July 30, 2010, the Sixth Judicial Circuit filed a response to the proposed rule change, requesting that the Court reject the proposed rule change, amend it, or assign the issue to the Commission on Trial Court Performance and Accountability for further study, in that order of preference. The suggested amendment is the addition of the following language to Rule 7.090:

> The pretrial conference may be managed by non-judicial personnel employed by or under contract with the court. Non-judicial

[1] Some counties did not respond and information was gathered from the clerk or, if the clerk did not respond, from local attorneys practicing in small claims court. Each such instance of this is noted on the survey through the use of italics.

> personnel must be subject to direct oversight by the court. A judge must be available to hear any motions or resolve any legal issues.

On August 11, 2010, the Twentieth Judicial Circuit also filed a response to the proposed rule change, requesting that the proposed rule change be amended to include the language above, suggested by the Sixth Circuit in its response.

On September 24, 2010, the Committee held its regular fall meeting and discussed, among other things, the proposed rule change, the Court's directive, and the results of the information gathered from each county. The Committee also reviewed the responses filed by the Sixth and Twentieth Circuits. The Committee reaffirmed its approval of the proposed amendment as originally submitted to the Court, with a vote of 16 in favor, 5 against and 1 abstention. The Committee then voted to add a committee note to the rule, which is proposed as follows:

> This change is not intended to prohibit the use of hearing officers, mediators, and other non-judicial courtroom personnel as part of the pretrial process.

The vote for the addition of a committee note was 16 in favor, 5 against and 1 abstention.

Finally, on October 7, 2010, the Conference of County Court Judges of Florida filed its own response in support of the Committee's proposed rule change.

Summary of Opposition to the Rule Change

The main issue regarding the proposed rule change appears to be whether the change will hobble judicial economy and prohibit efficient pretrial practices. There is the thought that the Committee has taken a cookie-cutter approach to pre-trial procedure that does not take into account the varieties in each county and each county's unique population and character.

The responses submitted by the Sixth and Twentieth Circuits perhaps best encapsulate the concerns that have been expressed. Chief Judge G. Keith Cary of the Twentieth Circuit cautioned that "[t]o impose the identical rigid staffing requirement upon the Glades County Court [Florida's 64th most populous county] as is required in the Lee County Court [Florida's 10th most populous county] would hinder rather than enhance the administration of justice." *Response of the Twentieth Judicial Circuit to this Court's Order of July 1, 2010*, ¶ 3.

Similarly, the Sixth Circuit stated that "[u]sing non-judicial personnel to handle administrative matters in small claims pretrial conferences is a good use

of our limited resources." *Response of the Sixth Judicial Circuit to this Court's Order of July 1, 2010*, ¶ 3.

The Committee emphatically agrees with these comments and observations and believes that, despite the fear that the rule change will impede judicial economy, the rule will actually improve it. For the reasons that will be discussed, the rule change is harmonious with the use of hearing officers and other non-judicial personnel employed by some of our counties.

Discussion

It is important to discuss the genesis of this proposed rule change. The existing rule already requires that the first five matters listed in the rule (simplification of issues, possible amendments to the pleadings, possible admissions and stipulations, limitations on the number of witnesses and settlement) "shall be considered" at the pretrial conference. Moreover, the sixth matter requires the consideration of "[s]uch other matters as **the court** in its discretion deems necessary." (emphasis added.) Rule 7.090(b)(6), together with Rule 7.135, allows the court to enter an appropriate order or judgment if it appears at the pretrial conference that there is no triable issue. *Linden v. Auto Trend, Inc.*, 923 So. 2d 1281, 1283 (Fla. 4th DCA 2006) The current rule requires the court to consider these six matters, which promotes judicial

economy by simplifying issues, paring down witnesses and evidence, and fully exploring settlement.

The matters mandated by current Rule 7.090(b) cannot be fully performed by non-judicial personnel. These matters clearly require the exercise of judicial decision-making, and the only person constitutionally empowered to engage in such an exercise is a judge. While administrative functions may be delegated to others for the sake of greater efficiency, and certainly hearing officers may make recommendations to the court, the judicial function is non-delegable. The Committee cannot imagine that the current rule was created in order to empower a clerk to dismiss a claim or case at the pretrial conference, or to make legal determinations about a case, without the parties ever appearing before a judge. It is the Committee's view that we must be more deferential to *pro se* litigants, not less. As the Twentieth Circuit suggested in its response, we should ensure that we "meet the people's needs in the People's Court."

Other circuits, including the Fourth, Sixth, Ninth, Eleventh and Fifteenth Circuits, have issued decisions that emphasize the importance of the judge's role under Rule 7.090. *See Metcalf v. Ortiz*, 16 Fla. L. Weekly Supp. 718 (Fla. 9th Cir. Ct. 2009) (court must set trial date and determine issues for trial at pretrial conference); *Portfolio Recovery Associates LLC v. Fernandez*, 13 Fla. L. Weekly Supp. 560 (Fla. 15th Cir. Ct. 2006) (defendant may verbally move to

dismiss claim at pretrial conference); *Tourtelot v. Koshick*, 12 Fla. L. Weekly Supp. 1008 (Fla. 6th Cir. Ct. 2005) (judge may summarily dispose of case at pretrial and no written motion is required); *National Moving Network, Inc. v. Lux*, 8 Fla. L. Weekly Supp. 342 (Fla. 11th Cir. Ct. 2001) (pretrial conferences are designed in part to simplify the issues for trial, determine the number of witnesses, explore the possibility of settlement and set a trial date).

The Committee also notes that several other Small Claims Rules refer to the court or judge making decisions at the pretrial conference. Rule 7.135 specifies that the "**court**" shall enter a summary disposition at the pretrial conference if there is no triable issue; Rule 7.140(a) requires the "**court**" to set the trial date at the pretrial conference; Rule 7.140(c) encourages the court to narrow contested factual issues, and permits the court to actually try the case at the pretrial conference if the parties consent; Rule 7.140(e) requires the "**court**" to assist unrepresented parties with certain aspects of preparing for trial; Rule 7.170(b) requires that the "**judge**" receive evidence on damages after a default is entered, which generally occurs at the pretrial conference, and further permits the "**judge**" to inquire into and prevent abuses of venue; Form 7.322, the mandatory Summons/Notice to Appear for Pretrial Conference, specifically advises the parties that they will appear for a pretrial conference before a

"**judge;**" and Form 7.323 , the Pretrial Conference Order and Notice of Trial, refers to the "**judge**" no less than eight times (emphasis added.)

Many small claims litigants are individuals or entities representing themselves *pro se*. Many of them are in a courtroom for the first time and have little knowledge of the process. They are understandably unfamiliar with the rules of evidence. Many times, they do not understand that the law draws a distinction between being wronged and **proving** that you were wronged. It is not until the pretrial conference, when the parties have been unsuccessful at mediation, and come before the presiding judge, that the judge is able to ask pointed questions, making one of the parties realize that there are serious proof problems with her planned claim or defense. For example, many litigants come into small claims court assuming that they can testify to everything that happened, including things that they did not witness and that they heard second or even third-hand[2].

As the Conference of County Court Judges so aptly stated the issue, "[a] quick perusal of the mandatory matters to be addressed at a pretrial conference, however, demonstrates the necessity of judicial decision-making, not merely performance of clerical functions…at some point in the pretrial conference, a judge must actually be involved." The committee believes that the six

[2] Rule 7.140(f) provides that the rules of evidence apply to small claims trials, but are to be liberally construed.

mandatory matters must be addressed by a judge **at some point** in the pretrial process, even if it is just a matter of reviewing a settlement stipulation or determining whether the case should even proceed to trial under Rule 7.135. What could be more economical than ensuring that a judge, who has the authority to enter judgment that a non-judicial person does not possess, be present at some point in the pretrial proceedings?

The core consideration for the Committee in requesting the rule change has been due process and the recognition that in our system of government, every legal claim is heard in a court of law, no matter what the amount in controversy. Efficiency is a necessary goal, especially in these times, but it cannot come at the price of a procedure where each case is processed and decided in accordance with our rule of law. The same may also be said of the foreclosure process, where speed and efficiency cannot come at the cost of legal procedure and due process of law.

The proposed rule change evolved when it came to the Committee's attention that some small claims litigants did not see a judge unless their case was actually tried. The Survey bears witness to this fact. *See* Exhibit B. Data for the Survey was collected from all 67 Florida counties. While there are certainly variations of pretrial procedures from county to county, it is highly

significant that in at least nine counties[3], the parties do not see a judge at any point before trial as a matter of course and at least six counties[4] do not routinely consider the six matters mandated by the current Rule 7.090(b) at the pretrial conference. Four counties allow a clerk, mediator, hearing officer or magistrate to consider the six matters mandated by the current Rule 7.090(b) instead of a judge.

The Sixth Circuit correctly points out that in 1988, the Court declined to accept the recommendation of the Florida Bar Board of Governors that Rule 7.090 be amended to require judges to personally preside over the pretrial conference. *See In Re: The Florida Bar Small Claims Rules*, 537 So. 2d 81 (Fla. 1988). The Committee, after careful consideration, has embraced Justice Barkett's dissent in that case:

> I would approve the recommendations of The Florida Bar Board of Governors to…articulate a requirement that county judges personally preside over the pretrial conference. Although I enthusiastically approve and endorse the use of mediators as *part* of a pretrial proceeding, I cannot agree that the practice of uniform and complete substitution of a mediator for a judge for all pretrial conferences is appropriate.

Id.

The Committee has concluded that requiring a judge to preside over pretrial conferences will not hinder the pretrial procedures in counties such as

[3] Charlotte, Collier, Jackson, Manatee, Orange, Osceola, Pinellas, Santa Rosa and Washington Counties.
[4] Charlotte, Collier, Jackson, Manatee, Orange and Osceola Counties.

those in the Sixth Judicial District. The Sixth Circuit states that it has used hearing officers to facilitate pretrial procedures for the past 22 years. However, this proposed rule change will not prevent counties in the Sixth Circuit, or other counties, from using hearing officers or other non-judicial personnel. For example, the Sixth Circuit uses a split system where a hearing officer greets the litigants, explains small claims procedure, and sends some cases to mediation where appropriate. A judge "is available throughout the pretrial calendars to hear arguments and resolve all legal issues. The judge also reviews and signs all mediation stipulations." This procedure would certainly comply with the proposed rule change as long as a judge is present, in the event the case does not settle, to appear before the parties and review the six matters mandated by the current rule. The rule change does not prevent non-judicial personnel from greeting litigants, explaining the process, calling the docket, or sending parties to mediation. Therefore, although the Committee appreciates the Sixth Circuit's concerns, it feels that they are unfounded because the procedures that have been in place for the past 22 years need not be altered.

The only counties that will be affected by this rule change are those counties that engage in a procedure where the parties do not see a judge before trial and the current Rule 7.090(b) inquiry is not conducted. Respectfully, this procedure would not only run afoul of the proposed rule change, it already

violates the current rule. The rule change merely requires that a judge be present to review the six matters that already must be reviewed at the pretrial conference. As expressed earlier, the consideration of the six matters actually promotes judicial economy, rather than impedes it.

Wherefore, the Committee recommends that the proposed changes to Rule 7.090 be accepted in their entirety, with the addition of the Committee's proposed comment set forth herein.

Respectfully submitted this 14th day of October, 2010.

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CERTIFICATE OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that on October 14th, 2010, a copy of the foregoing was served via U.S. mail on the individuals on the attached service list and that this report complies with the font requirements of Florida Rule of Appellate Procedure 9.100(*l*).

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