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FLORIDA'S PARTIAL FINAL JUDGMENT RULE: PROBLEMS AND SOLUTIONS

KENT R. PUTNAM*

Florida's partial final judgment rule creates uncertainty for attorneys and their clients. The author of this Article proposes solutions ranging from changes in terminology to amendments to the rule.

IN FLORIDA'S state courts, partial final judgments pursuant to Rule 9.110(k), Florida Rules of Appellate Procedure, are reviewable as a matter of right, either on appeal from the order itself, or, in some cases, when a judgment disposing of the entire case is rendered.¹ This Article examines the history of the rule as well as its present application and suggests modifications to correct the problems resulting from the rule as it is now promulgated.

I. PARTIAL FINAL JUDGMENT

Rule 9.110(k) of the Florida Rules of Appellate Procedure provides:

Except as otherwise provided herein, partial final judgments are reviewable either on appeal from the partial final judgment or on appeal from the final judgment in the entire case. If a partial final judgment totally disposes of an entire case as to any party, it must be appealed within thirty days of rendition.²

An order that disposes of a case as to a party is a partial final judgment for purposes of the rule.³ By rule, these orders must be immediately reviewed.⁴ Additionally, Florida courts have interpreted the language of the rule to consider other orders to be partial final judgments that may be reviewed either at the time of rendition or when the lower tribunal has completed its judicial labor in the case.⁵ These or-

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1. FLA. R. APP. P. 9.110(k).
2. *Id.*
3. *See id.*
4. *See id.*
5. *See infra* notes 30-32 and accompanying text.

ders are those that dispose of "a separate and distinct cause of action . . . which is not interdependent with other pleaded claims."⁶

A. *Distinct Claims*

Florida's Rule 9.110(k) was promulgated to correct a problem created by *Mendez v. West Flagler Family Association*.⁷ In *Mendez*, an insured brought a three-count complaint against a hospital association and an insurer.⁸ Counts one and two alleged breach of contract; the third alleged fraud, illegality, and a conspiracy to engage in fraud with regard to issuance of the insurance policy.⁹ The trial court entered a summary final judgment for both defendants on the third count and, after a motion for rehearing was denied, the plaintiff appealed.¹⁰ The Third District Court of Appeal dismissed the appeal for lack of jurisdiction, and the appellant petitioned the Supreme Court of Florida for certiorari.¹¹

After granting certiorari, the supreme court held that the summary judgment on the third count was sufficiently final to authorize a motion for rehearing and to toll the time for taking of the appeal.¹² The supreme court also rejected the petitioner's argument that an order disposing of less than all counts of a complaint is an interlocutory order for which no appeal is authorized:

It is our view the third count sets up a distinct and separate cause of action. It was based entirely on tort-fraud and illegality. It stood apart from the other two counts based on breaches of contract, respectively of the hospital association and the insurer. It arose from the alleged fraudulent issuance of the insurance policy originally and had naught to do with breaches of the policy after it was issued.¹³

The supreme court agreed that the issue presented in *Mendez* was similar to the one presented to the Second District Court of Appeal in

6. *Mendez v. West Flagler Family Ass'n*, 303 So. 2d 1, 5 (Fla. 1974) (reinstating an appeal that was dismissed in *Mendez v. West Flagler Family Ass'n*, 287 So. 2d 748 (Fla. 3d DCA 1973) (per curiam)).

7. 303 So. 2d 1 (Fla. 1974).

8. *Id.* at 2.

9. *Id.*

10. *Id.*

11. *Id.* at 2-3.

12. *Id.* at 5. Rule 9.020(g), Florida Rules of Appellate Procedure (formerly Rule 1.3, Florida Appellate Rules), provides that a timely and authorized motion for rehearing tolls the time of rendition of the order sought to be reviewed until disposition of the motion.

13. *Id.*

Duncan v. Pullum,¹⁴ and that the *Duncan* rule, which provides that such orders are immediately appealable, was correct.¹⁵

No one has argued that the *Mendez* decision was wrong. In fact, the rule has been applied¹⁶ to determine jurisdiction over appeals from orders disposing of counterclaims¹⁷ and cross-claims.¹⁸ Additionally, although no Florida appellate court has decided the question, the rule presumably applies to third-party claims.¹⁹ What is apparent from *Mendez*, however, is that the rule created a procedural trap for the litigator. When plaintiffs suffered an adverse disposition of some but not all of their counts, they could not be sure that the disposed of counts were not so factually and legally distinct from the remaining counts that they were not entitled to an immediate appeal.

More importantly, *Mendez* presented problems for appellate practitioners faced with an unfavorable disposition of some, but not all, of their clients' claims. For example, if the counts of a complaint are sufficiently distinct to qualify for an immediate appeal, failure to take an immediate appeal could result in loss of the right to review of the order. The unwary might fail to appeal an unfavorable disposition of a distinct claim and lose the right to appellate review.²⁰ The careful practitioner, on the other hand, when faced with disposition of a claim that may or may not be distinct from other claims had no option but to take an immediate appeal. Since the appellate court is the arbiter of its own jurisdiction,²¹ the appellant could face an expensive and time-consuming appeal to guarantee the right to obtain review of an order when, for a variety of reasons, it might have been preferable

14. 198 So. 2d 658, 661 (Fla. 2d DCA 1967).

15. *Mendez*, 303 So. 2d at 5.

16. The rule is equally applicable if the claims are stricken, see *Bodree v. First Union Nat'l Bank*, 540 So. 2d 240, 240 (Fla. 1st DCA 1989) (per curiam), if the claims are dismissed, *S.L.T. Warehouse Co. v. Webb*, 304 So. 2d 97, 100 (Fla. 1974), or if a summary judgment is granted to the defendant, *Kirkland v. Department of Health and Rehabilitative Servs.*, 489 So. 2d 800, 801-02 (Fla. 1st DCA 1986).

17. *S.L.T. Warehouse*, 304 So. 2d at 98.

18. *Duffy v. Realty Growth Investors*, 466 So. 2d 257 (Fla. 5th DCA 1985); *Meadows v. Ward*, 306 So. 2d 179 (Fla. 2d DCA 1975) (per curiam).

19. See *S.L.T. Warehouse*, 304 So. 2d at 97. This case involved a counterclaim of a third-party defendant. If there were no counterclaim by a third-party defendant, an order disposing of a third-party complaint in its entirety would, in most cases, dispose of the case entirely as to the third-party defendant, making it appealable on that basis. *Attorneys' Title Ins. Fund, Inc. v. Punta Gorda Isles, Inc.*, 547 So. 2d 1250, 1250 (Fla. 2d DCA 1989).

20. See *Szewczyk v. Bayshore Properties*, 456 So. 2d 1294, 1296 (Fla. 2d DCA 1984); *Seminole County v. Mertz*, 415 So. 2d 1286, 1291 (Fla. 5th DCA), *review denied*, 424 So. 2d 763 (Fla. 1982) (both finding that earlier orders had disposed of distinct claims and that appellate court had no jurisdiction to consider correctness of earlier orders on appeal from final order).

21. *Lovett v. City of Jacksonville Beach*, 187 So. 2d 96, 99-100 (Fla. 1st DCA 1966), *appeal dismissed*, 200 So. 2d 179 (Fla. 1967) (per curiam).

to have the order reviewed at the end of proceedings in the lower tribunal. This is known as the *Mendez* pitfall.²²

Rule 9.110(k) removed the *Mendez* pitfall by expressly stating that such orders could be reviewed on plenary appeal. However, the promulgation of the rule did not change the holding of *Mendez* as to which orders are reviewable. While partial final judgments still may be reviewed prior to the entering of a final order, this right of review remains limited to orders that dispose of a case as to a party, or to orders that dispose of claims that are legally and factually distinct from those that remain pending before the trial court.²³ Courts apply a rigid test and frequently find that disposed of claims are not sufficiently distinct to qualify as partial final judgments for purposes of the rule.²⁴

22. See *Szewczyk*, 456 So. 2d at 1296 n.2 (discussing then-proposed Rule 9.110(k) as the solution to the *Mendez* "trap"); *Murphy White Dairy, Inc. v. Simmons*, 405 So. 2d 298, 299 n.4 (Fla. 4th DCA 1981) (stating that it is "better to be safe than sorry under *Mendez*" and advising that when there is any doubt whether an order disposes of a distinct and separate claim, an appeal should be taken); see also *In re: Rules of Appellate Procedure*, 463 So. 2d 1114, 1116 (Fla. 1985) (committee note to amendment to Rule 9.110, adding subsection (k)). For a description of the problem, see Haddad, *Partial 'Final' Judgments: A Persistent Problem in Appellate Practice*, 53 FLA. B.J. 204 (Apr. 1979).

23. *Taddie Underground Util. Co. v. Sloan Pump Co.*, 497 So. 2d 701 (Fla. 2d DCA 1986); *Kirkland v. Department of Health and Rehabilitative Servs.*, 489 So. 2d 800 (Fla. 1st DCA 1986); *Stein v. Hospital Corp. of America*, 481 So. 2d 1264 (Fla. 4th DCA 1986); *Bay & Gulf Laundry Equip. Co. v. Chateau Tower, Inc.*, 484 So. 2d 615 (Fla. 2d DCA 1985) (all holding that Rule 9.110(k) does not make all partial judgments immediately appealable nor does it expand the class of orders immediately appealable).

24. See, e.g., *Gassner v. Caduceus Self Ins. Fund*, 532 So. 2d 1133 (Fla. 4th DCA 1988) (finding that of six counts brought by physicians challenging the retroactive assessment of insurance premiums, the three counts disposed of by summary judgment were interrelated with the remaining three counts, precluding partial final judgment); *RSH Constructors, Inc. v. Rose Creek Assocs.*, 527 So. 2d 967 (Fla. 1st DCA 1988) (dismissing partial final judgment appeal as to one count of multi-count complaint in a construction contract dispute because it was interrelated with remaining counts and involved same parties); *Palm Beach Newspapers v. Walker*, 506 So. 2d 39 (Fla. 4th DCA 1987) (dismissing appeal of a partial summary judgment on comparative negligence where negligence issues involving same parties and transaction remained pending); *Kirkland v. Department of Health and Rehabilitative Servs.*, 489 So. 2d 800 (Fla. 1st DCA 1986) (dismissing appeal of summary judgment for defendants on medical malpractice claim for lack of jurisdiction where pending claim of negligent supervision could not be maintained independently); *Odham v. Mouat*, 484 So. 2d 95 (Fla. 1st DCA 1986) (dismissing an appeal upon finding that breach of warranty and contract claims involving the same facts and parties were interrelated); *Stein v. Hospital Corp. of America*, 481 So. 2d 1264 (Fla. 4th DCA 1986) (allowing no partial final judgment on summary judgment and dismissing contract and warranty claims in eight-count negligence, breach of contract and implied warranty suit since all claims were interrelated); *Miami-Dade Water & Sewer Auth. v. Metropolitan Dade County*, 469 So. 2d 813 (Fla. 3d DCA 1985), *review denied*, 482 So. 2d 349 (Fla. 1986) (dismissing appeal from summary judgment as to one count of multi-count challenge to county water and sewer ordinance because all claims were interrelated); *Duffy v. Realty Growth Investors*, 466 So. 2d 257 (Fla. 5th DCA 1985) (finding dismissed counts alleging intentional infliction of emotional dis-

B. *Disposition of Parties*

Unlike orders that dispose of distinct claims, orders that dispose of one or more parties are easily identifiable.²⁵ Moreover, Rule 9.110(k) provides that the notice of appeal must be filed within thirty days of rendition,²⁶ or the right of review is lost.²⁷ Thus, this portion of Rule 9.110(k) generates little controversy except for the general procedural problems discussed below.²⁸

II. PROCEDURAL PROBLEMS

The problems that result from the current rules of procedure fall into two broad categories: 1) those involving terminology and jurisdiction of the respective tribunals and 2) those involving procedures for processing appeals.

A. *Terminology*

Rule 9.110(k) refers to review of "partial final judgments."²⁹ Although summary judgments are reviewable under the rule,³⁰ other orders, such as those striking³¹ or dismissing³² claims, are also reviewable. Thus, the term "judgments" clearly seems to be underinclusive. The term "orders" seems more appropriate. Additionally, the descriptive phrase "partial final" is questionable. Chief Judge Alan R. Schwartz of the Third District Court of Appeal stated that "since there is no such thing as a judgment which is both partial and final,

gress and loss of consortium unappealable under Rule 9.130 as interrelated with six counts of counterclaim and cross-claim still pending); *Venezia A., Inc. v. Askew*, 314 So. 2d 254 (Fla. 1st DCA 1975), cert. denied, 333 So. 2d 465 (Fla. 1976) (finding order dismissing damage claim not reviewable while additional count seeking injunctive relief based on same conduct remained pending in lower tribunal).

25. Orders that simply grant motions to dismiss or for summary judgment are not appealable because an order granting a motion is not a final judgment. *Russell v. Russell*, 507 So. 2d 661, 661 (Fla. 4th DCA 1987) (en banc); *Johnson v. First City Bank*, 491 So. 2d 1217, 1218 (Fla. 1st DCA 1986); *McCready v. Villas Apartments*, 379 So. 2d 719, 719 (Fla. 5th DCA 1980).

26. FLA. R. APP. P. 9.110(k); see *Florida Farm Bureau Ins. Co. v. Austin Carpet Serv., Inc.*, 382 So. 2d 305 (Fla. 1st DCA 1979) (finding that an order disposing of a case as to a party is sufficiently final that a timely motion for rehearing will toll rendition of the order).

27. *Del Castillo v. Ralor Pharmacy, Inc.*, 512 So. 2d 315 (Fla. 3d DCA 1987).

28. *Id.* The rule simply codified precedent in Florida as to orders which dispose of all claims against a party. See *Let's Help Fla. v. DHS Films, Inc.*, 392 So. 2d 915 (Fla. 3d DCA 1980).

29. FLA. R. APP. P. 9.110(k).

30. *Mendez v. West Flagler Family Ass'n*, 303 So. 2d 1, 5 (Fla. 1974).

31. See *Bodree v. First Union Nat'l Bank*, 540 So. 2d 240 (Fla. 1st DCA 1989) (had appellate court not identified a *Mendez* problem, it would have reviewed trial court order striking counterclaim).

32. *S.L.T. Warehouse Co. v. Webb*, 304 So. 2d 97, 99 (Fla. 1974).

the term may be an unhelpful oxymoronic one which should not be employed."³³ This author agrees.

A proper understanding of the problem requires a brief examination of the history of the concept of finality in Florida jurisprudence. The classic test for finality is whether the order or judgment in question constitutes an end to the judicial labor in the cause and leaves nothing further except execution of the judgment.³⁴ As law and equity courts began to merge, however, Florida appellate courts struggled with the question of appealability of orders that disposed of a case as to a particular party. The Second District Court of Appeal held that jurisdiction to review such an order depended upon the nature of the action below and the relief sought in the appellate forum.³⁵

However, appellate court discretion in exercising review authority, coupled with a broadly applied jurisdictional test, posed problems. Noting these problems, the First District Court of Appeal held that orders disposing of a case as to a party were appealable.³⁶ In doing so, the court altered the test for finality to "whether the order in question marks the end of the judicial labor in the case, and nothing further remains to be done by the court to fully effectuate a termination of the cause as between the parties directly affected."³⁷ This alteration dramatically changed both the operative definition of finality and the scope of review of trial court orders. It also created the need for a category of "partial final" orders, since many orders which meet this definition are not final in the classic sense. Once this category of "partial final" orders was created, district courts of appeal found it logical to expand the definition to orders disposing of a distinct cause of action.³⁸

33. *Del Castillo v. Ralor Pharmacy, Inc.*, 512 So. 2d 315, 319 n.12 (Fla. 3d DCA 1987).

34. *Howard v. Ziegler*, 40 So. 2d 776, 777 (Fla. 1949).

35. *Evin R. Welch & Co. v. Johnson*, 138 So. 2d 390 (Fla. 2d DCA 1962); *see also Schneider v. Manheimer*, 170 So. 2d 75 (Fla. 3d DCA 1964) (holding that disposing of claim as to one defendant is final and appealable even while denying petition for certiorari on other grounds).

36. *Hotel Roosevelt Co. v. City of Jacksonville*, 192 So. 2d 334, 338 (Fla. 1st DCA 1966).

37. *Id.* *Hotel Roosevelt* appears to be the first Florida case where the "termination of the cause as between the parties directly affected" test was employed; however, the test has been adopted in various other decisions that have considered the question. *Id.*; *see S.L.T. Warehouse Co. v. Webb*, 304 So. 2d 97, 99 (Fla. 1974); *Fetters v. United States Fire Ins. Co.*, 399 So. 2d 427, 428 (Fla. 5th DCA 1981); *Chan v. Brunswick Corp.*, 388 So. 2d 274, 275 (Fla. 4th DCA 1980). The Supreme Court of Florida announced a similar test of finality decades earlier. *See Hillsboro Plantation, Inc. v. Plunkett*, 55 So. 2d 534 (Fla. 1951). However, the remainder of the *Plunkett* opinion seems to suggest a case-by-case approach to the question of appellate review of orders that dispose of a case as to a party. *Id.* at 536. "A judgment is 'final' for the purpose of an appeal when it terminates a litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined." *Id.*

38. The Third District Court of Appeal was the first to use the term "partial final judg-

B. Procedural Problems

Because the right to review of partial final orders arises from a subsection of Rule 9.110, Florida Rules of Appellate Procedure,³⁹ a request for such review would seem to be controlled by the procedures for appeal of classic final orders. However, such procedures may be inappropriate for review of partial final judgments.

For example, in appeals from final orders, the clerk of the trial court prepares an index to the record on appeal and, before briefing is complete, transmits the record to the appellate court.⁴⁰ In an appeal from a partial final judgment, other claims remain pending before the lower tribunal. Assuming the lower court still has jurisdiction,⁴¹ the lower court and the parties may wish to continue litigating the remaining claims. Obviously, the lodging of the record in an appellate court would limit the trial court's ability to conduct further proceedings.

Another example is found in the applicable rule's provision that, with certain limited exceptions, the filing of a notice of appeal from a final order divests the lower tribunal of jurisdiction in the cause.⁴² A technical argument can therefore be made that the taking of an appeal from a partial final judgment bars further proceedings in the lower court on the claims that remain pending. Clearly, this may not be desirable, especially where review is sought of disposal of a claim separate and distinct from those remaining below.⁴³

ment" to describe an order that disposed of a case as to a defendant. *National Union Fire Ins. Co. v. Westinghouse Elec. Supply Co.*, 206 So. 2d 60, 60 (Fla. 3d DCA 1968). The district court was also the first to use the term in referring to an order that disposed of a separate and distinct claim. See *Hewitt v. Price*, 222 So. 2d 247, 248 (Fla. 3d DCA), *cert. denied*, 225 So. 2d 919 (Fla. 1969).

39. See FLA. R. APP. P. 9.110(k).

40. *Id.* 9.110(e).

41. See *infra* notes 42-43 and accompanying text.

42. Before the record is transmitted, the lower tribunal has concurrent jurisdiction to act on procedural matters other than extensions of time, which can be granted only by the appellate court. After the record has been transmitted, the lower court loses jurisdiction to act except as expressly permitted by the appellate court. FLA. R. APP. P. 9.600(a)-(b).

Despite the strong language of Rule 9.600, district courts have held that a lower court has jurisdiction during the pendency of the appeal to enforce a judgment that has not been stayed, *FMS Management Sys., Inc. v. IDS Mortgage Corp.*, 402 So. 2d 474 (Fla. 4th DCA 1981), and to make an award of attorney's fees, *Bernstein v. Berrin*, 516 So. 2d 1042 (Fla. 2d DCA 1987) (en banc). For a comprehensive discussion of the jurisdiction of the lower court during the course of appellate proceedings, see Haddad, *Jurisdiction of a Trial Court Pending Appeal: A Less Than Complete Divestment*, 63 FLA. B.J. 21 (July/Aug. 1989).

43. In *Rob-Cor, Inc. v. Ines*, 512 So. 2d 320 (Fla. 3d DCA 1987), the district court rejected the contention that the trial court lacked jurisdiction to adjudicate remaining claims after summary judgment was entered on a separate and distinct claim. *Id.* at 322. The district court did not indicate, however, that an appeal was taken from the summary judgment. *Id.*

III. PROPOSED SOLUTIONS

Because of the problems noted above, this Article proposes solutions ranging from changes in terminology to amendments to the rules. Courts, attorneys and litigants will realize several benefits from the adoption of these proposals.

A. Terminology

Rather than using the term "partial final judgment" to refer to orders that dispose of a case as to a party or adjudicate separate and distinct claims, the rules should identify these orders as particular types of "non-final" orders. This change would correct the terminology problems described above since, at present, some orders that are not judgments are illogically included in the term "partial final judgments." Additionally, it would restore the classic definition of finality and eliminate the "unhelpful oxymoronic" term "partial final."⁴⁴

B. Briefs, the Record and Jurisdiction

If orders of this kind are identified as non-final, their review would be controlled by Rule 9.130.⁴⁵ At least three improvements over the current review procedure of final orders would result. First, the initial brief would be due for service fifteen, rather than seventy, days after filing of the notice of appeal.⁴⁶ As further claims remain before the lower tribunal, this reduction in delay would benefit all parties—those involved in the appeal as well as those who may be involved in the litigation pending below but who have no role in the appellate proceedings.

44. An argument can be made that a useful model would have only one final order in any particular case. Florida appellate courts have held, however, that certain orders entered after an order on the merits are also final. See *Altamonte Hitch & Trailer Serv., Inc. v. U-Haul Co.*, 483 So. 2d 852 (Fla. 5th DCA 1986) (attorney's fees); *Grafman v. Grafman*, 488 So. 2d 115 (Fla. 3d DCA 1986) (order on petition to modify a dissolution of marriage). In *Clearwater Federal Savings & Loan Association v. Sampson*, 336 So. 2d 78 (Fla. 1976), the trial court entered a final judgment of foreclosure and subsequently granted the mortgagee's motion to receive funds held in the court registry. The mortgagor moved for rehearing of that order and filed notice of appeal when rehearing was denied. However, if the motion for rehearing did not delay rendition of the order sought to be reviewed, the appeal was untimely. *Id.* at 79. The Supreme Court of Florida found that it did and that the appeal was therefore timely. *Id.* at 80. The opinion makes clear that interlocutory orders entered after final orders are not equivalent to those entered before final order. *Id.* The opinion leaves uncertain, however, whether such orders should be considered final or "so final in nature as to partake of the character of a final decree." *Id.* In either event, such orders are appealable pursuant to Rule 9.110 or Rule 9.130(a)(4), Florida Rules of Appellate Procedure.

45. FLA. R. APP. P. 9.130.

46. *Id.* 9.110(f) and 9.130(e).

Second, appellate review of non-final orders ordinarily does not require preparation and transmittal of a record.⁴⁷ Instead, the appellant's initial brief is accompanied by an appendix that provides the court with copies of "such portions of the record deemed necessary to an understanding of the issues presented."⁴⁸ Most appeals of this nature are from orders rendered without the benefit of an evidentiary hearing, such as orders on motions to strike, to dismiss, or for summary judgment.⁴⁹ As counsel for the parties should have immediate access to the documents appropriate for inclusion in such an appendix, the costly and time-consuming procedures for preparation and transmittal of a record that are utilized in appeals from final orders become unnecessary.⁵⁰ If, however, preparation of a transcript is required for inclusion in the appendix, the appellant would have sufficient grounds for an extension of time for service of the initial brief.⁵¹ The use of appendices, rather than transmittal of the record, would also permit the lower court to have the record available should that court and the parties agree that further proceedings are appropriate.

Third, jurisdiction of each tribunal during the appellate proceedings would be clarified. During an appeal from a non-final order, "[i]n the absence of a stay, during the pendency of a review of a non-final order, the lower tribunal may proceed with all matters, including trial or final hearing; provided that the lower tribunal may not render a final order disposing of the cause pending such review."⁵² This would be a far better arrangement than the divestment of jurisdiction during review of final orders. The parties and the lower court could determine which, if any, unappealed claims should be heard during the appellate proceedings, subject to review by the appellate court.⁵³ The trial court

47. *Id.* 9.130(d). The appellate court may, however, order preparation and transmittal of the record.

48. *Id.* 9.130(e) and 9.220. The rules also permit appellee to utilize an appendix with the answer brief if there are additional portions of the record to be brought to the attention of the appellate court.

49. *See supra* note 15 and accompanying text.

50. Within 10 days of the filing of the notice of appeal of a final order, the appellant must file directions to the clerk and a designation to the court reporter. The appellee may file additional directions and designations within 20 days of filing the notice. FLA. R. APP. P. 9.200 (a)(2), (b)(1). Thereafter, the court reporter is permitted 30 days to prepare and deliver the transcripts. *Id.* 9.200(b)(2). After filing the notice of appeal, the clerk of the lower tribunal has 50 days to serve an index to the record and 110 days to transmit the record to the appellate court. *Id.* 9.110(e). These times may be, and frequently are, extended by the court upon proper motion.

51. *See id.* 9.300(a).

52. *Id.* 9.130(f).

53. A party not wishing to proceed below until the conclusion of the appeal could move for a stay. The trial court's ruling on a stay is reviewable by a motion in the appellate forum. *Id.* 9.310(a), (f).

would be prevented from entering a final order so that an enforceable judgment which might moot the appeal or otherwise interfere with the appellate court's jurisdiction could not be rendered until a mandate issues in the non-final appeal.

C. *Avoiding the Wagner Pitfall*

Based on the above discussion, this Article suggests that subsection (k) of Rule 9.110 be repealed and subsections (a)(3)(D) and (E) (*italicized portions*) be added to Rule 9.130, as follows:

(3) Review of non-final orders of lower tribunals is limited to those which:

. . .

(D) *dispose of a case as to any party;*

(E) *dispose of a separate and distinct cause of action which is not interdependent with other pleaded claims.*⁵⁴

The requirement that an order which disposes of a case as to a party must be appealed within thirty days should be retained. Thus, subsection (g) of Rule 9.130 should be amended (by adding *italicized portion*) to read:

(g) **Review on Full Appeal.** This rule shall not preclude initial review of a non-final order on appeal from the final order in the cause; *provided, however, that appeal of orders reviewable pursuant to subsection (a)(3)(D) must be commenced by filing a notice of appeal within thirty (30) days of rendition of the order.*⁵⁵

Finally, this Article acknowledges that the proposed changes include a risk of jurisdictional problems where an adversely affected party moves: for a new trial, rehearing, or certification; to alter or amend; or for judgment in accordance with prior motion for directed verdict, notwithstanding verdict, in arrest of judgment, or a challenge to the verdict. That is, where such a motion is authorized, its timely filing postpones rendition of the order, so the time for filing the notice of appeal does not begin to run until disposition of the motion.⁵⁶ In *Wagner v. Bieley, Wagner & Associates*⁵⁷ the Supreme Court of

54. *Cf. id.* 9.130(a).

55. *Cf. id.* 9.130(g).

56. *See id.* 9.020(g); Estate of Zimbrick, 453 So. 2d 1155, 1157 (Fla. 4th DCA 1984). Most often the applicable motion would be one for rehearing, but circumstances can be conceived where one or more of the other authorized motions would be appropriate, such as where a separate and distinct claim is severed and tried by a jury while the other claims are held in abeyance.

57. 263 So. 2d 1 (Fla. 1972).

Florida held that motions for rehearing and other post-trial relief were not authorized as to interlocutory orders and thus do not delay rendition of the order sought to be reviewed.⁵⁸ If a party incorrectly waits for disposition of a motion for rehearing or other apparently authorized relief before filing a notice of appeal, and the notice is filed more than thirty days after the order on the merits is rendered, appellate jurisdiction is not properly invoked and the appeal is subject to dismissal.⁵⁹ While this result is not as harsh as it might seem because the order could still be reviewed on plenary appeal,⁶⁰ there is risk that under the suggested amended rules a party may move for rehearing of an order disposing of a case as to a party, wait more than thirty days to file a notice of appeal while the trial court considers the motion, and consequently lose the right to appellate review. While the orders in question do not meet the classic definition of finality, they may "partake of the character of a final decree"⁶¹ sufficiently to authorize such motions as those for a new trial or rehearing. A better solution is to amend the Florida Rules of Civil Procedure⁶² to state that appropriate motions are authorized when directed to orders that dispose of a case as to a party or an order which disposes of a separate and distinct claim.⁶³ This would permit the parties and the lower tribunal to utilize the familiar and well-established "post-trial motions" in that forum without threat of losing the right of appellate review.

IV. CONCLUSION

While Rule 9.110(k), Florida Rules of Appellate Procedure, eliminates the "*Mendez* pitfall" and authorizes review of certain orders at a time in the proceedings when appellate review is appropriate, the rule's classification of these orders as "final" creates certain procedural and jurisdictional problems for the parties and the trial and appellate forums. This Article suggests reclassifying these orders as non-

58. *Id.* at 4.

59. *Id.* at 3; *Gordon v. Barley*, 383 So. 2d 322, 324 (Fla. 5th DCA 1980).

60. *But see Williams v. Department of Health & Rehabilitative Servs.*, 468 So. 2d 504 (Fla. 5th DCA 1985) (motion for rehearing directed to order denying motion for relief from judgment not authorized with the right to appellate review presumably lost).

61. *Clearwater Fed. Sav. & Loan Ass'n v. Sampson*, 336 So. 2d 78, 80 (Fla. 1976); *see supra* note 43.

62. *See FLA. R. CIV. P.* 1.530.

63. For example, if the appellate court finds that the claims disposed of by an order are not separate and distinct and that the appellant waited more than thirty days to file a notice of appeal, the notice could be found untimely when a motion for rehearing was directed to the order. Of course, if the claims are not separate and distinct, the order would not be reviewable until after rendition of a true final order, so no right of review could be lost under that hypothetical set of facts.

final and making corresponding changes in the applicable rules to correct these problems. Such modification would benefit courts, attorneys and litigants.