The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL: CS/SB 1424

INTRODUCER: Judiciary Committee and Senators Gaetz and Aronberg

SUBJECT: Summary Judgment/Florida Supreme Court

DATE: March 20, 2009 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Gizzi	Maclure	JU	**Fav/CS**
2.			JA	
3.				
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

This bill expresses the intent of the Legislature to encourage the Supreme Court to adopt rules authorizing a party to appeal an order denying a motion for summary judgment. A rule change by the court would allow a moving party to seek immediate interlocutory review of a denied summary judgment motion.

II. Present Situation:

Summary Judgment

Summary judgment orders are granted in a proceeding upon showing "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[1] The primary purpose of summary judgment is "to promote the efficient allocation … of judicial resources, and to protect litigants" from the high costs associated with meritless and

[1] Fla. R. Civ. P. 1.510(c).

frivolous litigation.[2] The positive attributes of summary judgment have played a vital part in increasing the credibility of Florida courts.[3]

The evolving role of judges in managing litigation has prompted some scholars to inquire whether traditional techniques and practices, such as summary judgment motions, are still providing the benefits they were designed to create.[4] One Florida attorney argues that a party's inability to appeal the denial of a valid summary judgment motion is in direct conflict with the primary intent of summary judgment:

> Unfortunately, in some state courts today, a party who would be entitled to summary judgment based on a correct application of those standards may nevertheless be forced to submit to trial because interlocutory appeal of summary judgment is not available. Such litigants must endure precisely the sort of costs the summary judgment rule was designed to avoid.[5]

The results of these actions, some argue, have constrained suitable summary judgment motions to adhere to trial court procedures that would otherwise be dismissed and have further created unreasonable litigation expenses in cases "when no triable issue exists."[6] These costs are contended to be particularly burdensome on "small businesses and individual defendants" who not only endure financial damages but also the reputational harm of being a party to an improper lawsuit.[7] Society may also be inconvenienced if administrative delay is generated from an overcrowded court system burdened by needless litigation.[8]

Others note that the costs associated with appellate review of pretrial decisions and reductions in the speed of the pretrial process are potential risks with the concept of allowing an immediate right of appeal for denied summary judgment orders.[9]

Interlocutory Orders in Florida

An order that grants or denies a summary judgment motion is classified as "interlocutory in character."[10] Florida courts do not consider a summary judgment order a final order subject to appellate review because it "merely establishes an entitlement to a judgment but is not itself a

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[2] Robert G. Kerrigan, *Allowing Interlocutory Appeals From Orders Denying Summary Judgment*, 80 Fla. B.J. 42, 42 (Oct. 2006) (citing *Dalton v. Alston & Bird*, 741 F. Supp. 1322, 1326 (S.D. Ill. 1996)).
[3] *See CIA. Ecuatoriana De Aviacion, C. A. v. U.S. and Overseas Corp.*, 144 So. 2d 338, 340 (Fla. 3d DCA 1962).
[4] *See, e.g.*, Jack H. Friedenthal and Joshua E. Gardner, *Judicial Discretion to Deny Summary Judgment in the Era of Managerial Judging*, 31 Hofstra L. Rev. 91 (2002); Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 Yale L. J. 27 (Oct. 2003).
[5] Kerrigan, *supra* note 2, at 42.
[6] *Id.* at 42-43.
[7] *Id.*
[8] Friedenthal and Gardner, *supra* note 4, at 121.
[9] Molot, *supra* note 4, at 89.
[10] Fla. R. Civ. P. 1.510(c). (Note: The terms "interlocutory" and "non-final" order will be used interchangeably throughout this analysis.)

judgment."[11] These types of "piecemeal appeals" are not permitted in Florida unless otherwise provided by law.[12]

Florida R. App. P. 9.130(a) provides a limited number of non-final orders that are authorized for interlocutory appeal. Under that rule:

> (3) Appeals to the district courts of appeal of non-final orders are limited to those that
> (A) concern venue;
> (B) grant, continue, modify, deny, or dissolve injunctions, or refuse to modify or dissolve injunctions;
> (C) determine
> (i) the jurisdiction of the person;
> (ii) the right to immediate possession of property, including but not limited to orders that grant, modify, dissolve or refuse to grant, modify, or dissolve writs of replevin, garnishment, or attachment;
> (iii) the right to immediate monetary relief or child custody in family law matters;
> (iv) the entitlement of a party to arbitration, or to an appraisal under an insurance policy;
> (v) that, as a matter of law, a party is not entitled to workers' compensation immunity;
> (vi) that a class should be certified;
> (vii) that, as a matter of law, a party is not entitled to absolute or qualified immunity in a civil rights claim arising under federal law; or
> (viii) that a governmental entity has taken action that has inordinately burdened real property within the meaning of section 70.001(6)(a), Florida Statutes;
> (D) grant or deny the appointment of a receiver, and terminate or refuse to terminate a receivership.[13]

The Florida Supreme Court has declined to extend eligibility for interlocutory reviews beyond non-final orders "for which an appeal as of right has been provided by law" under Fla. R. App. P. 9.130(a)(3).[14]

The Court has also restricted a party's ability to use common law certiorari as a means to "circumvent the interlocutory appeal rule" by limiting certiorari review to those cases in which the trial court's order "depart[s] from the essential requirements of law and … cause[s] material injury to the petitioner … leaving no adequate remedy on appeal."[15] Lower Florida courts have determined that summary judgment orders do not qualify for pre-trial appeal under common law certiorari because they do not create the type of "injury … which cannot be remedied after final

[11] 3 Fla. Jur. 2d *Appellate Review* s. 64 (2009).
[12] *Perry v. Perry*, 976 So. 2d 1151 (Fla. 4th DCA 2008).
[13] Fla. R. App. P. 9.130(a)(3).
[14] Kerrigan, *supra* note 2, at 44 (citing Fla. R. App. P. 9.130(a) and *National Assur. Underwriters v. Kelley*, 702 So. 2d 614, 615 (Fla. 4th DCA 1997)).
[15] *Martin-Johnson, Inc. v. Savage*, 509 So. 2d 1097, 1099 (Fla. 1987).

judgment."[16] Consequently, a "non-final order denying a motion for summary judgment is not reviewable by interlocutory appeal or common-law certiorari" in Florida.[17] As a result, a moving party who is denied a motion to summary judgment is required to postpone appellate review on the order "until the matter is concluded in the trial court."[18]

Other Jurisdictions

A few states have reduced the jurisdictional barriers of their final judgment rules by extending interlocutory review privileges to cover summary judgment orders.[19] At least one jurisdiction provides full interlocutory appeal rights for summary judgment motions, while others provide a limited right for review.

The Delaware Supreme Court allows pre-trial appeals for summary judgment so long as the order determines "substantial issues and establishes legal rights."[20] Hawaii also allows moving parties to obtain a pre-trial review of their summary judgment orders, but at the limited discretion of the trial court.[21] Under Federal law, appellate courts have the discretion to hear non-final district court orders if it "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal … may materially advance the ultimate termination of the litigation."[22]

Some attorneys fear that providing litigants with limited appeal rights would fall short of achieving the intended benefits of summary judgment.[23] Such proponents argue for a more sufficient method that would create "a general right of review … either as an absolute right or as a matter resting within the discretion of the appellate court."[24]

The Supreme Court of New York has adopted such a procedure by providing summary judgment motions with an appeal as of right, similar to those listed in Fla. R. App. P. 9.130(a)(3). Under New York, a moving party is entitled to an immediate appeal of a denied summary judgment order so long as it is appealed before a final judgment is issued.[25]

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[16] *Vanco Construction, Inc. v. Nucor Corp.*, 378 So. 2d 116, 116 (Fla. 5th DCA 1980); *see also Paul N. Howard Company, INA, v. Camp, Dresser & McKee, Inc.*, 938 So. 2d 638, 638 (Fla. 5th DCA 2006).
[17] *Barber v. Wonderland Greyhound Park*, 656 So. 2d 961, 961-962 (Fla. 5th DCA 1995) (citing *Vanco Constr., Inc. v Nucor Corp.*, 378 So. 2d 116 (Fla. 5th DCA 1980)).
[18] *Martin-Johnson, Inc.*, 509 So. 2d at 1098.
[19] Note: Concepts expressed in portions of this section of the bill analysis were obtained through the legal research conducted by Attorney Robert G. Kerrigan in the previously cited Florida Bar Journal, *Allowing Interlocutory Appeals From Orders Denying Summary Judgment*.
[20] *Haveg Corporation v. Guyer*, 58 Del. 535, 538 (Del. 1965).
[21] HAW. REV. STAT. s. 641-1(b) ("… an appeal in a civil matter may be allowed by a circuit court in its discretion from an order denying a motion to dismiss or from any interlocutory judgment, order, or decree…").
[22] Kerrigan, *supra* note 2, at 46 (quoting 28 U.S.C. s. 1292(b)).
[23] *Id.*
[24] *Id.*
[25] *Id.* (citing NY CPLR s. 5701(a)1.: "from any final or interlocutory judgment except one entered subsequent to an order of the appellate division which disposers of all issues in the action;"); *see also Ginzburg v. Tempco, Inc.*, 688 N.Y.S.2d 230 (N.Y. App. Div. 1999).

Florida Constitutional Provisions

The State Constitution provides the Supreme Court with power to "adopt rules for the practice and procedure in all courts."[26] In addition to other judiciary powers, article V, section 4(b)(1) of the Florida Constitution grants the Supreme Court the authority to adopt court rules that determine when an interlocutory order is entitled to appellate review. District courts of appeal "may review interlocutory orders in such cases to the extent provided by rules adopted by the supreme court."[27]

III. Effect of Proposed Changes:

This bill expresses legislative intent for the Supreme Court to allow a moving party to seek immediate interlocutory review of a denied summary judgment motion, thereby eliminating the need to obtain a final judgment before appealing the order.

The language of the bill encourages the Supreme Court to adopt rules of procedure authorizing a moving party to seek pre-trial appeal of summary judgment orders and to further provide instructions requiring trial judges to submit a written order explaining the basis of a denied summary judgment order.

If the rule change as envisioned by this bill is adopted by the Supreme Court, an appellant would be permitted to submit a simplified brief to the appellate court requesting interlocutory review solely on the basis of the summary judgment motion. The pending case would continue in the trial court until the appellate court grants discretionary review, at which time the appellate court would assume temporary jurisdiction until the appeal is resolved.

In turn, a rule change would create another class of non-final orders that would be authorized to obtain interlocutory appeal as of right under Fla. R. App. P. 9.130(a)(3).

This act shall take effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

[26] FLA. CONST. art. V, s. 2(a).
[27] FLA. CONST. art. V, s. 4(b)(1).

D. Other Constitutional Issues:

Article II, section 3 of the Florida Constitution requires the powers of the state be divided into three branches of government and declares that "[n]o person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."[28]

Florida case law has held, that "[t]he Constitution does not authorize the legislature to provide for interlocutory review. Any statute purporting to grant interlocutory appeals is clearly a declaration of legislative policy and no more. … [W]e find that [the Supreme Court] alone has the power to define the scope of interlocutory appeals…."[29]

However, because this bill only expresses legislative intent that the Supreme Court amend its rules, it does not create a separation of powers issue.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

This bill encourages the Supreme Court to allow moving parties to seek immediate appeal from a denied summary judgment motion. A new appeal as of right may create additional costs on the state courts system associated with amending the current rules of appellate procedure. In the likelihood of increased trial court appeals, a rule change may also generate extra expenses for appellate courts.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

[28] FLA. CONST. art. II, s. 3.
[29] *State v. Gaines*, 770 So. 2d 1221, 1224-25 (Fla. 2000).

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing the differences between the Committee Substitute and prior version of the bill.)

CS by Judiciary on March 18, 2009:
The committee substitute replaces the word "defendant" with the word "party" in one of the "whereas" clauses, describing who is not entitled to immediate appeal for a denied motion for summary judgment under current law.

B. Amendments:

None.