TERRY'S TAKES

April 23-29, 2023

Supreme Court of Florida

In Re: Amendments to Florida Rule of Civil Procedure 1.530 and Florida Family Law Rule of Procedure 12.530

Supreme Court of Florida
4/27/23, Per Curiam
Topics: Motion for New Trial; Rehearing

The Supreme Court of Florida seems to have heard the complaints about its recent rule change. After amending the rule late last August to require that an alleged failure of a trial judge to made sufficient factual findings has to be preserved for appeal by a motion for rehearing, the Court is again amending Rule 1.530 (and the similar Family Law Rule 12.530).

After hearing public comment on the rule change, the Supreme Court retreated from the harsher position and amended the rule to require that in order to preserve the issue for appeal, a party has to file a motion for rehearing if it wants to argue on appeal that a judge failed "to make required **findings of fact**." What's the difference? My understanding is that only a complete lack of factual finding on a given issue needs to be brought to the court's attention via rehearing, but if the judge makes a factual finding and the aggrieved party wants to argue on appeal that the factual finding is unsupported in the record by sufficient or competent, substantial evidence, that argument need not be preserved by a motion for rehearing in light of the rule change. Time will tell if this view is correct.

Notably, this rule is applicable to "**all orders**, not just final judgments, and makes clear that the rules only apply when a judge is required to make specific findings of fact and not when a party seeks to make other challenges to a trial court's order." The new rule looks like this:

> (a) Jury and Non-Jury Actions. A new trial may be granted to all or any of the parties and on all or a part of the issues. To preserve for appeal a challenge to ~~the sufficiency of a trial court's findings in the final judgment~~ failure of the trial court to make required findings of fact, a party must raise that issue in a motion for rehearing under this rule. On a motion for a rehearing of matters heard without a jury, including summary judgments, the court may open the judgment if one has been entered, take additional testimony, and enter a new judgment.

https://supremecourt.flcourts.gov/content/download/867123/opinion/sc2022-0756.pdf

Third DCA

Carnevale v. Shir

3d DCA
4/26/23, Judge Bokor

Topics: Disqualification or Recusal of Judge; Writ of Prohibition

Carnevale, the Appellant, filed motions to disqualify the trial judge from presiding over three cases. The Carnevales argued that the trial judge showed bias due to social medial postings showing a friendly relationship with a proposed third-party intervenor, Mr. Feldman (a lawyer), and Mr. Feldman's counsel. The judge also allowed Mr. Feldman to participate in hearings without having been formally added as a party.

Rule 2.330(i) bars a second motion to disqualify a judge for alleged prejudice or partiality if there was a prior motion by the same party and a successor judge was appointed. The only exception is if the judge rules that he or she is in fact not fair or impartial. Here, the judge denied the motion to disqualify him based on the fact that the Carnevales had filed a motion to disqualify the predecessor judge.

After the judge denied the motions, the Carnevales filed petitions for writs of prohibition in all three cases. The DCA put out three identical orders for all three cases. Though a petition is an original proceeding, not an appeal, the DCA stated that if a successor judge does not **admit** he or she is impartial, the DCA "reviews" that determination under **an abuse of discretion**. The DCA cited one of its cases from February 2023 for the proposition that prohibition "does not lie unless the record clearly refutes the successor judge's decision to deny the motion."

(NOTE: The standard applied here seems to apply only to motions against successor judges. In ANOTHER case issued by the Third DCA in February 2023, Saenz v. Sanchez, the court expressly stated that the standard of review of a trial court's determination on a motion to disqualify is *de novo*, not abuse of discretion, and it cited its own precedent in Rodriguez v. Halsall, No. 3D22-2056, 2023 WL 27889, at *1 (Fla. 3d DCA Jan. 4, 2023). And the standard for obtaining the writ in a case where a judge denied a motion to disqualify was this: "To be legally sufficient, a motion to disqualify must demonstrate some actual bias or prejudice so as to create a reasonable fear that a fair trial cannot be had." Hollywood Park Apartments West, LLC v. City of Hollywood, Florida, No. 4D22-1523, 2023 WL 151312, at *1 (Fla. 4th DCA Jan. 11, 2023)(quoting Downs v. Moore, 801 So. 2d 906, 915 (Fla. 2001)(internal quotation omitted)). Those cases did not deal with successor judges, but, frankly, that fact should not affect the **standard** for a writ involving original jurisdiction. Technically, the DCA is not "reviewing" anything. It's not an appeal. Which is why the *de novo* standard is the only one that makes sense. And the substance—proof of actual bias or prejudice so as to create a reasonable fear that a fair trial cannot be had—seems equivalent to the rule that a movant must show that a successor judge is in fact not fair or impartial. The major difference in the cases does not seem attributable to the law on the merits, but, instead, the DCA's decision whether to apply a "de novo" standard or an "abuse of discretion" standard, and the Third DCA seems to be putting out contrary decisions. Or that is, at least, Terry's Take on the issue.)

The DCA did, however, move on to analyze the facts, and its factual findings exonerate the judge. Thus, it appears that the DCA would have reached the same result based on a *de novo* review. https://supremecourt.flcourts.gov/content/download/867049/opinion/221984_DC02_04262023_095642_i.pdf

Kilinsky v. Bank Leumi Le-Israel, Ltd.

3d DCA

4/26/23, Per Curiam (Emas, Scales, and Miller)
Topics: Personal Jurisdiction

In this case, the party apparently agreed to personal jurisdiction in a foreign court and then tried to argue the foreign judgment was not enforceable in American courts because the foreign court lacked personal jurisdiction over him. The DCA rejected the argument.

An out-of-country foreign judgment will be recognized as enforceable in American courts and not disregarded based on possible lack of personal jurisdiction if the defendant, prior to the commencement of the proceedings, agreed to submit to the jurisdiction of the foreign court with regard to the subject matter involved in the final judgment.

If the defendant raised the issue of personal jurisdiction in the foreign court, he can avoid the judgment in American courts if he can demonstrate that the foreign court lacked personal jurisdiction, but he bears the burden to show a reason for non-recognition if the foreign judgment, on its face, awarded a monetary sum certain and was final, conclusive, and capable of enforcement.
https://supremecourt.flcourts.gov/content/download/867041/opinion/220273_DC05_04262023_092639_i.pdf