

Trial Law TIPS

Roy D. Wasson's
TIP #58

ROY D. WASSON is board certified in Appellate Practice with extensive courtroom experience in more than 750 appeals and thousands of trial court cases, civil, criminal, family and commercial. AV-rated.

Successor Judges Can Overturn Prior Non-Final Rulings of Original Judge

Introduction

More and more frequently trial lawyers are finding a new face on the bench at the time of trial from the judge who had previously handled the case. In addition to the normal turnover resulting from judicial retirements and elevations to higher courts, judges are rotating between various divisions more often than they used to, requiring trial lawyers to educate the replacement judge to complicated cases, sometimes on the very eve of trial. Of course, having a new judge on the case is not necessarily all that bad, especially where a predecessor judge has ruled against you on certain important interlocutory matters.

Courthouse Legend—“I Can’t Reconsider My Predecessor’s Rulings”

Most trial lawyers are familiar with the principle of law that a successor judge who takes the place of a disqualified judge may reconsider and vacate prior rulings of the judge who has been recused from the case. *See* Fla. R. Jud. Admin. 2.160(h). However, there is a popular “courthouse legend” afoot that a successor judge has no power to overturn rulings of a predecessor judge, where the original judge was not recused, but simply left the case for other reasons. Not so. The replacement judge can reconsider and overturn any non-final ruling made by his or her predecessor.

The best case on this point for those of you who may be seeking a second bite at the apple is *Deemer v. Hallett Pontiac, Inc.*, 288 So. 2d 526 (3d DCA 1974). In that case, Judge Turner had ordered the plaintiff to make an election of remedies. The case was to be tried before another judge named Judge Balaban. The plaintiff moved to set aside Judge Turner’s order and filed a motion for pre-trial conference. “Although feeling that Judge Turner’s order was incorrect, Judge Balaban . . . entered an order denying the plaintiff’s motion to set aside the order [requiring an election of remedies] which the judge believed he could not reverse in light of *Balfe v. Gulf Oil Co.-Latin America . . .*” *Deemer*, 288 So. 2d at 526.

On appeal, the Third District held as follows:

Where one circuit judge has made an interlocutory order in a case, and for some reason is not able to continue to preside therein, ***another judge of the circuit court*** (before whom the cause is entitled to come by virtue of his assignment thereto by the presiding judge or an approved rule of the court) ***can vacate the prior order when the case is pending and has not gone to final judgment.*** Here the trial judge mistakenly concluded the contrary and grounded his order thereon, upon the assumption that such action was precluded by *Balfe v. Gulf Oil Company-Latin America*, Fla. App.1973, 279 So.2d 94. ***The Balfe decision is not applicable to successive interlocutory orders by different circuit judges in a pending cause.***

The rule referred to in *Balfe* is one which precludes a successor judge from reviewing, modifying or reversing a ***final order or judgment*** in a cause made by his predecessor (unless for mistake or fraud). See to like effect, *Lawyers Co-op Pub. Co. v. Williams*, 149 Fla. 390, 5 So.2d 871, 872; *Groover v. Walker*, Fla.1956, 88 So.2d 312.

On occasion, for varied reasons or circumstances, two or more judges of a circuit will act separately at different stages of a pending case. When that occurs, they have equal powers, and each has the power of the court. *State ex rel. Brooks v. Freeland*, 103 Fla. 663, 138 So. 27, 28; *State ex rel. Palmer v. Atkinson*, 116 Fla. 366, 156 So. 726, 96 A.L.R. 539; *City of Coral Gables v. Blount*, 131 Fla. 36, 178 So. 554.

While a case is pending, a second circuit judge properly assigned to the case can vacate or vary interlocutory orders made earlier therein by another judge, the same as could be done by the latter. In *Groover v. Walker*, supra, after stating the rule against a successor judge reviewing or reversing a predecessor judge's final order or judgment in a case, the Court stated: "The rule would appear to be otherwise with respect to interlocutory orders or decrees," citing *Jones v. McConnon & Co.*, 100 Fla. 1158, 130 So. 760, so holding.

Id. at 527.

Putting the Shoe on the Other Foot

What if it is your ox that is being gored by this principle of law that the new judge can overturn prior rulings? If the replacement judge is being asked by the defense attorney to vacate rulings that favored your side of the case, you may want to think about going back to the decision in *Groover v. Walker*, 88 So. 2d 312 (Fla. 1956). That case was cited as authority by the Third DCA in *Deemer*, but the *Deemer* case did not expressly address one aspect of *Groover* which you may find useful. *Groover* contained

language to the effect that a successor judge was not permitted to “reverse or modify his predecessor’s final orders *or discretionary rulings*” 88 So. 2d at 314 (emphasis added).

It goes without saying that most non-final rulings are on discretionary matters, so you may find it useful to argue that a successor judge cannot overturn a predecessor’s exercise of discretion in entering a non-final order. You may encounter the argument that the reference in *Groover* to “discretionary rulings” was simply dicta, and that the bright line test for the power of a successor judge to overturn a predecessor judge’s prior ruling is whether that ruling was final or non-final. The actual holding of the *Groover* court was that, while there is a rule against a successor judge overturning a predecessor judge’s prior final rulings, “[t]he rule would appear to be otherwise with respect to interlocutory orders or decrees.” 88 So. 2d at 314. At least now you should have the ammunition to make the appropriate argument under the facts and circumstances under the case.

Conclusion

You may not succeed the first time you try to dispel the “courthouse legend” that a replacement judge cannot revisit the prior rulings of his or her predecessor. But if your client’s position cannot survive trial under the original rulings in the case, you only have one option, and that is to

Keep Tryin!

Roy