

**IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT, STATE OF FLORIDA**

FOLEY, *et ux*, *Appellants*

vs.

ORANGE COUNTY, *et alia*, *Appellees*

Appeal No.: 5D21-233

Case No.: 2016-CA-007634-O

**MOTION FOR REHEARING
AND
CERTIFICATION**

RECEIVED, 03/24/2021 03:20:27 PM, Clerk, Fifth District Court of Appeal

APPELLANTS DAVID AND JENNIFER FOLEY MOVE THE COURT pursuant Rule 9.330, Florida Rules of Appellate Procedure, for rehearing of its order, dated March 23, 2021, on the Foleys’ “Motion for Order Directing Compliance with Rule 9.200,” and for certification of the following question to the Florida Supreme Court:

Is the word “may” in Rule 9.200(f)(3), “a word of mandate” when an appellant moves the court per Rule 9.200(e), to enforce the ministerial duties assigned the clerk by Rule 9.200(d)(1)(C)(i)(ii) and (iii)?

BACKGROUND

1. The Foleys’ “Motion for Order Directing Compliance with Rule 9.200,” requested the following relief per Rule 9.200(e):

David and Jennifer Foley move the Court for an order directing the clerk of the Orange County Circuit Court to correct the Record Index and Record on Appeal as follows: 1) make the record text searchable; 2) replace the document bookmarked as “01/28/2021 -

Directions to Clerk (p. 1490)” with the “Directions to Clerk,” originally e-filed by the Foleys January 28, 2021; 3) insert into the Record “Plaintiffs’ Motion for Judicial Notice” filed May 22, 2017, as requested by the Foleys’ “Directions to the Clerk;” 4) repaginate the record and index to reflect the replacement of the Foleys’ “Directions to Clerk” and the insertion of their “Plaintiffs’ Motion for Judicial Notice;” 5) remove extraneous and unauthorized bookmarks from the PDF of the Record on Appeal; and, 6) correct the “Total Volumes” number in the index heading, or eliminate it and the unauthorized volume bookmarks in the PDF of the Record on Appeal.

2. The Foleys’ motion cited and quoted the specific provisions of Rule 9.200(d) that made each of their requests a ministerial duty of the clerk.
3. Appellee Orange County objected to all but item three (3) on grounds that the remaining relief was not “practical or economical” for the Orange County clerk (who happens to be a defendant/appellee in this case).
4. The court’s order of March 23 granted the Foleys only that relief conceded by Orange County, and stated:

ORDERED that Appellants’ “Motion for Order Directing Compliance with Rule 9.200” and Appendix, filed March 12, 2021, is treated as a motion to supplement the record and granted. Appellants shall, by April 1, 2021, file supplemental directions to the clerk of the lower tribunal that include Plaintiffs’ Motion for Judicial Notice, filed May 22, 2017. Appellants shall cause the supplemental record to be transmitted to this Court by April 22, 2021. It is further

ORDERED that all remaining requests in Appellants’ “Motion for Order Directing Compliance with Rule 9.200” and Appendix are denied.

ARGUMENT

The duty provision of Rule 9.200(e) states: “The burden to ensure that the record is prepared and transmitted in accordance with these rules shall be on the petitioner or the appellant.” This provision makes the Foleys solely responsible for providing the merits panel – and any other reviewing judges – with a record that is not only complete but is also conveniently text searchable and properly bookmarked for ease of navigation as required by the rules.

The enforcement provision of Rule 9.200(e), states: “Any party may enforce the provisions of this rule by motion.” This provision empowers the Foleys to expeditiously fulfill their duty by motion, rather than by the longer more costly process of mandamus; mandamus is otherwise the go-to alternative here because each request in the Foleys’ motion is a ministerial duty of the clerk (who happens to be a defendant/appellee in this case).

The motions panel, however, apparently construes Rule 9.040(c),¹ and the word “may” in Rule 9.200(f)(3),² as granting it discretion to alter the ministerial duties assigned the clerk by Rule 9.200(d), and to annul the authority and choice of

¹ Rule 9.040(c). Remedy. If a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought; provided that it shall not be the responsibility of the court to seek the proper remedy.

² Rule 9.200(f)(3). If the court finds that the record is not in compliance with the requirements of subdivision (d) of this rule, it may direct the clerk of the lower tribunal to submit a compliant record, which will replace the previously filed noncompliant record.

remedy granted the Foleys by Rule 9.200(e); the motions panel presumes it is authorized to rewrite the appellate rules and inconvenience the merits panel when Orange County suggests doing so would be “practical or economical” for the Orange County clerk (who happens to be a defendant/appellee in this case).

The Foleys disagree. The Supreme Court alone decides what rules of procedure are “practical” and must be observed, Article V, Section 2,³ Florida Constitution. The Supreme Court has decided it “practical” to assign the clerk certain ministerial duties – among them those the Foleys move this court to enforce. The Supreme Court has decided it “practical” to give the Foleys the power to compel performance of those ministerial duties by motion rather than by mandamus. Consequently, it is not “practical” or reasonable for this court to assume these rules are arbitrary, meaningless, or optional; it is not “practical” or reasonable to assume the Supreme Court gave this court discretion to subvert the duties it assigned the clerk or the power it granted the Foleys; it is not “practical” or reasonable to assume this court “may” otherwise avoid the Foleys’ chosen remedy per Rule 9.200(e), by offering them a consolation remedy proposed by

³ SECTION 2. Administration; practice and procedure.

(a) The supreme court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review, the administrative supervision of all courts, the transfer to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought...

appellees (for the convenience of that appellee who is the clerk) to supplement the record per Rule 9.200(f)(2).

The word “may” in Rule 9.200(f)(3), does not grant the court discretion to alter the ministerial duties assigned the clerk by Rule 9.200(d), or to annul the authority and choice of remedy granted the Foleys by Rule 9.200(e).

“[I]t is settled that the word ‘may’ is not always permissive, but may be a word of mandate in an appropriate context. This especially is true where the [rule] in question is necessary to preserve a constitutional right.” *Myles v. State*, 602 So.2d 1278, 1281 (Fla.1992). Here Article I, Sections 2,⁴ 9,⁵ and 21,⁶ of the Florida Constitution guarantee the Foleys the right and the authority to compel the clerk and the court to follow the rules and procedures established by the Florida Supreme Court as they must do for all others before the law. There is nothing more “practical” than due process and equal protection.

⁴ SECTION 2. Basic rights. All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property. No person shall be deprived of any right because of race, religion, national origin, or physical disability.

⁵ SECTION 9. Due process. No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself.

⁶ SECTION 21. Access to courts. The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

The Foleys respect the tenure and authority of Judges Cohen, Wallis, and Edwards. But in deciding not to inconvenience the clerk (who happens to be a defendant/appellee in this case) the motions panel overlooks or misapprehends their duty to facilitate the duty and authority given the Foleys by Rule 9.200(e) to ensure the merits panel – and any other reviewing judges or justices – have a record that is not only sufficiently complete to satisfy enlightenment era jurists like Blackstone or Coke, but is also up to the technological standards of the even geekier generation of the 21st century bench, i.e., a record that is conveniently text searchable and properly bookmarked for easy point-n-click navigation.

For these reasons the Foleys ask the court to rehear their motion and to certify the following question as one having a great effect on the proper administration of justice throughout 21st century Florida:

Is the word “may” in Rule 9.200(f)(3), “a word of mandate” when an appellant moves the court per Rule 9.200(e), to enforce the ministerial duties assigned the clerk by Rule 9.200(d)(1)(C)(i)(ii) and (iii)?

CONCLUSION

WHEREFORE DAVID AND JENNIFER FOLEY MOVE THE COURT pursuant Rule 9.330, Florida Rules of Appellate Procedure, for rehearing of its order, dated March 23, 2021, on the Foleys’ “Motion for Order Directing Compliance with Rule 9.200,” and for certification of the following question to the Florida Supreme Court:

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CERTIFICATE OF SERVICE

Appellants certify that on March 24, 2021, the foregoing was electronically filed with the Clerk of the Court, and served on the following, through ePORTAL:

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Date: March 24, 2021

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