

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

CASE NO.: 5D21-233
L.T. CASE NO.: 2016-CA-007634-O

DAVID W. FOLEY and JENNIFER T. FOLEY,

Appellants,

v.

ORANGE COUNTY, a political subdivision
of the State of Florida, et al.

Appellees.

**APPELLEE, ORANGE COUNTY, FLORIDA'S RESPONSE TO
MOTION FOR REHEARING AND CERTIFICATION**

Appellee, Orange County, Florida, pursuant to Rule 9.330 of the Florida Rules of Appellate Procedure, responds to the Motion for Rehearing and Certification ("Motion") filed by David Foley and Jennifer Foley ("the Foleys") and states:

1. Contrary to the allegations in the Foleys' Motion, the Clerk of the Court is a separate and independent constitutional entity. The Clerk of the Court is not the same entity as Orange County, a charter county and political subdivision of the State of Florida.

2. Further, the Clerk of the Court is not a party to this proceeding. The Clerk of the Court has not filed a response to the Foleys' Motion.

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3. Pursuant to Rule 9.330(a)(2)(A), “[a] motion for rehearing shall state with particularity the points of law or fact that, in the opinion of the movant, the court has overlooked or misapprehended in its order or decision. The motion shall not present issues not previously raised in the proceeding.”

4. It has been a fundamental rule for quite some time that a motion for rehearing that reargues the issue already decided by the court is prohibited. In *Hicks v. Am. Integrity Ins. Co.*, 241 So. 3d 925, 928 (Fla. 5th DCA 2018), the court denied a motion for rehearing and explained:

Appellees’ motion does what [Florida Rule of Appellate Procedure] 9.330(a) proscribes; it re-argues the merits of the case. It appears that counsel are utilizing the motion for rehearing and/or clarification as a last resort to persuade this court to change its mind or to express their displeasure with this court's conclusion. This is not the purpose of [r]ule 9.330. It should be noted that the filing of [r]ule 9.330 motions should be done under very limited circumstances, it is the exception to the norm. Motions for rehearing are strictly limited to calling an appellate court's attention—without argument—to something the court has overlooked or misapprehended. The motion for rehearing is not a vehicle for counsel or the party to continue its attempts at advocacy.

Hicks v. Am. Integrity Ins. Co., 241 So. 3d 925, 928 (Fla. 5th DCA 2018) (citations and quotation marks omitted; emphasis added; quoting *Boardwalk at Daytona Development, LLC v. Paspalakis*, 212 So. 3d 1063, 1063 (Fla. 5th DCA 2017)).

5. A motion for rehearing “is not a vehicle through which an unhappy litigant or attorney [may] reargue the same points previously presented”

McDonnell v. Sanford Airport Auth., 200 So. 3d 83, 84-85 (Fla. 5th DCA 2015) (citing *Ayala v. Gonzalez*, 984 So. 2d 523, 526 (Fla. 5th DCA 2008)).

6. Caution should be exercised when bringing a rehearing motion, as rehearing is only appropriate in exceptional cases. See *Boardwalk at Daytona Dev., LLC v. Paspalakis*, 212 So. 3d 1063 (Fla. 5th DCA 2017); *Lawyers Title Ins. Corp. v. Reitzes*, 631 So. 2d 1101 (Fla. 4th DCA 1994) (imposing monetary sanctions when motion for rehearing merely reargued merits of appellate court’s decision).

7. In application, the Foleys’ Motion for Rehearing and the relief requested therein should be denied for the same reasons as articulated in Orange County’s Response to the Foley’s Motion for Order Directing Compliance with Rule 9.200 filed on March 19, 2021.

8. Similarly, the Foleys’ Motion for Certification should be denied.

9. Rule 9.300(a)(1)(C) of the Florida Rules of Appellate Procedure requires “[a] motion for certification [to] set forth the case(s) that expressly and directly conflicts with the order or decision or set forth the issue or question to be certified as one of great public importance.”

10. Here, the Foleys’ Motion did not expressly and directly identify a case that is in direct conflict with the Court’s Order. The Motion does not raise a question of great public importance. Fla. R. App. P. 9.331(d)(1) (2020).

11. In conclusion, Orange County respectfully requests that this Court deny the Foleys' Motion for Rehearing and for Certification.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of March 2021, pursuant to Florida Rule of Judicial Administration 2.516, the foregoing was filed with the Clerk of the Court by using the Florida Courts E-Filing Portal System. Accordingly, a copy of the foregoing is being served on this day to the attorney(s) or interested parties identified in the e-Portal Electronic Service List, including those listed below, via transmission of Notices of Electronic Filing generated by the e-Portal System.

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