CRACKING THE CODE: INTERPRETING AND ENFORCING THE APPELLATE COURT'S DECISION AND MANDATE

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INTRODUCTION

In 1799, French troops in Egypt discovered a granite slab inscribed with a decree praising an Egyptian king.[1] The decree appeared in hieroglyphic, demotic,[2] and Greek.[3] This slab, the Rosetta Stone, enabled scholars to compare the Greek writings to the other two languages.[4] The stone "was the key to the deciphering of Egyptian hieroglyphics."[5] Sometimes, trial judges and lawyers need to look for a Rosetta Stone to decipher the meaning of decisions handed down by the appellate courts. In law school, students are trained to read appellate decisions and apply them to other cases. However, students are taught little about how to interpret and enforce appellate court decisions. Certain kinds of decisions, or certain language used in decisions, may have different meanings in different contexts, or in different courts. It is not always enough to read the court's decision in the particular case. It sometimes is necessary to read other decisions to understand

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1. Microsoft Encarta Online Encyclopedia, *Rosetta Stone* <http://encarta.msn.com/encnet/crefpages/RefArticle.aspx?refid=761570831>.

2. Demotic language is a "simplified form" of ancient Egyptian writing. *Merriam-Webster's Collegiate Dictionary* 307 (Frederick C. Mish et al. eds., 10th ed., Merriam-Webster, Inc. 2000).

3. Microsoft Encarta Online Encyclopedia, *Rosetta Stone* <http://encarta.msn.com/encnet/crefpages/RefArticle.aspx?refid=761570831>.

4. *Id.*

5. *Id.*

what the appellate court wants the trial court to do. Often, it is necessary to seek further guidance from the appellate court.

This Article will discuss some issues that arise after an appeal is concluded, and, as further proceedings are held in the trial court below, the need for clear directions from the appellate court to the trial court and to the parties and appropriate remedies when the trial court fails to understand or to comply with the appellate mandate.

THE MANDATE

The mandate is the appellate court's official communication of its judgment to the lower tribunal, directing the action the lower tribunal is to take or the disposition it is to make of the cause of action.[6] The appellate court's decision does not become final until the appellate court issues the mandate.[7] The appellate court continues to have jurisdiction of the case until the mandate is remitted to the trial court.[8]

Florida Rule of Appellate Procedure 9.340(a) provides that the court will issue the mandate within fifteen days from the date of the order or decision, unless the court orders otherwise.[9] Copies of the mandate must be served on all parties and on the trial court.[10] The time for issuing the mandate will be extended (1) if a timely motion for rehearing, clarification, or certification has been filed; (2) until fifteen days after rendition of the order denying the motion; or (3) if the motion is granted, until fifteen days after the final determination of the case.[11] The appellate court has discretion to expedite or delay issuing the mandate, so long as that discretion is exercised within the fifteen-day period.[12] Filing a petition for review in the Florida Supreme Court does not automatically stay issuance of the mandate.[13] Instead, the party seeking a

6. *Tierney v. Tierney*, 290 S.2d 136, 137 (Fla. Dist. App. 2d 1974); *Colonel v. Reed*, 379 S.2d 1297, 1298 (Fla. Dist. App. 4th 1980).

7. *Dept. of Health & Rehabilitative Servs. v. S. Beach Pharm., Inc.*, 635 S.2d 117, 120 (Fla. Dist. App. 1st 1994).

8. *Colonel*, 379 S.2d at 1298.

9. Fla. R. App. P. 9.340(a) (2002).

10. *Id.*

11. *Id.* 9.340(b).

12. *S. Beach*, 635 S.2d at 120.

13. *Robbins v. Pfeiffer*, 407 S.2d 1016, 1017 (Fla. Dist. App. 5th 1982).

stay must file a motion asking the court to withhold issuance of the mandate.[14]

INTERPRETING THE MANDATE

Although the trial court's duty to follow the appellate mandate often is described as "ministerial," or involving no discretion, the trial court's task often is not as simple as the word suggests.[15] Following the appellate court's mandate requires the trial court first to interpret the appellate court's decision and then to determine exactly what the appellate court has directed it to do.

Law of the Case

An important consideration in applying and interpreting the appellate court's decision is the doctrine of "the law of the case."[16] In *Department of Transportation v. Juliano*,[17] the Florida Supreme Court recently explained and clarified the doctrine. The doctrine of the law of the case "requires that questions of law actually decided on appeal must govern the case in the same court and the trial court through all subsequent stages of the proceeding."[18] Under this doctrine, a trial court must follow prior rulings of the appellate court, as long as the facts on which the appellate court's decision was based continue to be the facts of the case.[19] The law of the case is a principle of judicial estoppel, related to, but more flexible than, res judicata and collateral estoppel.[20] The doctrine's purpose is "to lend stability to judicial decisions and the jurisprudence of the state, as well as to avoid 'piecemeal' appeals and to bring litigation to an end as expeditiously as possible."[21]

The doctrine of the law of the case applies to issues that were "actually presented and considered" in a prior appeal in the case,

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14. *See generally R.L.W. v. State*, 409 S.2d 1072, 1073 (Fla. Dist. App. 1st 1982) (withholding mandate "during the period provided for invoking Supreme Court review . . . and thereafter, if review is sought, pending final disposition").

15. *E.g. Mendelson v. Mendelson*, 341 S.2d 811, 813–814 (Fla. Dist. App. 2d 1977).

16. *Dicks ex rel. Montgomery v. Jenne*, 740 S.2d 576, 578 (Fla. Dist. App. 4th 1999) (citing *Riley v. Camp*, 130 F.3d 958, 981 (11th Cir. 1997)).

17. 801 S.2d 101 (Fla. 2001).

18. *Id.* at 105.

19. *Id.* at 106.

20. *Id.* at 105. Res judicata and collateral estoppel do not apply to successive appeals in the same case "because the same suit, and not a new and different one, is involved." *Id.*

21. *Parker Family Trust I v. City of Jacksonville*, 804 S.2d 493, 498 (Fla. Dist. App. 1st 2001) (quoting *Strazzula v. Hendrick*, 177 S.2d 1, 3 (Fla. 1965)).

as well as to issues "implicitly addressed or necessarily considered by the appellate court's decision."[22] A reversal by the appellate court is not necessarily an adjudication of any points other than the questions discussed and decided, but if "a particular holding is implicit in the decision rendered, it is no longer open for consideration."[23]

Commentators have noted the confusion created by the Florida Supreme Court's decision in *Airvac, Incorporated v. Ranger Insurance Company*.[24] Some courts had interpreted *Airvac* as holding that the law of the case applies to issues the court could have decided, even if it did not.[25]

In *Juliano*, the court determined that the doctrine of the law of the case does not apply to issues that were neither raised by the parties, nor decided by the appellate court.[26] The *Juliano* court expressly receded from *Airvac* and stated that *Airvac* was decided on the doctrine of waiver, not the law of the case.[27] However, as in *Airvac*, a party's failure to raise an issue on appeal that was the subject of a prior ruling by the trial court can constitute a waiver and can preclude the trial court from subsequently reconsidering that decision.[28]

Juliano has not cleared up all the confusion about the law of the case. The trial court still must discern what issues were actually or necessarily decided by the appellate court. For example, in *Best Meridian Insurance Company v. Tuaty*,[29] the court held that a challenge to admission of certain testimony on whether an insurance company had mailed notices to its insured, was barred by the appellate court's observation in a prior appeal that "the two

22. *Juliano*, 801 S.2d at 106.

23. *S/D Enters., Inc. v. Chase Manhattan Bank, N.A.*, 375 S.2d 1109, 1111 (Fla. Dist. App. 3d 1979).

24. 330 S.2d 467 (Fla. 1976); *see generally* Raymond T. Elligett & Charles P. Schropp, *Law of the Case Revisited*, 68 Fla. B.J. 48, 48–50 (Mar. 1994).

25. *E.g. Valsecchi v. Proprietors Ins. Co.*, 502 S.2d 1310, 1311 (Fla. Dist. App. 3d 1987); *Fed. Deposit Ins. Co. v. Hemmerle*, 592 S.2d 1110, 1116–1117 (Fla. Dist. App. 4th 1991).

26. *Juliano*, 801 S.2d at 107.

27. *Id.*

28. *Id.*; *cf. McBride v. State*, 810 S.2d 1019, 1023 (Fla. Dist. App. 5th 2002) (holding that the law of the case did not preclude relief from an illegal sentence pursuant to a successive Rule 3.800(a) motion, when the defendant raised the same issue in a prior motion that was denied by the trial court and never appealed; certifying question to Florida Supreme Court).

29. 811 S.2d 777 (Fla. Dist. App. 3d 2002)

sides have presented conflicting evidence" on the issue,[30] and that the insured's evidence of nonreceipt of the notices was sufficient to preclude summary judgment on the issue of whether the notices were mailed.[31] Admissibility of the evidence, the court reasoned, was a necessary underpinning of its conclusion that the evidence was sufficient to defeat summary judgment.[32] Thus, a correct application of doctrines such as the law of the case and waiver requires careful study of the appellate court's opinion to determine not only what the court actually decided, but what underlying rationale — stated or unstated — supported the decision.

The appellate court, and not the trial court, may reconsider and correct an erroneous appellate ruling that has become the law of the case if continued application of the prior ruling would result in "manifest injustice."[33] Although departure from the law of the case should be a rare exception, in developing areas of the law, courts are more often apt to find that application of the doctrine of the law of the case would result in a "manifest injustice."

One example is the courts' evolving interpretation of Florida Statutes Section 768.81(3). Enacted in 1986, the statute modified the doctrine of joint and several liability and required courts in negligence actions to have juries apportion fault among the parties.[34] The statute provides, in pertinent part,

> In cases to which this section applies, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability . . . .[35]

Courts interpreting this statute initially were split on whether the jury was required to apportion fault among all parties to the case or among all parties to the incident out of which the case arose, regardless of whether they were parties to the lawsuit.[36] Before the Florida Supreme Court resolved the conflict

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30. *Id.* at 779 (quoting *Best Meridian Ins. Co. v. Tuaty*, 752 S.2d 733, 736 (Fla. Dist. App. 3d 2000)).

31. *Id.*

32. *Id.*

33. *E.g. Juliano*, 801 S.2d at 106; *Brunner Enters., Inc. v. Dept. of Revenue*, 452 S.2d 550, 552 (Fla. 1984).

34. Fla. Stat. § 768.81(3) (2001).

35. *Id.*

36. *Compare Messmer v. Teacher's Ins. Co.*, 588 S.2d 610, 611 (Fla. Dist. App. 5th

by ruling that the jury should apportion fault among all parties to the incident, a substantial number of cases had been tried in which fault was not apportioned properly. *Schindler Elevator Corporation v. Viera*[37] (*"Viera I"*) is one such case.

In *Viera I*, the trial court, following the law as it then existed, refused the defendant's request to list a nonparty on the verdict form for purposes of apportioning fault.[38] The jury found the defendant seventy-five percent at fault and the plaintiff twenty-five percent at fault.[39] The defendant appealed.[40] While the first appeal was pending, the Florida Supreme Court decided in *Fabre v. Marin*[41] that the jury should be instructed to apportion fault to nonparties, not just parties to the litigation.[42] As a result, in *Viera I*, the court reversed the judgment pursuant to *Fabre* and remanded for a new trial, with instructions that the trial court should "confine the issues on retrial to a determination of the negligence, comparative negligence and the apportionment of fault, if any," among the plaintiff, the defendant, and the nonparty.[43] In a motion for rehearing, the plaintiff argued that the defendant's negligence and the plaintiff's comparative negligence should be taken as established, with instructions to the jury to determine only whether the nonparty was negligent and, if so, to apportion fault among the plaintiff, the defendant, and the nonparty.[44] The court denied a rehearing, and the case was remanded for a retrial on all liability issues, but not on damages.[45]

While the second *Viera* trial was pending, the Third District adopted the *Viera* plaintiff's argument in cases requiring reversal because of the *Fabre* decision.[46] The Third District court ulti-

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1991) (requiring apportionment of fault among parties to the incident, whether or not the persons are parties to the litigation) *with Fabre v. Marin*, 597 S.2d 883, 885–886 (Fla. Dist. App. 3d 1992) (requiring an apportionment of fault only among parties to the litigation), *quashed, Fabre v. Marin*, 623 S.2d 1182 (Fla. 1993), *overruled, Wells v. Tallahassee Meml. Regl. Med. Ctr.*, 659 S.2d 249, 254 (Fla. 1995) (overruling only footnote 3 in *Fabre*).

37. 644 S.2d 563 (Fla. Dist. App. 3d 1994) (*Viera I*).
38. *Viera I*, 644 S.2d at 564.
39. *Id.*
40. *Viera II*, 693 S.2d at 1107.
41. 623 S.2d 1182 (Fla. 1993).
42. *Id.* at 1185.
43. *Viera I*, 644 S.2d at 564.
44. *Viera II*, 693 S.2d at 1107.
45. *Id.*
46. *Id.* (citing *Shufflebarger v. Galloway*, 668 S.2d 996, 997 (Fla. Dist. App. 3d 1996) (en banc); *Ashraf v. Smith*, 647 S.2d 892 (Fla. Dist. App. 3d 1994)).

mately sat en banc to resolve the issue. The same court in *Shufflebarger v. Galloway*[47] held "where the issues of negligence and comparative negligence were resolved in the first trial, and the only reversible error was the omission of a *Fabre* nonparty, it is unnecessary to reopen all of the liability issues," thus receding from *Viera I*.[48]

Viera was retried while *Shufflebarger* was under en banc consideration. Although the plaintiff called the pending en banc consideration of the issue to the trial court's attention, the trial court felt "bound by the remand instructions in *Viera I* and sent the case to the jury on all liability issues."[49] This time, the jury came back with a verdict in favor of the defendant.[50]

Before the final judgment was entered in *Viera*, the Third District ruled en banc in *Shufflebarger* that a new trial in such situations should be limited to the issue of apportionment of fault, and the jury should be instructed that the defendant was negligent.[51] The plaintiff in *Viera* moved for a new trial on the *Shufflebarger* terms.[52] The trial court granted the motion on the grounds that it would constitute a "manifest injustice" to deny a new trial when the Third District had receded from *Viera I*, the decision based on which the second trial had just been conducted.[53] The defendant filed an appeal from the order granting the third new trial.[54] The Third District affirmed, concluding that "this is one of the exceptional cases in which we should reconsider the law of the case because to do otherwise would work a manifest injustice."[55] The court noted that when the court, en banc, has receded from an earlier panel decision while the case was pending on remand, it is "appropriate to depart from the law of the case in order to avoid a manifest injustice."[56]

As the tangled tale of *Viera* demonstrates, poorly drafted statutory amendments may require a court to depart from the law

47. 668 S.2d 996 (Fla. Dist. App. 3d 1996) (en banc).

48. *Viera II*, 693 S.2d at 1108 (citing *Shufflebarger*, 668 S.2d at 997 (Fla. Dist. App. 3d 1996) (en banc)).

49. *Id.* At the time, of course, the trial court's ruling was correct.

50. *Id.*

51. *Shufflebarger*, 668 S.2d at 998.

52. *Viera II*, 693 S.2d at 1107.

53. *Id.* at 1108.

54. *Id.* at 1107.

55. *Id.* at 1108.

56. *Id.* (citing *Strazzulla*, 177 S.2d at 4).

of the case when the interpretation of the statute evolves after an appeal and a retrial is pending.[57] However, not every intervening appellate decision that proves a prior appellate decision was wrong will justify departure from the law of the case. A showing of manifest injustice is required. For example, in *Department of Health and Rehabilitative Services v. Shatto*,[58] the court held that an intervening Florida Supreme Court decision on a venue question did not justify departure from the law of the case when there was no manifest injustice.[59]

Thus, in the trial court, application of the doctrine of the law of the case is a complex matter, involving consideration of what was actually decided, what was implicitly decided, and what was waived. Whether continued application would work as a "manifest injustice" can be decided only by the appellate court, but should be raised in the trial court to avoid waiver.

Specific versus General Directions

Even when it is clear what the appellate court has decided, it is not always clear what the appellate court has instructed the trial court to do. What the trial court is permitted to do on remand depends on what the appellate court has directed it to do. It often is observed that if the appellate court affirms the trial court's order, the trial court has no further power over that order, except to enforce it.[60] It cannot change, modify, or evade the order.[61]

When the appellate court reverses a judgment, it may remand with specific directions or with general directions for further proceedings.[62] The case law shows that trial courts sometimes have difficulty interpreting these directions.[63] "Remand for

57. The legislature amended Florida Statutes Section 768.81(3) yet again in 1999, creating a complex formula for apportionment of fault, depending on the degree of fault assigned to various parties and nonparties. *Id.* It can be expected that more exceptions to the law of the case will be needed as the courts struggle to interpret new amendments.

58. 538 S.2d 938 (Fla. Dist. App. 1st 1989).

59. *Id.* at 939.

60. Fla. Const. art. V, § 4.

61. *Milton v. Keith*, 503 S.2d 1312, 1313 (Fla. Dist. App. 3d 1987) (citing *Dow Corning Corp. v. Garner*, 452 S.2d 1 (Fla. Dist. App. 4th 1984) (directing the court to enter the order issued by the appellate court)).

62. Fla. Const. art. V, § 4; Fla. R. App. P. 9.340.

63. *E.g. Warren v. Dept. of Administration*, 590 S.2d 514, 515 (Fla. Dist. App. 5th 1991) (holding the remand of an award of appellate attorneys' fees did not authorize the

a specific act does not reopen the entire case; the lower tribunal only has the authority to carry out the appellate court's mandate."[64] "[I]t is improper [for the trial court] to exceed the bounds of that instruction."[65] For example, when the appellate court reversed and "remanded for a trial to determine the value of the defendants' special equity in the goods received," the trial court did not have the authority to allow the defendants to amend the original complaint to assert a counterclaim seeking damages for wrongful replevin.[66] The appellate court's direction to try a particular issue precluded the trial court from trying a new and independent cause of action.[67] However, when a judgment is reversed and remanded with general directions for further proceedings, the trial court is vested with broad discretion to direct the course of the case.[68]

Reversal and remand "for further proceedings not inconsistent with this opinion," does not always give the trial court broad discretion. For example, in the first appeal in *Pearson v. Chakmakis*,[69] the appellate court held that the grandparents' petition for adoption should have been denied, and the mother's petition for return of custody of the child to her should have been granted.[70] The court reversed and remanded for "further proceedings not inconsistent with this opinion."[71] The trial court interpreted this as authority to set a trial on the issue of custody.[72] The mother filed a motion in the appellate court, apparently seeking enforcement of the mandate.[73] Acknowledging that its directions in the first opinion were not specific and "the language used may have been somewhat misleading," the court clarified its intention to direct transfer of the custody of the child to the mother.[74]

As *Pearson v. Chakmakis* demonstrates, a remand for "further proceedings not inconsistent with this opinion" is not a signal

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trial court to award additional fees incurred prior to the appeal).

64. *Id.*
65. *Wolfe v. Nazaire*, 758 S.2d 730, 733 (Fla. Dist. App. 4th 2000).
66. *Modine Mfg. Co. v. ABC Radiator, Inc.*, 367 S.2d 232, 235 (Fla. Dist. App. 3d 1979).
67. *Id.*
68. *Wolfe*, 758 S.2d at 733.
69. 115 S.2d 75 (Fla. Dist. App. 3d 1959).
70. *Id.* at 81.
71. *Id.*
72. *Pearson v. Chakmakis*, 116 S.2d 256, 257 (Fla. Dist. App. 3d 1959).
73. *Id.* at 256–257.
74. *Id.* at 257.

that the trial court has carte blanche to conduct whatever further proceedings it chooses in its discretion.[75] It is important to carefully examine the appellate opinion to determine exactly what further proceedings would be "not inconsistent" with the appellate court's opinion.[76] As *Chakmakis* also demonstrates, it would be helpful for appellate courts to give clear guidance to the trial court and to the parties.[77]

GETTING GUIDANCE FROM THE COURT

Often the problem of the trial court's noncompliance with the appellate court's mandate is not an issue of willingness, but rather it stems from the trial court's inability to understand what the appellate court requires.[78]

Sometimes a court's decision is not entirely clear, even to the court's own members. In *Carnesi v. Ferry Pass United Methodist Church*,[79] a majority of the Florida Supreme Court cryptically quashed a district court's decision and "remanded for proceedings consistent with our opinions in" two other separate cases.[80] Justices Charles T. Wells and Major B. Harding dissented.[81] Justice Wells objected, "I do not understand what either the district court or the trial court is to do."[82] Justice Harding worried, "the majority opinion creates considerable confusion and offers little guidance to the trial court on remand."[83]

One district court of appeal has acknowledged its "obligation to the trial courts . . . to render clarification of any opinions, judgments, decisions or orders upon appropriate inquiry."[84] Two examples of the need for clear direction from the appellate courts,

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75. *Pearson*, 115 S.2d at 81.

76. *Chakmakis*, 116 S.2d at 257.

77. *Id.*

78. *Arena Parking, Inc. v. Lon Worth Crow Ins. Agency*, 802 S.2d 344, 346 (Fla. Dist. App. 3d 2001) (recognizing a need for clarification of the prior opinion in the case); *Chakmakis*, 116 S.2d at 257 ("because the directions stated in our opinion were not thus specific, and because the language used may have been somewhat misleading in this respect, we are not persuaded that the chancellor has refused to follow, or will not readily comply with the mandate of the court as . . . clarified herein").

79. 826 S.2d 954 (Fla. 2002).

80. *Id.* at 955.

81. *Id.*

82. *Id.*

83. *Id.* at 956.

84. *Maeder v. Grayson*, 227 S.2d 308, 309 (Fla. Dist. App. 3d 1969).

and the appellate courts' efforts to give that direction, arise in the denial of extraordinary writs and the remand for an award of attorneys' fees.

Extraordinary Writs

The effect of the denial of an extraordinary writ depends not only on the type of writ, but also on the district that has jurisdiction of the case. The Florida Supreme Court has approved the right of the district courts of appeal to assign different meanings to the language used in denying writs.[85] This has resulted in some confusion for trial court judges and practitioners. The district courts of appeal have tried to clear up some of the confusion.[86]

Each court has its own rules about what it says when the court intends its denial of prohibition to be a ruling on the merits, thus constituting the law of the case. In the Third and Fourth districts, denial of a petition for writ of prohibition constitutes a ruling on the merits, unless the court states otherwise.[87] In the Florida Supreme Court and in the other district courts of appeal, the rule is the opposite; denial of a petition for writ of prohibition is not a ruling on the merits, unless the opinion states otherwise.[88] The Florida Supreme Court has approved the procedure adopted by the Third and Fourth districts, but treats the matter as one for the district courts' discretion.[89] In the Florida Supreme Court, at least with respect to denials of prohibition in cases involving the refusal of a judge to disqualify himself,

> if an order from this Court denying a petition for a writ of prohibition based upon an unsuccessful motion for disqualification is to constitute a decision on the merits and, thereby, foreclose further review of the disqualification issue

85. *Barwick v. State*, 660 S.2d 685, 691 (Fla. 1995).

86. *See infra* nn. 86–90 (citing cases in which the district courts of appeal have addressed this issue).

87. *Gaiter v. State*, 737 S.2d 565, 565 (Fla. Dist. App. 3d 1999); *Obanion v. State*, 496 S.2d 977, 980 (Fla. Dist. App. 3d 1986); *Hobbs v. State*, 689 S.2d 1249, 1251 (Fla. Dist. App. 4th 1997).

88. *Sumner v. Sumner*, 707 S.2d 934, 935 (Fla. Dist. App. 2d 1998); *Smith v. State*, 738 S.2d 410, 412 (Fla. Dist. App. 5th 1999); *Pub. Employee Rels. Commn. v. Sch. Bd. of De-Soto County*, 374 S.2d 1005, 1010 (Fla. Dist. App. 2d 1974) ("denial of a writ of prohibition without opinion is not *res judicata* unless the sole possible ground of the denial was that the court acted on the merits of the jurisdictional question, or unless it affirmatively appears that such denial was intended to be on the merits").

89. *Barwick*, 660 S.2d at 691.

> on direct appeal, the order will state that it is "with prejudice."[90]

There is no uniform rule, however, applicable throughout Florida.

The courts generally agree about denial of certiorari without opinion. In the Second, Third, Fourth, and Fifth districts, denial of a petition for writ of certiorari without opinion is not an adjudication on the merits and does not establish the law of the case, res judicata, or collateral estoppel.[91] It appears that the First District has not addressed this issue.

Whether a court can deny certiorari on the merits, which would establish the law of the case, is a troubling question. The Florida Supreme Court recently stated that denial of certiorari "cannot be construed as a determination of the issues presented in the petition . . . and cannot be utilized as precedent."[92] However, the district courts of appeal have noted that a denial of certiorari *"without opinion"* is not a decision on the merits and have suggested that a denial of certiorari *with an opinion* could establish the law of the case.[93] Therefore, it is important to read the decision carefully to determine whether it is "on the merits." Because a finding of irreparable harm that cannot be corrected on appeal is essential to certiorari jurisdiction, the Second District in *Parkway Bank v. Fort Myers Armature Works, Incorporated*,[94] and the Fourth District, in *The Bared and Company, Incorporated v. McGuire*,[95] have stated that they will dismiss, rather than deny, a petition for certiorari when the petitioner has an adequate remedy by appeal.[96] Such a ruling would not be a ruling on the merits.[97] The Fifth District in *Nassif v. Amgen, Incorporated*,[98] cited both *Bared* and *Parkway Bank*, in a per curiam denial of certiorari, leaving open the question of whether, in that district, a dis-

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90. *Id.*

91. *Bevan v. Wanicka*, 505 S.2d 1116, 1117 (Fla. Dist. App. 2d 1987); *Barone v. Scandinavian World Cruises (Bahamas), Ltd.*, 531 S.2d 1036, 1039 (Fla. Dist. App. 3d 1988); *Accent Realty of Jacksonville, Inc. v. Crudele*, 496 S.2d 158, 160 (Fla. Dist. App. 3d 1986); *Johnson v. Fla. Farm Bureau Cas. Ins. Co.*, 542 S.2d 367, 369 (Fla. Dist. App. 4th 1988); *Casey-Goldsmith v. Goldsmith*, 735 S.2d 610, 610 (Fla. Dist. App. 5th 1999).

92. *Shaps v. Provident Life & Accident Ins. Co.*, 826 S.2d 250, 253 (Fla. 2002).

93. *Id.*

94. 658 S.2d 646 (Fla. Dist. App. 2d 1995).

95. 670 S.2d 153 (Fla. Dist. App. 4th 1996).

96. *Parkway Bank*, 658 S.2d at 649; *Bared*, 670 S.2d at 157.

97. *Parkway Bank*, 658 S.2d at 650; *Bared*, 670 S.2d at 158.

98. 699 S.2d 1391 (Fla. Dist. App. 5th 1997).

missal of a certiorari petition signifies something different from a denial.[99]

Perhaps the appellate courts should certify to the Florida Supreme Court the question of how the district courts of appeal should indicate the nature of their rulings on extraordinary writs. Uniformity in the language used would help enlighten trial courts and litigants about the meaning of appellate decisions on petitions for extraordinary writs.

Remand for Award of Appellate Attorneys' Fees in Dissolution Cases

In *Silva v. U.S. Security Insurance Company*,[100] the court held that the appellate court order awarding or denying appellate attorneys' fees constitutes the law of the case on the issue of entitlement to court-awarded fees.[101] While this may be true in general, dissolution-of-marriage cases pose a special problem. In dissolution cases, the court must award fees based on the relative financial situation of the parties — one party's need and the other party's ability to pay.[102] The parties' relative financial positions may change after a reversal and remand. Moreover, the court also may be required to factor in other equitable considerations under the Florida Supreme Court's decision in *Rosen v. Rosen*.[103] The question in domestic-relations cases is whether the trial court on remand may consider those equitable factors after the appellate court has ordered fees to be awarded to one of the parties.

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99. *Id.*

100. 734 S.2d 429 (Fla. Dist. App. 3d 1999).

101. *Id.* at 430. *Contra Candyworld, Inc. v. Granite St. Ins. Co.*, 700 S.2d 424, 425 (Fla. Dist. App. 4th 1997) (holding the prior denial of appellate attorneys' fees did not constitute the law of the case when the court's ruling was not on the merits, but on the procedural issue of failure to state appropriate grounds in the motion); *but see Segelstrom v. Blue Shield of Fla., Inc.*, 233 S.2d 645, 646 (Fla. Dist. App. 2d 1970); *Allstate Ins. Co. v. De La Fe*, 647 S.2d 965, 966 (Fla. Dist. App. 3d 1994); *Hernstadt v. Brickell Bay Club Condo.*, 602 S.2d 967, 968 (Fla. Dist. App. 3d 1992). When further proceedings are required in the trial court, the outcome of which will determine who is the prevailing party under a statute awarding fees to the prevailing party, or to an insured if the insured prevails, the appellate court may grant a motion for appellate fees, contingent on the party prevailing in the proceedings below on remand. *Allstate*, 647 S.2d at 966.

102. Fla. Stat. § 61.16(1).

103. 696 S.2d 697 (Fla. 1997). *Rosen* requires courts to consider "the scope and history of the litigation; the duration of the litigation; the merits of the respective positions; whether the litigation is brought or maintained primarily to harass (or whether a defense is raised mainly to frustrate or stall); and the existence and course of prior or pending litigation." *Id.* at 700.

In *Yohanan v. deClaire*,[104] the Fourth District held

> an order [from the appellate court] establishing a right to attorney's fees, where the amount is to be determined upon remand, limits the trial court to a determination of the amount of a reasonable fee and does not reopen the issues of need and ability to pay, those issues having been considered and passed upon by this court.[105]

But in *White v. White*,[106] the Fourth District, en banc, held that an order granting appellate fees in a dissolution case, without more, constituted only a determination of "whether the matter of appellate fees should be further addressed by the trial court," unless the appellate court specifically indicated otherwise.[107] An order from the Fourth District granting appellate fees to a party only

> represents our tentative conclusion that the moving party should be given a chance to show that he or she needs help from the adverse party as to some or all of the appellate fees reasonably incurred and, if the need is proven, that the paying party has the ability to defray some or all of the moving party's fees.[108]

Thus, in the Fourth District, an order granting a motion for appellate fees in a domestic-relations case still requires the moving party to go before the trial court and address need, ability of the other party to pay, and any equitable factors that may be applicable under *Rosen*.[109] In contrast, the Third District appears to follow *Yohannan*.[110] In the Third District, when the court intends to remand the case for a complete reassessment of these issues, it generally says so in its order.[111]

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104. 435 S.2d 913 (Fla. Dist. App. 4th 1983).

105. *Id.* at 916.

106. 683 S.2d 510 (Fla. Dist. App. 4th 1996) (en banc); 695 S.2d 381 (Fla. Dist. App. 4th 1997) (adopting panel decision).

107. *White*, 683 S.2d at 512.

108. *White*, 695 S.2d at 382–383.

109. *Rosen*, 696 S.2d at 700.

110. *See Stroud v. Indus. Fire & Cas. Co.*, 528 S.2d 550, 550 (Fla. Dist. App. 3d 1988) (per curiam affirmance with citation to *Yohannan*).

111. *See generally Polley v. Polley*, 588 S.2d 638, 643 (Fla. Dist. App. 3d 1991) (remanding for reconsideration of the husband's income, and reversing ruling that the wife should pay husband's attorneys' fees for reconsideration on further proceedings); *Bacardi v. Bacardi*, 386 S.2d 1201, 1203 (Fla. Dist. App. 3d 1980) ("The wife's motion for attorneys' fees for services rendered on this appeal is hereby remanded to the lower court for deter-

The Second District's opinion in *Rados v. Rados*,[112] constitutes a kind of Rosetta Stone for translating that court's orders on motions for appellate attorneys' fees. In *Rados* the court, acknowledging it was "aware that these orders have engendered some confusion within the bench and bar," decided to "give the parties and the trial court greater guidance."[113] It listed five different kinds of orders it would issue on motions for appellate attorneys' fees, and specified how each kind of order was to be carried out by the trial court.[114]

For example, if the Second District wants the trial court simply to determine the amount of fees to be awarded to a particular party, it will issue an order stating, "[T]he motion for appellate attorneys' fees is granted. The movant is entitled to an award of all reasonable appellate attorneys' fees."[115] If the court wants the trial court to conduct an analysis of the factors under *Rosen*, the court will issue an order stating that

> [t]he motion for appellate attorney's fees is remanded to the trial court. If the movant establishes his or her entitlement pursuant to section 61.16, Florida Statutes, and [*Rosen*], the trial court is authorized to award the movant all or a portion of the reasonable appellate attorney'[s'] fees.[116]

The court also specified the language it would use to deny fees or to give particular weight to one or more of the factors listed in *Rosen*.[117]

It is hard to imagine an appellate opinion more helpful to trial courts and litigants than *Rados*. Perhaps other courts will follow *Rados* by issuing opinions explaining what they mean when they grant a motion for appellate fees.[118]

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mination and assessment at the conclusion of the further proceedings required by this opinion.").

112. 791 S.2d 1130 (Fla. Dist. App. 2d 2001).

113. *Id.* at 1131.

114. *Id.* at 1133–1134.

115. *Id.* at 1133.

116. *Id.* at 1134.

117. *Id.* at 1133–1134.

118. Recently, the Third District issued an opinion in which it cited *Rados* and gave specific instructions to the trial court to consider the *Rosen* factors on remand because the appeal "lacked merit." *Young v. Hector*, 2002 Fla. App. LEXIS 8208 at *4 (Fla. Dist. App. 3d June 12, 2002). This is consistent with the Third District's practice of giving specific instructions when it intends for the trial court to consider anything other than the amount of fees on remand. The Third District did not take the additional step that the Second

ENFORCING THE MANDATE

Efforts to Evade or Delay Carrying Out the Mandate

Once the mandate has been issued and the trial court has deciphered it, the trial court must carry it out. If the trial court fails or delays in carrying out the mandate or acts beyond the scope of the mandate, the appellate court may take enforcement action in a number of ways.

The appellate court has jurisdiction to enforce its own mandate, including the power to prevent unreasonable delays by the trial court in carrying out that mandate.[119] Once the appellate court has issued its mandate, compliance by the trial court is purely ministerial.[120] The trial court cannot depart from the appellate court's order.[121] As one court emphatically stated, "A trial court does not have discretionary power to alter or modify the mandate of an appellate court in any way, shape or form."[122]

A trial court cannot unreasonably delay its compliance with the appellate court's mandate. The appellate courts have issued a number of decisions ordering trial courts to act forthwith to carry out the mandate or vacating a stay that results in a delay in carrying out the mandate.[123]

Appellate courts often frown on efforts to introduce new issues after an appellate decision that has given specific instructions. For example, in *Savage v. Macy's East, Incorporated*,[124] the Third District, in its original opinion, ruled that a claimant was entitled to unemployment-compensation benefits because she was not guilty of misconduct connected with her work.[125] The Department of Labor and Employment Security still denied benefits on remand, this time because while her appeal from the disqualification was pending, the claimant failed to continue applying for

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District took in *Rados* of listing and explaining the different types of language it would use in future attorneys'-fees orders. *Rados*, 791 S.2d at 1133–1134.

119. *Blackhawk Heating & Plumbing Co. v. Data Lease Fin. Corp.*, 328 S.2d 825, 827 (Fla. 1975).

120. *Wilcox v. Hotelerama Assn.*, 619 S.2d 444, 445–446 (Fla. Dist. App. 3d 1993).

121. *Id.* at 446.

122. *Id.*

123. *E.g. Blackhawk Heating*, 328 S.2d at 827; *Citibank, N.A. v. Plapinger*, 469 S.2d 144, 145 (Fla. Dist. App. 3d 1985); *Home Sav. & Loan Assn. of Fla. v. Epperson*, 427 S.2d 246, 247 (Fla. Dist. App. 4th 1983).

124. 708 S.2d 689 (Fla. Dist. App. 3d 1998).

125. *Id.* at 689.

benefits.[126] She filed a motion for enforcement of the appellate court's mandate.[127] The court granted the motion and ordered the agency to pay the benefits because "the lower tribunal 'utterly lacks the power to deviate from the terms of an appellate mandate.'"[128]

Similarly, when the appellate court has ordered a specific disposition of a case, such as direction of a verdict, the trial court may not subsequently order a different disposition, such as a new trial. For example, in *St. Lucie Harvesting and Caretaking Corporation v. Cervantes*,[129] the appellate court reversed and remanded the original judgment, with direction of the entry of a directed verdict in favor of the defendant.[130] The trial court instead granted a new trial.[131] On the second appeal, the court admonished the plaintiff's counsel for "[leading] the trial court into error."[132] Because the appellate court's previous direction was clear, "the trial court was without authority to disregard that direction."[133]

A trial court may, however, after issuance of the mandate, entertain a timely motion for relief from judgment, pursuant to Florida Rule of Civil Procedure 1.540(b), without leave of the appellate court.[134]

When a trial court fails to carry out the mandate of the appellate court or alters or evades the mandate, the appellate court can order compliance with the mandate.[135] If all else fails, the appellate court can give its decree the effect it should have been given by the lower court.[136] The appellate court's use of this extreme measure is rare. However, after repeated appellate proceedings, when the trial court has demonstrated its reluctance or refusal to carry out the appellate court's mandate, the appellate court itself

126. *Savage v. Macy's E., Inc.*, 719 S.2d 1208, 1209 (Fla. Dist. App. 3d 1998).
127. *Id.*
128. *Id.* (citing *Mendelson v. Mendelson*, 341 S.2d 811, 814 (Fla. Dist. App. 2d 1977)).
129. 639 S.2d 37 (Fla. Dist. App. 4th 1994).
130. *Id.* at 41.
131. *St. Lucie Harvesting & Caretaking Corp.*, 664 S.2d 7 (Fla. Dist. App. 4th 1995).
132. *Id.* at 8.
133. *Id.*
134. *Ohio Cas. Group v. Parrish*, 350 S.2d 466, 468 (Fla. 1977). The trial court may not, however, grant relief from judgment while the appeal is pending. *Leo Goodwin Found., Inc. v. Riggs Natl. Bank of D.C.*, 374 S.2d 1018, 1019 (Fla. Dist. App. 4th 1979).
135. *Savage*, 719 S.2d at 1210.
136. *Stuart v. Hertz Corp.*, 381 S.2d 1161, 1163 (Fla. Dist. App. 4th 1980).

can enter the judgment that the trial court should have entered.[137] Appellate courts rarely resort to entry of the judgment and usually express confidence that the trial court will comply with the appellate court's ruling.[138]

Even when the appellate court rules in favor of the petitioner for a writ of mandamus, the court generally will withhold the formal issuance of the writ, with the expectation that the official will comply with the views expressed in the court's opinion.[139] However, if the official or judge refuses to comply, the appellate court can enter the judgment that the trial court should have entered. For example, in *State ex rel. Williams v. Baker*,[140] the Florida Supreme Court at first withheld issuance of the writ in expectation of compliance.[141] However, the trial court did not comply.[142] Finally, the Florida Supreme Court entered the judgment the trial court should have entered.[143] Similarly, in *Wright v. Board of Public Instruction*,[144] after ten years of litigation and appeals, the Florida Supreme Court noted the

137. *State ex rel. Williams v. Baker*, 248 S.2d 650, 651 (Fla. 1971) (issuing a writ after the trial court did not issue the writ as commanded by the Florida Supreme Court); *Wright v. Bd. of Pub. Instruction*, 100 S.2d 403, 406 (Fla. 1958) (entering judgment after more than ten years of trial and appellate proceedings, when trial court failed to enter judgment in accordance with mandate of prior appeal); *Div. of Alcoholic Bevs. & Tobacco v. Tampa Crown Distributors, Inc.*, 745 S.2d 418, 420 (Fla. Dist. App. 1st 1999) (acknowledging power to enter judgment but declining to do so; remanding to lower tribunal for entry of judgment, "confident that the trial judge will comply with this opinion"); *Sullivan v. Chase Fed. Sav. & Loan Assn.*, 132 S.2d 341, 343 (Fla. Dist. App. 3d 1961) (entering judgment trial court should have entered after trial judge disagreed with appellate decision and refused to carry it out after three appellate proceedings).

138. *Chakmakis*, 116 S.2d at 257 ("[W]e are not persuaded that the chancellor has refused to follow, or will not readily comply with the mandate of this court; the motion for this court to enter such decree or order as should have been given by the trial court . . . is denied, without prejudice."). Appellate courts even appear reluctant to directly order the trial court to enter the judgment it should have entered after the first appeal. *See Baker v. State*, 789 S.2d 549, 549 (Fla. Dist. App. 3d 2001) ("Although various efforts have been made to do so, the trial court has not yet entered sentences in accordance with our decisions. . . . Accordingly it is ordered that the trial court shall forthwith enter sentences or corrected sentences in lower court case numbers . . . to no more than a concurrent total of twenty years in prison with credit for all time served in any of the cases.").

139. *Monroe Educ. Assn. v. Clerk, Dist. Ct. of App., Third Dist.*, 299 S.2d 1, 3 (Fla. 1974).

140. 248 S.2d 650 (Fla. 1971).

141. *Id.* at 651.

142. *Id.*

143. *Id.*

144. 100 S.2d at 403 (Fla. 1957).

> disagreement of the trial court with both the correctness and wisdom of the former opinions of this Court in this case, as expressed in the opinion and judgment before us, and the trial court's reluctance, if not actual refusal, to carry out the mandate in the second appeal.[145]

The Florida Supreme Court entered the judgment that the trial court should have entered.

Procedural Vehicles for Enforcing the Mandate

When a party believes that a trial court's rulings after an appeal do not comply with the appellate court's decision, or when the trial court fails to act promptly, a number of procedural avenues are available for those seeking enforcement of the mandate.

The most direct avenue is a motion filed in the appellate court, in the same case as the original appeal, asking the appellate court to direct the lower tribunal to comply with its mandate.[146] One advantage is that a motion does not require an additional filing fee. It is fairly common for appellate courts to grant such motions.[147] The Florida Rules of Appellate Procedure expressly provide for review of some kinds of orders entered by the trial court after an appeal.[148] For example, trial-court orders awarding appellate attorneys' fees are reviewed by a motion filed in the appellate court.[149]

A second procedure available for enforcing the appellate mandate is the petition for writ of mandamus or certiorari.[150] Mandamus is available to compel the trial court to perform a ministerial act; compliance with the appellate mandate is a ministerial act.[151] Thus, mandamus has been used when the trial court delays implementation of the mandate, either by refusing to act or by issuing a stay.[152]

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145. *Id.* at 406.

146. *Monroe Educ. Assn.*, 299 S.2d at 2.

147. *E.g. Savage*, 719 S.2d at 1209; *Baker*, 789 S.2d at 549 (granting the motion to enforce mandate after noting the trial court's delay in entering sentences in accordance with the court of appeal's decisions).

148. Fla. R. App. P. 9.400(c) (providing review by motion for orders on appellate attorneys' fees).

149. *Id.*

150. *Monroe Educ. Assn.*, 299 S.2d at 2.

151. *O.P. Corp. v. Village of N. Palm Beach*, 302 S.2d 130, 131 (Fla. 1974).

152. Fla. R. App. P. 9.100; *Wilcox*, 619 S.2d at 446.

Certiorari also has been used to enforce the appellate mandate.[153] Mandamus is a remedy to compel an action that the lower tribunal has not yet taken; certiorari is a remedy to quash an action that departs from the essential requirements of law.[154] Consequently, while mandamus is appropriate when the trial court delays or refuses to act, certiorari may be appropriate when the trial court acts, but acts in a way that departs from the appellate court's ruling.[155]

Very rarely, an appellate court may exercise its power under the "all writs" provision in Article V of the Florida Constitution.[156] This provision empowers a district court of appeal to issue all writs necessary to the complete exercise of its jurisdiction.[157] This includes the power to direct the trial court to carry out its mandate after an appeal.[158]

If the trial court, after remand, enters a final judgment or another type of order that is appealable under the appellate rules, a party may, of course, seek review by appeal.[159] If available, this avenue may be preferable, because the appellate standard of review is less difficult to meet than the standard for issuance of an extraordinary writ.[160]

CONCLUSION

Trial courts are required to obey the appellate court's mandate. Lawyers should assist the trial court with understanding what the appellate court has ordered the trial court to do. Inter-

153. *Colonel*, 379 S.2d at 1298.

154. *Broward County v. G.B.V. Intl., Ltd.*, 787 S.2d 838, 842 (Fla. 2001); *Blackhawk Heating*, 328 S.2d at 827.

155. *Colonel*, 379 S.2d at 1298. A petition for writ of certiorari must be filed within thirty days of rendition of the order. Fla. R. App. P. 9.100(c).

156. *Monroe Educ. Assn.*, 299 S.2d at 3 (citing Fla. Const. art. V).

157. *Id.* at 2–3.

158. *Stuart*, 381 S.2d at 1163; *cf. Sullivan*, 132 S.2d at 342 (denying party petitioned for constitutional writ after prevailing in appeal because the court was not persuaded that the lower tribunal would not comply with its mandate as clarified).

159. *E.g. BankAtlantic v. Streicher Enters., Inc.*, 783 S.2d 1209, 1209–1210 (Fla. Dist. App. 4th 2001) ("This is the second appeal in this case."); *Home Sav. & Loan Assn. v. Epperson*, 427 S.2d 246, 247 (Fla. Dist. App. 4th 1983) (appealing trial court's decision to withhold execution of the court of appeal's mandate).

160. Certiorari functions as a "safety net" and gives the appellate court the prerogative to reach down and stop a miscarriage of justice where no other remedy exists. *G.B.V. Intl., Ltd.*, 787 S.2d at 842. Certiorari requires a showing of a departure from "the essential requirements of law, thereby causing irreparable injury which cannot be adequately remedied on appeal following final judgment." *Belair v. Drew*, 770 S.2d 1164, 1166 (Fla. 2000).

pretation of the appellate court's mandate on remand may require a Rosetta Stone, another case in which the court explains what it means when it uses certain language. Appellate courts should strive for more clarity in their directions on remand. When confronted with the trial court's inability, or unwillingness, to follow the appellate mandate, litigants may, and should, seek clarification and enforcement in the appellate court.