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Civil Procedure

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CIVIL PROCEDURE

M. MINNETTE MASSEY* AND ROGER A. BRIDGES**

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* Professor of Law, Univ. of Miami. This article considers cases reported in vols. 178-200 So. 2d.

** Member, Ed. Bd., U. MIAMI L. REV. This survey was completed in May, 1968. Subsequently, the Fla. App. R. and Fla. R. Civ. Pro. were amended effective Oct. 1, 1968, 211 So. 2d (Fla. 1968). Major changes noted by asterisks.

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“There shall be one form of action to be known as [a] ‘civil action.’”¹ Thus, the 1967 revision of the Rules of Civil Procedure, with the consequent procedural merger of law and equity has made Florida a

1. FLA. R. CIV. P. 1.040. All reference to rules in the text will refer to the Florida Rules of Civil Procedure unless otherwise indicated.

code pleading jurisdiction. The current revision made many minor changes in style, grammar and punctuation, none of which was intended to change the meaning or intent of any rule.² Substantial changes in the rules will be indicated within the appropriate topic. The statutorily-styled numbering system of the new rules will be used throughout this article, even though many of the cases were decided under the previous rules. Only when necessary will the previous numbers be cited. Due to the merger of law and equity, the distinction between the two is noted only where still appropriate.

I. COURTS, JUDGES AND ATTORNEYS

A. Courts

The plaintiff sued the defendant in a small claims court and served him with a notice to appear. The defendant filed an unverified motion to dismiss for improper venue, but did not appear at the time prescribed in the notice. The court entered a default judgment. On appeal, the defendant argued that his motion to dismiss constituted a general appearance and that the judge could not enter a default judgment without hearing the motion and giving the defendant a notice to appear. The court affirmed the judgment, holding that the Rules of Civil Procedure do not apply to small claims courts³ and that it would be manifestly unjust to say that the court cannot properly enter a default judgment under these circumstances.⁴

Although it is more orderly to issue an order of transfer or consolidation when a case is shunted from one judge to another within the same circuit, this is a matter of internal administration and does not affect the validity of the orders entered by either judge.⁵

B. Judges

1. JUDGE REMOVED BECAUSE OF PREJUDICE

The third district refused to answer a certified question, to wit:

Does a circuit judge to whom a cause is re-assigned have jurisdiction to hear and rule upon a motion to vacate a default judgment when the first circuit judge before whom the case was originally pending, who refused to vacate a default judgment,

2. *In re* Florida Rules of Civil Procedure, 1967 Revision, 187 So.2d 598, 638 (Fla. 1966). In promulgating the new rules, the court included the subcommittee notes.

3. FLA. R. CIV. P. 1.010.

The Supreme Court of Florida has adopted rules of procedure for civil actions in the County Judges' Court, County Courts, Justice of the Peace Courts and Small Claims Courts. See *In re* Summary Claims Procedure Rules, 203 So.2d 616 (Fla. 1967), *amended*, 205 So.2d 297 (Fla. 1967) and *211 So.2d — (Fla. 1968).

4. *Palatka Auto Auction, Inc. v. First Nat'l Bank*, 191 So.2d 450 (Fla. 4th Dist. 1966).

5. *Bankers Life & Cas. Co. v. Gaines Constr. Co.*, 191 So.2d 478 (Fla. 3d Dist. 1966).

has been judicially prohibited from proceeding with the cause because of his prejudice?⁶

The court stated that the propriety of refusing to vacate the default judgment had been previously upheld⁷ thus becoming the law of the case, and noted that the first judge's prejudice had occurred after he had ruled on the motion to vacate.

2. JUDGE ASSIGNED FROM ANOTHER CIRCUIT

In an eminent domain proceeding, a judge assigned from another circuit may enter a supplemental judgment for interest and attorney's fees where the period of his assignment has not expired.⁸

3. AUTHORITY OF SUCCESSOR JUDGES

A Florida statute requires a successor judge to hear and determine all matters pending before the original judge upon the latter's death, resignation or retirement.⁹ In a case of first impression, the second district held that the statute is ambiguous and does not authorize a successor judge to weigh and compare the testimony of witnesses he did not see. Thus, where oral testimony is produced at trial and the cause is left undetermined by the original judge, his successor cannot render a verdict or judgment without a trial *de novo* unless upon the record by stipulation of the parties. A judge is certainly as important as a juror, and no verdict could be upheld if a juror were absent.¹⁰

However, when a judge who has heard a cause and dictated a final judgment retires from the bench without signing it, his successor has jurisdiction to complete the action by signing the judgment. Generally, a successor judge may complete any acts uncompleted by his predecessor where they do not require the successor to weigh and compare testimony.¹¹ This result seems just since parties should suffer no detriment by reason of the resignation, death or impeachment of a judge.¹²

4. JUDGES WITHIN THE SAME CIRCUIT

Two separate suits to appoint a receiver for the same company were filed in different divisions of the same circuit court. One judge appointed a receiver and then, without any formal order, the two suits were consolidated before a different judge who removed the first appointee and

6. *Jensen v. Hoofe*, 184 So.2d 696, 697 (Fla. 3d Dist. 1966).

7. *Jensen v. Hoofe*, 136 So.2d 680 (Fla. 3d Dist. 1962).

8. *Dean v. State Rd. Dep't*, 184 So.2d 517 (Fla. 3d Dist. 1966). *See also* FLA. R. CIV. P. 1.020(c)(4).

9. FLA. STAT. § 38.12 (1967).

10. *Bradford v. Foundation & Marine Constr. Co.*, 182 So.2d 447, 449 (Fla. 2d Dist. 1966.)

11. *Olympic Mfg. Co. v. Shepherd*, 190 So.2d 588 (Fla. 3d Dist. 1966).

12. FLA. STAT. § 38.12 (1967).

named a different person to act as receiver in both cases. The district court of appeal held that each judge in the court may perform all the duties prescribed for circuit judges and the decision of one judge is the decision of the court. The court noted that the second judge did not vacate the prior order but merely substituted receivers.¹³

5. JUSTICE OF THE PEACE

A justice of the peace is included within the general rule that no action can be maintained against a judge of any court for an error in judgment committed in execution of his official duties.¹⁴

C. Attorneys

1. AMENDMENTS

Subsection (e) of Rule 1.030, Florida Rules of Civil Procedure now provides that:

Attorneys for a party may be substituted at any time by order of court. No substitute attorney shall be permitted to appear in the absence of such an order. The court may condition such substitution upon payment of or security for the substituted attorney's fee and expenses or upon such terms as may be just.

The Committee Notes state that the new subsection sets out the existing law as stated in *Diem v. Diem*¹⁵ and other cases.¹⁶

2. ATTORNEY FEES

In *Strickland v. Frey*,¹⁷ the attorney represented the plaintiff after the two had signed a contingent fee contract whereby the attorney would receive forty percent of the proceeds of any recovery. The plaintiff received a jury verdict in the amount of ten thousand dollars, but judgment was not entered because of a pending counterclaim. After three years, the plaintiff, without his attorney's knowledge, settled the claim with the defendant for five hundred dollars. The defendant then amended his answer by asserting a release and satisfaction, whereupon the attorney filed a reply alleging a fraudulent and collusive settlement between his client and the defendant with the intent to deprive him of his fee. The attorney then moved to dismiss the counterclaim for lack of prosecution¹⁸ and for entry of final judgment for the plaintiff in the amount of the jury verdict. The judge dismissed the counterclaim, denied final judgment and ordered a trial to determine whether the settlement was fraudulent. After trial by

13. *Bankers Life & Cas. Co. v. Gaines Constr. Co.*, 191 So.2d 478 (Fla. 3d Dist. 1966).

14. *Silvers v. Drake*, 188 So.2d 377 (Fla. 1st Dist. 1966).

15. 136 Fla. 824, 187 So. 569 (1939).

16. *In re Florida Rules of Civil Procedure*, 1967 Revision, 187 So.2d 598, 637 (Fla. 1966).

17. 187 So.2d 84 (Fla. 4th Dist. 1966).

18. FLA. R. CIV. P. 1.420(e).

the court, a four thousand dollar judgment was entered against the defendant in favor of the plaintiff's attorney. On appeal, the court found no error¹⁹ and held that:

In some circumstances an attorney will be permitted to continue a suit in the name of his client in order to recover his fees and costs after his client has made a fraudulent or collusive settlement with the intent to deprive his attorney of fees and costs.²⁰

The guardian of an incompetent in Florida sold part of the estate's property in Indiana. The attorney for the purchasers performed services on behalf of the seller which would ordinarily be done by the seller. The guardian's attorney had knowledge of the services. The purchaser's attorney filed suit in the county judge's court and was awarded a fee. The district court of appeal held that there was an implied contract sufficient to uphold the award.²¹ Regardless of such a finding, however, the court could grant the fee on a quantum meruit basis.²² The award was deemed proper.²³

II. PROCESS

Generally, the recent cases in this area are concerned with whether a Florida court has obtained judicial jurisdiction over a non-resident, corporate or individual.

Section 48.17 of the Florida Statutes contains the procedures for substituted service on a defendant who conceals his whereabouts. Section 48.161 provides that in such a situation, the plaintiff must serve the Secretary of State and mail a notice of such service and a copy of process by registered or certified mail to the defendant. The defendant's return receipt therefore and the plaintiff's affidavit that he complied with the statute must be filed with the court. In *Steedman v. Polero*,²⁴ the plaintiff had complied with all the statutes for substituted service except mailing a copy of process to the defendant and filing the return receipt and affidavit of compliance with the court. The defendant appealed a denial of his motion to quash service. The court held that the omitted procedures could not be required in cases where the defendant concealed himself, observing that: "Obviously, mail could not be sent to a defendant whose whereabouts are unknown, nor could an officer serve him if he cannot be found."²⁵

19. The dissenting judge could find no basis for allowing the attorney's claim because there was no service of process on the defendant and the court lacked jurisdiction; the attorney was not a party to the action and could not intrude his collateral issue into the main case; the measure of damages for the attorney was forty percent of the judgment for the plaintiff, yet that judgment was not final and could conceivably be reversed on appeal.

20. *Sentco, Inc. v. McCulloh*, 84 So.2d 498 (Fla. 1955).

21. *Dierick v. Wisheart*, 195 So.2d 614 (Fla. 3d Dist. 1967).

22. *Lucom v. Atlantic Nat'l Bank*, 97 So.2d 478 (Fla. 1957).

23. FLA. STAT. § 745.33 (1967).

24. 181 So.2d 202 (Fla. 3d Dist. 1965).

25. *Id.* at 203.

When a plaintiff, in an attempt to serve process upon a corporation, serves a person who the plaintiff knows has severed all connections with the corporation, the service is obviously invalid.²⁶ In this case, the defendant's motion to dismiss for insufficiency of process and lack of jurisdiction over the defendant was denied. The defendant appealed and at the same time requested a supersedeas²⁷ from the trial court which was granted. While the appeal was pending, the plaintiff obtained an alias summons²⁸ and properly served the president of the defendant corporation who moved to quash. This motion was also denied and a second appeal was taken.

The court held that Rule 1.160 provides for the issuance of mesne process, which does not require that an order of court be granted. The supersedeas bars further litigation only on the order appealed. Thus, no order of the court was required for the clerk to issue the alias summons. Further, an "insurance summons" has received tacit approval in Florida,²⁹ and "the mere fact of service of process, especially one in which there is some suspicion of invalidity, does not bar issuance of a second summons by the clerk."³⁰

A corporation which has not been properly served and unsuccessfully moves for dismissal for insufficiency of service of process, does not waive its right to again raise the question by participating further in the cause.³¹ In this case, the plaintiff sought to prevent certain actions concerning real property and filed a *lis pendens*.³² All three defendants joined the motion to dismiss the *lis pendens*, but only the corporate defendant had previously moved for dismissal for insufficiency of service of process. Subsequently, all three defendants moved to dismiss for such insufficiency. The court held that the corporation's motion should be granted, but the other defendants had waived the objection because they had proceeded first on the merits by their motion to dismiss the *lis pendens* and only thereafter had attempted to challenge the court's jurisdiction.³³

Nonresident witnesses and suitors who come to Florida for the purpose of attending court are immune from service of process while attending the judicial action³⁴ except when the process in the second suit is

26. *Sunrise Beach, Inc. v. Phillips*, 181 So.2d 169 (Fla. 2d Dist. 1965).

27. FLA. APP. R. 5.1.

28. See FLA. R. CIV. P. 1.160.

29. *Punta Gorda Ready Mixed Concrete, Inc. v. Green Manor Constr. Co.*, 166 So.2d 889 (Fla. 1964).

30. *Sunrise Beach, Inc. v. Phillips*, 181 So.2d 169, 171-72 (Fla. 2d Dist. 1965).

31. *Green v. Roth*, 192 So.2d 537 (Fla. 2d Dist. 1966).

32. See FLA. R. CIV. P. Form 1.918.

33. FLA. R. CIV. P. 1.140(a), (h). It should be noted that the defendants in this case had never filed a responsive pleading and the case does not come within the exact terms of the rule. However, the court stated that a similar construction had been made of Federal Rule of Civil Procedure 12, the counterpart of Rule 1.140. *Stavang v. American Potash & Chem. Corp.*, 344 F.2d 117 (5th Cir. 1965).

34. *Rorick v. Chancey*, 130 Fla. 442, 178 So. 112 (1937).

issued in litigation incident to or correlated with the subject matter of the proceedings for which the nonresident came to Florida.³⁵

When the suit for which the nonresident is in attendance involves fraud, misrepresentation, etc., in obtaining money from a bank account and the second suit is for fraud, misrepresentation, etc., in obtaining proceeds from an estate, the issues are not incidental or correlative and the service of process should be quashed. Further, the exception to the immunity rule is not applicable when there is a lack of identity of parties, and an executrix of an estate is not identical with the decedent-plaintiff in the first action.³⁶

Section 47.23 of the Florida Statutes provides, *inter alia*, that "[t]he courts of this state shall obtain jurisdiction of minors when the original writ of subpoena or summons ad respondendum . . . is served by reading the writ or summons to be served to the minor to be served." A sheriff's return³⁷ which recites that a writ was served on the minor by serving the minor's mother at her usual place of abode is not sufficient to meet the requirements of the statute. The court does not have jurisdiction unless the return indicates that the writ or summons was actually read to the minor.³⁸

The defendant's motion to sever a complaint³⁹ was granted whereupon the defendant moved to dismiss on the ground that a new suit resulted from the severance and that the required process had not been served.⁴⁰ The motion was denied. On appeal, the court held that there were two ways in which jurisdiction could have been obtained in the severed case. First, additional service of process could have been made. Second, appropriate copies of the record in the original case, including a showing of process, could have been encompassed in the record of the severed case.⁴¹ However, because the appellant had not provided the court with a record evidencing a lack of process, the court affirmed the denial of the motion to dismiss.⁴²

It has been previously held that in cases of conflict between courts of concurrent jurisdiction, the court which first exercises jurisdiction by having its summons served, acquires control of the action to the exclusion of the other.⁴³ However, Rule 1.050 provides that actions shall be deemed

35. *State ex rel. Ivey v. Circuit Court*, 51 So.2d 792 (Fla. 1951).

36. *Bruner v. Robins*, 191 So.2d 567 (Fla. 3d Dist. 1966).

37. Although the circumstances of this case precluded it, a plaintiff is usually entitled to additional process against a defendant when the original process is returned improperly executed. FLA. R. CIV. P. 1.070(b).

38. *Flint v. Baker*, 189 So.2d 654 (Fla. 2d Dist. 1966).

39. See FLA. R. CIV. P. 1.270(b).

40. FLA. R. CIV. P. 1.070(b).

41. FLA. STAT. § 46.08 (1967).

42. *City of South Bay v. Armstrong*, 188 So.2d 21 (Fla. 4th Dist. 1966).

43. *Martinez v. Martinez*, 153 Fla. 753, 15 So.2d 842 (1943).

commenced when the complaint is filed. Thus, when a complaint is filed first in a circuit court in one county and another filed subsequently in a small claims court in another county, the former will have jurisdiction even though process is served first in the latter action.⁴⁴

III. VENUE

A. *In General*

Venue, of course, means the geographical area in which a defendant has a privilege to be sued or tried, while jurisdiction is the power of a court to hear and determine a particular cause.⁴⁵ At common law, venue for local actions was the county in which the disputed land lay or a disputed transaction took place, and venue for transitory actions could be laid in any county where the court could acquire jurisdiction of the defendant.⁴⁶ The Florida general venue statute⁴⁷ provides generally that suits shall be commenced in the county (1) where the defendant resides, or (2) where the cause of action accrued, or (3) where the property in litigation is located. This venue privilege may be waived by a proper agreement.⁴⁸

The statute specifically uses the word "defendant." Thus, when a plaintiff brings an action for negligence against an administrator for the allegedly negligent decedent, it is proper to bring the cause in the country where the administrator resides. Since the administrator is the defendant and the legislature has made no special provision for such a case, the venue is proper.⁴⁹

In an action based on both breach of an implied warranty and negligence, the plaintiff corporation sued in the county where the defendant corporation's⁵⁰ product was accepted by the plaintiff, a distributor of the defendant's goods. The defendant moved to dismiss because of improper venue, alleging that all its acts regarding the transaction took place in another county. The motion was denied, and on appeal the court pointed out that suits upon several causes of action may be brought where either of the causes arose.⁵¹ Further, causes of action based on an implied warranty of a product clearly accrue where the product is accepted. Thus, venue was proper and it was not necessary to decide the proper venue for the alleged negligence.⁵²

44. *Hunt v. Ganaway*, 180 So.2d 495 (Fla. 1st Dist. 1965).

45. *Deeb, Inc. v. Board of Pub. Instruction*, 196 So.2d 22 (Fla. 2d Dist. 1967).

46. F. JAMES, *CIVIL PROCEDURE* 616, 617 (1965).

47. FLA. STAT. § 46.01 (1967).

48. *Deeb, Inc. v. Board of Pub. Instruction*, 196 So.2d 22 (Fla. 2d Dist. 1967).

49. *O'Brien v. Mitchell*, 190 So.2d 189 (Fla. 1st Dist. 1966).

50. Suits against a domestic corporation may be commenced where the cause of action accrued. FLA. STAT. § 46.04 (1967).

51. FLA. STAT. § 46.03 (1967).

52. *James V. Freeman, Inc. v. Chemical Packaging Corp.*, 189 So.2d 410 (Fla. 1st Dist. 1966).

In the statute fixing venue for corporations,⁵³ the phrase, "where the cause of action accrued" can be vexing. Regarding libel actions, the question of where the cause accrued has recently been answered by the Supreme Court of Florida for the first time. In *Firstamerica Development Corp. v. Daytona Beach News-Journal Corp.*,⁵⁴ the court held that the plaintiff may obtain proper venue in any county where the newspaper corporation, by its own action, circulates the defamatory matter. In this case the defendant had a very limited circulation in Dade County but the extent of circulation was held not to be determinative. The court also indicated its approval of the "single publication rule" which would allow the plaintiff only one cause of action, regardless of the number of counties in which the libelous material is circulated. However, this issue was not before the court and no direct holding was made.⁵⁵

In *Cicero v. Paradis*,⁵⁶ a father brought suit in his own right for injuries to his minor son. The minor, at that time, was a defendant in a cause filed in another county arising from the same accident. The court agreed that the father had an independent cause of action⁵⁷ but held that since he was permitted by statute⁵⁸ to join his son's cause of action, he should be permitted to join only in the action where his son's cause was pending.

B. Change of Venue

When the trial judge recognizes that the appropriate venue is in another county, he should immediately grant a motion to transfer.⁵⁹ The fact that the attorneys have made unclear stipulations which the plaintiff claims require the defendant to submit to a deposition in the county where the suit was originally filed does not authorize the judge to condition his grant of the motion or transfer on such appearance. The judge in the county to which the cause is transferred should decide the place of the deposition.⁶⁰

C. State Agencies

The courts of a county wherein a state agency makes an administrative order usually have venue for judicial review of the order. However, where there is: (1) a threatened invasion of a constitutional right; or (2) an attempt to seize property, the local circuit court where the invasion

53. FLA. STAT. § 46.04 (1967).

54. 196 So.2d 97 (Fla. 1966).

55. *Id.* at 104. This case was approved by the legislature. FLA. STAT. § 770.05-08 (1967).

56. 184 So.2d 212 (Fla. 2d Dist. 1966).

57. *Id.* at 215.

58. FLA. STAT. § 46.09 (1967). The dissenter argued that the statute permits the father to join his cause of action with that of the son's but did not compel it.

59. FLA. R. CIV. P. 1.060(b).

60. *Spalding v. Von Zamit*, 180 So.2d 208 (Fla. 3d Dist. 1965).

or attempted seizure occurs has venue notwithstanding the fact that the order is made elsewhere.⁶¹

D. *Contractual Relationships*

It is established in Florida that contracts which require the payment of money but do not specify the place of payment will be construed to require payment at the residence or place of business of the payee.⁶² The rationale is that when money is owed, the debtor should seek the creditor. The Supreme Court of Florida has recently reiterated the rule, holding that it makes no difference whether the suit is brought in general or special assumpsit; the cause of action arises in the county of residence of the payee.⁶³

A different situation arises when the plaintiff has been paid for all the work he has completed on a construction contract and the defendant refuses to allow completion of the work. In such a case, the plaintiff's damages would be the profit which he would have realized had he been allowed to complete the contract. Since the action is not for money owed, the cause of action against the defendant corporation accrued within the county where the contract was to be performed or the county where the defendant's place of business is located.⁶⁴ Venue was improperly laid in the plaintiff's county of residence.⁶⁵

E. *Forum Non Conveniens*

Florida has no law similar to the federal statute which codifies the doctrine of *forum non conveniens*. This codification allows a judge to transfer the action to a more convenient forum where venue would also be proper.⁶⁶

In Florida, the right is granted to a plaintiff to select a forum⁶⁷ and that right may not be withdrawn by a court on the grounds that a different forum might better suit the convenience of a defendant, whether it is suggested that the cause be transferred to a different county in this state,⁶⁸ or to another state.⁶⁹

However, state courts are authorized to apply the doctrine of *forum non conveniens* in cases involving the Federal Employers' Liability Act.⁷⁰

61. *Williams v. Ferrentino*, 199 So.2d 504 (Fla. 2d Dist. 1967).

62. *See Massey & Westen, Civil Procedure*, 20 U. MIAMI L. REV. 599 (1966).

63. *Saf-T-Clean, Inc. v. Martin-Marietta Corp.*, 197 So.2d 8 (Fla. 1967).

64. FLA. STAT. § 46.04 (1967).

65. *Mendez v. George Hunt, Inc.*, 191 So.2d 480 (Fla. 4th Dist. 1966).

66. 28 U.S.C. § 1404(a) (1964).

67. FLA. STAT. ch. 46 (1967).

68. *Touchton v. Atlantic Coast Line R.R.*, 155 So.2d 738 (Fla. 3d Dist. 1963).

69. *Texas Gulf Sulphur Co. v. Downtown Inv. Co.*, 188 So.2d 19 (Fla. 1st Dist. 1966).

70. *Missouri ex rel. So. Pac. Ry. v. Mayfield*, 340 U.S. 1 (1959).

In such cases, it is within the discretion of the trial court whether to apply the doctrine and the appellate court will review only that discretion.⁷¹ In a case of first impression, the record disclosed acute forum shopping, inaccessibility to proof, unavailability of compulsory process, nonresident litigants, etc. The denial of the motion to dismiss constituted an abuse of discretion and was reversed.⁷²

IV. COMMENCEMENT OF ACTIONS: STATUTE OF LIMITATIONS

Many of the cases during this survey period have construed particular statutes of limitation. They are arranged below under the appropriate heading. The effect of the statutes is also discussed under the topics of Amended Pleadings⁷³ and Summary Judgement.⁷⁴

A. *Delinquent Taxes*

The Florida Statutes provide generally that after twenty years from the date of issuance, no action may be commenced on a delinquent tax certificate by a private holder.⁷⁵ The clerks of the circuit courts are instructed to mark such certificates as cancelled.⁷⁶ The provisions of these laws have also been extended to the state and its agencies, counties and municipal corporations.⁷⁷

In *Smith v. City of Arcadia*,⁷⁸ the city attempted to foreclose a lien for unpaid municipal taxes for the year 1923. At the time of the delinquency, the city was not required to issue delinquent tax certificates. The trial court entered a summary judgment for the city, evidently on the basis that the above-mentioned statutes were not applicable because the action was not based on a delinquent tax certificate. On appeal, the court reversed and held that the obvious intention of the legislature was to free real estate of most liens arising out of tax levies more than twenty years old. To hold that the statutes barred actions on delinquent tax certificates but not actions for liens arising out of unpaid taxes for which no certificate was issued would be ridiculous. Although a court of equity is not bound by statutes of limitations, it may nevertheless apply the doctrine to laches to achieve the same result.

B. *Workmen's Compensation*

There is a conflict in the statutes which, under certain circumstances, effectively preclude a workmen's compensation insurance carrier from recovering its subrogated claim for damages from a municipality. Section

71. *Atlantic Coast Line R.R. v. Cameron*, 190 So.2d 35 (Fla. 1st Dist. 1966).

72. *Southern Ry. v. McCubbins*, 196 So.2d 512 (Fla. 3d Dist. 1967).

73. See p. 470 *infra*.

74. See p. 495 *infra*.

75. FLA. STAT. § 196.12 (1967).

76. FLA. STAT. § 194.58 (1967).

77. FLA. STAT. § 95.021 (1967).

78. 185 So.2d 762 (Fla. 2d Dist. 1966).

440.39 provides that if an injured employee or his dependents fail to bring suit against a tortfeasor within one year from the time the cause of action accrued, the insurance carrier may sue the wrongdoer. However, section 95.24 provides that no action shall be brought against any city or village for any negligent or wrongful injury unless brought within twelve months from the time of injury. Thus, if the injured employee does not bring a suit within one year, the carrier is also precluded from ever bringing suit against the city.⁷⁹ The renunciation by the injured claimant of the right to sue within one year does not amount to a waiver which will allow the carrier to institute proceedings one day prior to the expiration of one year. The court indicated that any action to alter the conflict must be taken by the legislature, not by the courts.⁸⁰

C. Foreign Judgments

The Florida seven-year limitation period for actions other than those for the recovery of real property applies to foreign judgments.⁸¹ This rule applies even though the note sued upon in this state was made in another state which has laws permitting judgments rendered on such notes to be renewed by judicial action at regular intervals. The renewal proceedings are invalid and the statutory bar of the *lex fori* is not removed if the defendant had not been served with process, had not voluntarily appeared and had previously moved from the state in which the renewal proceedings were instituted.⁸²

D. Conversion

Section 95.11(5)(c) of the Florida Statutes prescribes a three-year statute of limitation upon an "action for taking, detaining or injuring any goods or chattels, including actions for the specific recovery of personal property." Section 95.11(4) provides a four-year statute of limitation on other actions not specifically provided for in the chapter. In *International Mail Order, Inc. v. Capitol National Bank*,⁸³ the plaintiff brought an action for reconversion more than three but less than four years after the cause of action had accrued. The court affirmed an order of summary judgment for the defendant on the basis that an action for conversion was included in the three-year period of limitation.

E. Invasion of Privacy

An action for invasion of privacy is an "action not specifically provided for in this chapter," and the limitation period is four years.⁸⁴ The

79. United States Cas. Co. v. Town of Palm Beach, 119 So.2d 800 (Fla. 2d Dist. 1960).

80. American Mut. Liab. Ins. Co. v. City of West Palm Beach, 185 So.2d 174 (Fla. 4th Dist. 1966).

81. FLA. STAT. § 95.11(2) (1967).

82. Markham v. Gottegen, 179 So.2d 100 (Fla. 2d Dist. 1965).

83. 192 So.2d 287 (Fla. 3d Dist. 1966).

84. FLA. STAT. § 95.11(4) (1967).

statute does not disclose whether the period begins to run when the invasion occurs or when the plaintiff learns of it. In *Houston v. Florida-Georgia Television Company*,⁸⁵ it was held that the period begins when the invasion occurs. The ignorance of the plaintiff is a result of a lack of due diligence and a party cannot take advantage of his own fault. The result might be otherwise if the defendant were guilty of secret fraud or fraudulent concealment.⁸⁶

F. Defendant out of the Jurisdiction

Generally, when a defendant is out of the state and cannot be served whether personally or constructively, the statute of limitations is tolled.⁸⁷ When such a situation occurs, the statute is tolled even though the defendant, during a four-year residence in another state, has returned to Florida for short periods which total eight months.⁸⁸

In *Aviation Credit Corp. v. Batchelor*,⁸⁹ the defendant lived in California when he signed a note payable in Florida and continued to live there until seven years after the breach had occurred. He then moved to Florida where he was sued on the note. The trial judge entered summary judgment for the defendant on the basis that the cause of action accrued in California and that Florida's "borrowing statute"⁹⁰ made the California limitation period (which barred the action) applicable. The appellate court held that the cause of action accrued where the contract was to be performed, and that Florida's five-year limitation applied.⁹¹ Although a literal application of the tolling statute⁹² would require a conclusion that it would not be applicable to this case because one cannot return to the state unless he has first been in it, the court felt bound by previous decisions of the Supreme Court of Florida which held that the statute would apply and an action could be brought against an out-of-state defendant when he came into the state.⁹³

G. Estoppel

Section 733.16 provides that claims or demands for damages for the acts of a decedent shall be barred unless filed within six months from the time of the first publication of notice to creditors. In *North v. Culmer*,⁹⁴

85. 192 So.2d 540 (Fla. 1st Dist. 1966).

86. FLA. STAT. § 95.11(5)(d) (1967).

87. *Levy v. Kirk*, 187 So.2d 401 (Fla. 3d Dist. 1966); FLA. STAT. § 95.06 (1967).

88. *Friday v. Newman*, 183 So.2d 25 (Fla. 2d Dist. 1966).

89. 190 So.2d 8 (Fla. 3d Dist. 1966).

90. FLA. STAT. § 95.10 (1967).

91. FLA. STAT. § 95.11(3) (1967).

92. FLA. STAT. § 95.07 (1967) provides, *inter alia*, "If, when the cause of action shall accrue against a person, he is out of the state, the action may be commenced within the term herein limited after his return to the state. . ."

93. *E.g.*, *Seaver v. Stratton*, 133 Fla. 183, 183 So. 335 (1937).

94. 193 So.2d 701 (Fla. 4th Dist. 1967).

the plaintiff had a claim for damages against a person and was negotiating with an insurance company who was representing the person. The plaintiff's attorney did not know of the person's death which occurred in another county. The statutory notice was also published in the other county. The insurance company indicated to the attorney that the claim would be settled and changed adjusters several times. The plaintiff was finally informed that the claim was barred because of the above-mentioned statute. The court held that the facts of the case raised an estoppel, relieving the plaintiff of the burden of the statute. Since the insurance company was a privy to the defendant executor, the plaintiff should be allowed to raise the affirmative defense of estoppel to meet the claim of the statute of limitation contained in the defendant's answer.

An estoppel may also arise when the plaintiff sues the wrong defendant who, with knowledge that he is the wrong defendant, continues to file motions in the cause until the period of limitations has expired. This is especially true where there is a close connection between the defendant who was served and the proper defendant.⁹⁵

V. PLEADINGS

A. *Pleadings Allowed or Required*

The pleadings which are allowed or required are contained in Rule 1.100. The 1967 revision of the rules made no substantial changes in this area. For a discussion of the changes which were made in the 1965 revision, the reader is referred to the previous *Survey of Civil Procedure*.⁹⁶

B. *Complaint*

One of the most significant additions to the 1967 Rules of Civil Procedure is the proposed forms for use with the rules.⁹⁷ As adopted by the Supreme Court, the letter of submission by The Florida Bar states, "The following forms of process shall be sufficient in all actions. Departures from these forms shall not void papers which are otherwise sufficient and the forms may be varied. . . . The following forms of complaints and petitions are sufficient for the types of cases they cover. . . ."⁹⁸ It would seem that the practitioner would be wise, and safe, by fully utilizing the new forms.

A complaint should set forth a "short and plain statement of the ultimate facts showing that the pleader is entitled to relief,"⁹⁹ and "[a]ll

95. In this case, the corporation which was served and the proper defendant corporation had several common officers; their agent for service was the same person and the names were similar.

96. Massey & Westen, *Civil Procedure*, 20 U. MIAMI L. REV. 608, 609 (1966).

97. *In re Florida Rules of Civil Procedure, 1967 Revision*, 187 So.2d 598, 638 (Fla. 1966).

98. *In re Florida Rules of Civil Procedure, 1967 Revision*, 187 So.2d 598, 638 (Fla. 1966).

99. FLA. R. CIV. P. 1.110(b).

pleadings shall be construed so as to do substantial justice."¹⁰⁰ The complaint must be sufficient to inform the defendant of the nature of the claims against him.¹⁰¹ A complaint which alleges legal conclusions but does not allege facts to support the conclusions is usually held to be legally insufficient.¹⁰²

In *Morgan v. Morgan*,¹⁰³ the wife sued for divorce on the ground of extreme cruelty. The complaint listed several of the husband's alleged shortcomings but concluded with the phrase, "plaintiff charges defendant with extreme cruelty." The trial judge denied the husband's motion to dismiss, but the district court reversed, holding that the complaint lacked sufficient ultimate facts. It is submitted that cases of this nature should be evaluated today in the light of the official forms. Form 1.943 requires only that the complaint state that the defendant has been guilty of extreme cruelty to plaintiff.

The legal sufficiency of a complaint is usually tested by a motion to dismiss for failure to state a cause of action.¹⁰⁴ For purposes of the motion, all allegations of fact in the complaint are taken as true and the action should not be dismissed unless it appears that the plaintiff could not be entitled to any relief under the facts pleaded.¹⁰⁵ If two separate claims are stated in one count and the complaint is not so vague, indefinite or ambiguous as wholly to fail to state a cause of action, the court should not dismiss but should entertain a motion for separate statements and a more definite statement.¹⁰⁶ Allegations which go to the merits or attack the veracity of a complaint should be set out in the answer¹⁰⁷ and not raised in a motion to dismiss.¹⁰⁸ The question of whether a dismissal for failure to state a cause should be with prejudice is discussed elsewhere.¹⁰⁹

The parties to an action are usually bound by the admissions and allegations contained in the pleadings.¹¹⁰ This statement, however, refers to those pleadings upon which issue is finally joined. Since cases may be decided on issues which are not raised by the pleadings¹¹¹ and the rules

100. FLA. R. CIV. P. 1.110(g).

101. *Richardson v. Sams*, 166 So.2d 468 (Fla. 1st Dist. 1964).

102. *Baya v. Williams*, 184 So.2d 675 (Fla. 2d Dist. 1966).

103. 180 So.2d 684, 685 (Fla. 3d Dist. 1965).

104. FLA. R. CIV. P. 1.140(b).

105. *Lytell v. McGahey Chrysler-Plymouth, Inc.*, 180 So.2d 354 (Fla. 3d Dist. 1965).

106. *Plowden & Roberts, Inc. v. Conway*, 192 So.2d 528 (Fla. 4th Dist. 1966); *Industrial Medicine Publishing Co. v. Colonial Press, Inc.*, 181 So.2d 19 (Fla. 3d Dist. 1965).

107. FLA. R. CIV. P. 1.110(c).

108. *Nelson v. Ward*, 190 So.2d 622 (Fla. 2d Dist. 1966).

109. See p. 488 *infra*.

110. *Carvell v. Kinsey*, 87 So.2d 577 (Fla. 1956).

111. "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised by the pleadings." FLA. R. CIV. P. 1.200.

allow alternative positions to be taken by a party regardless of consistency,¹¹² it would be anomalous to allow one party to use the opposing party's pleadings as evidence when no attempt is made by the party to prove the facts alleged in his pleadings.¹¹³ By the same reasoning, an admission which a defendant makes in a cross-claim against a co-defendant may not be used as evidence by the plaintiff when the cross-claim has been eliminated by a final summary judgment. The cross-claim has been dropped from the case leaving the record in the same position it would have been in had the cross-claim not been filed.¹¹⁴

When the plaintiff files a motion to amend the complaint by "adding" a paragraph, he is not necessarily bound to the statement. In *Vann v. Hobbs*,¹¹⁵ plaintiff's counsel actually wanted to substitute a count of simple negligence for a count of gross negligence. The defendant was precluded from reading the deleted count of gross negligence into evidence.

"In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity."¹¹⁶ However, this rule has not altered the fact that the sufficiency of the allegations may be tested by a motion to dismiss.¹¹⁷ The fact that the rule requires that a denial of performance or occurrence must be made with particularity does not make the denial an affirmative defense which cannot be raised by motion.¹¹⁸ Thus, if the plaintiff chooses to state the performance of conditions precedent with a particularity not required by the rules and specific allegations disclose facts which will necessarily defeat the cause of action then, on motion, the complaint may be dismissed.¹¹⁹

The rules require that when items of special damage are claimed, they must be specifically pleaded.¹²⁰ However, if such items are not pleaded and evidence concerning them is introduced without objection, the judge may consider the pleadings to be amended¹²¹ and give instructions to the jury concerning the special damages.¹²²

112. FLA. R. CIV. P. 1.110(g)

113. *Hines v. Trager Constr. Co.*, 188 So.2d 826, 831 (Fla. 1st Dist. 1966).

114. *Id.* at 830.

115. 197 So.2d 43 (Fla. 2d Dist. 1967).

116. FLA. R. CIV. P. 1.120(c).

117. *Wagman v. Lefcoe*, 167 So.2d 765 (Fla. 3d Dist. 1964).

118. *See* p. 498 *infra*.

119. *Plowden & Roberts, Inc. v. Conway*, 192 So.2d 528 (Fla. 4th Dist. 1966); *Martin v. Highway Equip. Supply Co.*, 172 So.2d 246 (Fla. 2d Dist. 1965); FLA. R. CIV. P. 1.110(d).

120. FLA. R. CIV. P. 1.120(g).

121. FLA. R. CIV. P. 1.190(b).

122. *Gardner v. Terminal Transp. Co.*, 189 So.2d 405 (Fla. 2d Dist. 1966).

C. Defenses

1. IN GENERAL

Every defense should be included in a responsive pleading except those defenses which the rules permit to be raised by motion.¹²³ Of course, a defense may be waived¹²⁴ under certain circumstances and the grounds for a defense may be waived if not specifically stated.¹²⁵ A party is well advised to preserve any waivable defense by motion before in any way pleading to the merits of a cause of action.¹²⁶ A defendant may plead alternative and inconsistent defenses in one count or in separate counts.¹²⁷ Generally, affirmative defenses must be set forth in a pleading and are not appropriate in a motion.¹²⁸ The denial of a plaintiff's motion to strike certain allegations of defense from the defendant's answer is not reviewable by certiorari unless irreparable harm would otherwise result to the plaintiff.¹²⁹

2. RAISING AFFIRMATIVE DEFENSES BY MOTION

In *Martin v. Highway Equipment Supply Co.*,¹³⁰ the court held that when a complaint shows a defect on its face which will defeat the claim, the defendant may raise the appropriate affirmative defense in a motion to dismiss. The district courts could not agree as to the propriety of this action. The first¹³¹ and third¹³² districts refused to allow an affirmative defense to be so raised. The second¹³³ and fourth¹³⁴ districts approved the procedure.

The issue appears to have been decided by the 1967 revision to the rules.¹³⁵ A sentence has been added to Rule 1.110(d), to wit: "Affirmative defenses appearing on the face of a prior pleading may be asserted as grounds for a motion or defense under Rule 1.140(b); provided this shall not limit amendments under Rule 1.190 even if such ground is sustained." The subcommittee notes state that "If the pleader affirmative show [sic] that he has no claim in his pleading, the claim should be disposed of at the earliest possible stage."¹³⁶

123. FLA. R. CIV. P. 1.140(b).

124. FLA. R. CIV. P. 1.140(h).

125. FLA. R. CIV. P. 1.140(b).

126. See *Green v. Roth*, 192 So.2d 537 (Fla. 2d Dist. 1966).

127. FLA. R. CIV. P. 1.110(g).

128. FLA. R. CIV. P. 1.110(d). *But see* p. 498 *infra*.

129. *Nobel v. McNeil*, 179 So.2d 126 (Fla. 1st Dist. 1965).

130. 172 So.2d 246 (Fla. 2d Dist. 1965); *Hawkins v. Williams*, 200 So.2d 800 (Fla. 1967).

131. *Croft v. Young*, 188 So.2d 859 (Fla. 1st Dist. 1966).

132. *Staples v. Battisti*, 191 So.2d 583 (Fla. 3d Dist. 1966).

133. *Martin v. Highway Equip. Supply Co.*, 172 So.2d 246 (Fla. 2d Dist. 1965).

134. *Plowden & Roberts, Inc. v. Conway*, 192 So.2d 528 (Fla. 4th Dist. 1966).

135. *In re Florida Rules of Civil Procedure, 1967 Revision*, 187 So.2d 598 (Fla. 1966).

136. *Id.* at 637.

D. Corporate Pleading

In a case of first impression the second district held that a complaint signed by the president of a corporation who was not an attorney is a nullity. Such a pleading must be signed by a practicing member of the bar.¹³⁷ The fact that an individual is permitted to represent himself in court does not permit a corporation to do so.¹³⁸ A corporation is not permitted to practice law and since the complaint is a nullity, it is not amendable.¹³⁹ If any relief is to be obtained, the complaint must be refiled.¹⁴⁰

E. Counterclaims

With certain exceptions, "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, provided it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim . . ." ¹⁴¹ A party need not state a counterclaim not arising out of the same transaction or occurrence.¹⁴² However, the fact that the trial of a permissive counterclaim might unduly prolong a trial is not ground for striking or dismissing the counterclaim.¹⁴³ If such a problem occurs, the judge has the authority to order a separate trial of the counterclaim.¹⁴⁴

When a defendant files a counterclaim seeking independent relief, he becomes an actor or profiteer of the judicial machinery and process. If he then chooses to exercise his privilege against self-incrimination,¹⁴⁵ the court may properly deny him relief and strike the counterclaim.¹⁴⁶

In *Von Zamft v. Morton*,¹⁴⁷ the plaintiff had taken a voluntary dismissal¹⁴⁸ of his complaint. The judge had set aside a day for trial of the defendant's counterclaim. On the day of the trial, the plaintiff's attorney moved for an adjournment because his client was out of town and tied up on business. It was not an abuse of the discretion of the trial court to render judgment for the defendant on the counterclaim under these circumstances.

137. *Nicholson Supply Co. v. First Fed. Sav. & Loan Ass'n*, 184 So.2d 438 (Fla. 2d Dist. 1966), 19 A.L.R.3d 1067.

138. FLA. R. CIV. P. 1.030(b).

139. See p. 470 *infra*.

140. See Note, *The Corporation and the Practice of Law*, 21 U. MIAMI L. REV. 889 (1967).

141. FLA. R. CIV. P. 1.170(a).

142. FLA. R. CIV. P. 1.170(b).

143. *Murrell v. Murray*, 181 So.2d 365 (Fla. 3d Dist. 1966).

144. FLA. R. CIV. P. 1.170(i).

145. *Stockham v. Stockham*, 168 So.2d 320 (Fla. 1964).

146. *Nuckols v. Nuckols*, 189 So.2d 832 (Fla. 4th Dist. 1966). In this case the wife sued for separate maintenance and the husband counterclaimed for divorce, but refused to answer questions concerning an allegedly improper relationship with another woman. The trial court's decree in favor of the husband was reversed.

147. 185 So.2d 726 (Fla. 3d Dist. 1966).

148. FLA. R. CIV. P. 1.420(a).

If taken literally, Rule 1.170(j) provides that when a demand on a counterclaim or cross-claim exceeds the jurisdiction of the court where the action is pending, the entire cause of action will be transferred to another court of competent jurisdiction. However, in at least two situations, only the counterclaim will be transferred. First, a complete transfer will be denied when this would lead to an impractical situation.¹⁴⁹ Second, when a suit is brought in the proper court under a statutory proceeding and the demand of the defendant's counterclaim exceeds the jurisdiction of that court, the cause will not be completely transferred. The original court will retain jurisdiction of the statutory claim.¹⁵⁰

F. *Cross-claims*

Cross-claims against a co-party are permissive but must arise out of the same transaction or occurrence that is the subject matter of the original claim or a counterclaim.¹⁵¹ An entry of judgment on a cross-claim which alleges that the co-defendant is liable to the defendant for any amount that the latter might be held liable to the plaintiff should not be made while an appeal is pending from a final summary judgment in the main action. In many cases, the outcome of the cross-claim is dependent upon the disposition of the case in chief. Thus, if the summary judgment in the main action is reversed, it is obvious that the cross-claim must be reconsidered. If the defendant is not liable to the plaintiff in such a situation, the cross-defendant cannot then be liable to the defendant.¹⁵²

However, the dismissal of a cross-claim with prejudice while the main action is still pending is a final order and may be immediately appealed. In a case of first impression, the court stated that all the parties were before the court, that the extensive evidence should be resolved in one trial by one jury, and that the entertainment of the appeal would most expeditiously serve the interest of the litigants and efficient administration of justice.¹⁵³

G. *Sham Pleadings*

When a counterclaim exceeds the jurisdiction of the court, the cause should be transferred forthwith to the proper court.¹⁵⁴ However, if the other party moves to strike the counterclaim as a sham, the rules authorize the court to which the motion is presented to take evidence and strike the pleading or enter proper judgments if the pleading is found to be a sham.¹⁵⁵

149. *City of Miami v. Jafra Steel Corp.*, 184 So.2d 178 (Fla. 3d Dist. 1966).

150. *State ex rel. Attias v. Blanton*, 195 So.2d 870 (Fla. 3d Dist. 1967).

151. FLA. R. CIV. P. 1.170(g).

152. *Groner v. Underwriters Ins. Co.*, 179 So.2d 123 (Fla. 3d Dist. 1965).

153. *Leeward & Hart Aero. Corp. v. South Cent. Airlines, Inc.*, 184 So.2d 454, 456 (Fla. 1st Dist. 1966).

154. FLA. R. CIV. P. 1.170(j).

155. FLA. R. CIV. P. 1.150(a).

There is clearly an ambiguity which inheres in these rules. To follow either rule meticulously would lead to an infraction of the other when the plaintiff moves to strike as sham a counterclaim which exceeds the court's jurisdictional amount. In considering the problem, the Supreme Court of Florida held that the immediate concern was to determine the nature of the pleading and that was to be accomplished by the original court. Jurisdiction would thereafter be fixed by the ruling.¹⁵⁶

H. *Third Party Practice*

1. IN GENERAL

Third party practice¹⁵⁷ came to Florida with the 1965 revision to the Rules.¹⁵⁸ By allowing a defendant, and a plaintiff who is faced with a counterclaim, to bring in third parties it may be possible to adjudicate all facets of a cause of action at one time.

Third party practice is not available to a defendant unless the proposed third party defendant is or may be liable to the defendant.¹⁵⁹ The fact that the proposed defendant may be liable to the plaintiff is not sufficient to invoke the procedure. It is a matter of the trial judge's discretion as to whether a motion under the rule should be granted. He may require the defendant to state with ". . . preciseness and particularity the grounds, basis and theory under which the same are required as Third Party Defendants," and the appellant must show an abuse of the judge's discretion to prevail upon appeal.¹⁶⁰

In *Hotel Roosevelt Co. v. City of Jacksonville*,¹⁶¹ a Florida appellate court decided for the first time that an order dismissing a third party complaint with prejudice is immediately appealable as a final order because the order terminates the cause as between the interested parties. The court noted that Federal Rule 14 was substantially similar to the Florida Rule but that federal decisions could not be considered as controlling. Federal Rule 54(b) permits a federal court to direct final judgment as to one or more but fewer than all the claims involved in a multiple claim action, only upon an express determination that there is no just reason for delay and upon an express direction of final judgment. When Florida adopted third party practice, no rule similar to Federal Rule 54(b) was adopted. Thus, the standards are different and federal law cannot control.

It was harmless error for a judge to allow the use of third party practice prior to the time the rule became effective when the court had

156. *City of Miami v. Jafra Steel Corp.*, 184 So.2d 178, 180 (Fla. 3d Dist. 1966).

157. FLA. R. CIV. P. 1.180.

158. *In re* Florida Rules of Civil Procedure, 1965 Revision, 178 So.2d 15 (Fla. 1965).

159. "A third party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third party defendant." FLA. R. CIV. P. 1.180(a).

160. *Boling v. Barnes*, 198 So.2d 377, 378 (Fla. 2d Dist. 1967).

161. 192 So.2d 334 (Fla. 1st Dist. 1966).

jurisdiction of the subject matter and parties and any future proceedings would be governed by the new rule.¹⁶²

2. "VOUCHING-IN"

Although it is a little noticed and seldom used device, a form of third party practice has always been available in Florida. In *Olin's Rent-A-Car System, Inc. v. Royal Continental Hotels*,^{162a} the hotel had been successfully sued in a previous action for personal injury. Olin was a licensee at the hotel whose negligence appeared to have caused the injury. When first sued, the hotel had advised the rent-a-car company that if it was held liable in the suit, Olin would then be liable to the hotel. Olin was also requested to defend the suit but refused to do so.

In holding that the rent-a-car company was liable to indemnify the hotel, Judge Barns reviewed the common-law history of vouching-in a third party in an indemnity situation. Generally, the theory covers all claims for indemnity, express or implied. Vouching-in is appropriate when a non-party to a suit would be under a duty to indemnify the defendant for any judgment rendered against the defendant. Of course, the defendant must give due notice to the non-party, and the judgment may not be obtained with fraud or collusion.

A major difference between common law vouching-in and current third party practice is that the former may operate beyond state lines in acquiring jurisdiction over one's person.

I. Amended Pleadings

1. IN GENERAL

Rule 1.190 prescribes the procedures for the amendment of pleadings and states that leave shall be freely given when justice so requires. Florida courts have generally been liberal in allowing amendments. A judge should closely examine all of the pleadings and if the insufficiencies of a complaint appear to be such that they may be cured by proper amendments, a dismissal with prejudice is improper.¹⁶³

There are, of course, certain circumstances under which a judge should not allow further amendments. When an amended counterclaim not only fails to state a cause of action but establishes that no cause of action exists, the action should be dismissed with prejudice.¹⁶⁴ If the plaintiff has had opportunities to amend his pleadings and has declined to do so, he is not entitled to amend after the case has been completed and the judge has announced his decision.¹⁶⁵ Although the courts are liberal in al-

162. *Schmid v. Saphier*, 184 So.2d 908 (Fla. 4th Dist. 1966).

162a. 187 So.2d 349 (Fla. 4th Dist. 1966).

163. *Conklin v. Smith*, 191 So.2d 311 (Fla. 1st Dist. 1966).

164. *Price v. Airlift Int'l, Inc.* 181 So.2d 549 (Fla. 3d Dist. 1966).

165. *Whitman v. Firehouse Drive-Inn, Inc.*, 193 So.2d 439 (Fla. 1st Dist. 1966).

lowing amendments, by now the axiom is established that the liberality gradually diminishes as the case progresses.¹⁶⁶

Certain other requirements must be met before a party is entitled to amend a pleading. For instance, a judge does not abuse his discretion by denying a motion to amend a complaint when the new complaint is not submitted with the motion and the motion does not incorporate the additional facts or theories of law on which the party would rely to state a cause of action if the amendment were permitted.¹⁶⁷

The type of action which is pending may play a role in the judge's determination as to whether to allow an amendment. In *Virginia Mirror Co. v. Hall*,¹⁶⁸ the action was for garnishment. The plaintiff filed an affidavit in the action, but it was not in conformity with the statute.¹⁶⁹ After answering, the defendant moved to quash the writ of garnishment and pointed out the defects in the plaintiff's affidavit. The trial judge decided that the amendment would not be in the interest of justice and denied the motion to amend. The denial was affirmed.

If a plaintiff has no valid cause of action existing at the time of filing suit, the defect cannot ordinarily be remedied by the accrual of a cause while the suit is pending. A complaint amended on this basis should be dismissed with prejudice.¹⁷⁰

Regardless of the situations above-mentioned where the courts have denied motions to amend, the judicial attitude continues to be liberal toward allowing the amendment. As an example, in *McSwiggan v. Edson*,¹⁷¹ the plaintiff brought an action in equity. He was allowed to amend his prayer once, and then moved to amend by dropping all equitable complaints and moved to transfer the case to the law side. The court properly granted both motions in the interest of justice.

2. DIVORCE ACTIONS

An interesting situation is developing in Florida which might allow a party to a divorce action to obtain an *in personam* divorce against a non-resident spouse. If a court does have personal jurisdiction over the defendant, it can also adjudicate a support claim along with the divorce action.¹⁷² In *Kitchens v. Kitchens*,¹⁷³ it was held that a wife who sued her husband for separate maintenance could later amend the complaint so as to make the action one for divorce. In *Gilbert v. Gilbert*,¹⁷⁴ a wife who had

166. *United States v. State*, 179 So.2d 890 (Fla. 3d Dist. 1965).

167. *Silvers v. Drake*, 188 So.2d 377 (Fla. 1st Dist. 1966).

168. 181 So.2d 6 (Fla. 2d Dist. 1965).

169. FLA. STAT. § 77.03 (1967).

170. *Hasam Realty Corp. v. Dade County*, 178 So.2d 747 (Fla. 3d Dist. 1965).

171. 186 So.2d 13 (Fla. 1966).

172. *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957).

173. 162 So.2d 539 (Fla. 3d Dist. 1964).

174. 187 So.2d 49 (Fla. 3d Dist. 1966).

not lived in Florida for six months served her husband personally in an action for separate maintenance.¹⁷⁵ The husband answered and returned to his residence out of the state. After the wife had fulfilled the six-months residency requirement,¹⁷⁶ she was allowed to amend the complaint in order to seek a divorce on the same grounds as those alleged for separate maintenance.¹⁷⁷ The motion and notice of hearing were served on the husband's attorney who moved to quash the amended complaint on jurisdictional grounds. The motion was denied.

The appellate court held that Florida's liberal attitude toward amendment required only that the amended pleading be based upon the same specific conduct, transaction or occurrence which the plaintiff tried to enforce in the original complaint.¹⁷⁸ Although there is a due process requirement of notice to the defendant, that requirement is met by service upon the party's attorney,¹⁷⁹ and there is no need to resort to the constructive service statutes. The court originally had personal jurisdiction over both defendants. The length and character of residence do not affect jurisdiction over the person, but only jurisdiction over the subject matter. Thus, when the wife had lived in Florida for six months and amended her complaint to seek a divorce, the court then had jurisdiction over both of the parties and the subject matter and could enter any proper judgment.¹⁸⁰

3. RELATION-BACK DOCTRINE

When the matter asserted in the amended pleading arises from the same conduct, transaction or occurrence as that attempted to be set forth in the original pleading, the amendment should be held to relate back to the date of the original pleading.¹⁸¹ If the plaintiff files his complaint in his own name when it should have been filed in the corporate name, the amendment will relate back to the original filing date even though the statute of limitations has run in the intervening period.¹⁸² In certain situations the plaintiff will be permitted to amend the complaint in order to insert the name of the proper defendant after the period of limitation has expired. When the defendant who is served has a close relationship with the party who should have been served and lulls the plaintiff into a false sense of security until the statute has run, the amendment will be held to relate back.¹⁸³ However, in an action against a decedent's estate no amendments to a complaint should be permitted after the expiration of

175. See FLA. STAT. § 65.09 (1967).

176. FLA. STAT. § 65.02 (1967).

177. FLA. STAT. § 65.04 (1967).

178. *Keel v. Brown*, 162 So.2d 321 (Fla. 2d Dist. 1964).

179. FLA. R. CIV. P. 1.080(b).

180. *Gilbert v. Gilbert*, 187 So.2d 49, 51 (Fla. 3d Dist. 1966).

181. FLA. R. CIV. P. 1.190(c).

182. *Haines v. Leonard L. Farber Co.*, 199 So.2d 311 (Fla. 2d Dist. 1967).

183. *Argenbright v. J.M. Fields Co.*, 196 So.2d 190 (Fla. 3d Dist. 1967).

the time allowed for filing claims¹⁸⁴ unless the amendment requires no additional facts to be proved and the parties in interest and the essential elements of the controversy remain the same.¹⁸⁵

It has been held that a pleading filed by a corporation and signed by its president who is not an attorney is a nullity and cannot be amended. If the statute of limitations has run in the meantime, it would appear that the plaintiff has lost the cause of action.¹⁸⁶

VI. PRE-TRIAL PROCEDURES

The Rules require that certain defenses be affirmatively pleaded.¹⁸⁷ However, a defendant who fails to so plead may notify the plaintiff of his intention to do so and have the defense included in a pretrial order.¹⁸⁸ If the plaintiff makes no objection to the order prior to trial, the defense will be in issue and instructions regarding it may be given by the judge.¹⁸⁹

Actions taken by attorneys at pre-trial conferences may be extremely important as shown by *Wabash Life Insurance Co. v. Senitt*,¹⁹⁰ At the pre-trial conference, the plaintiff offered copies of medical bills, and the defendant reserved objections as to their relevancy and materiality. The pre-trial order took note of the objection. At the trial, the defendant objected to the introduction of the medical expenses on bases other than materiality and relevancy. The trial judge ruled that the defendant could make no objection to the evidence except that reserved at the conference. The ruling was affirmed.

One of the purposes of a pre-trial conference is to limit the number of witnesses a party is allowed to call.¹⁹¹ When a judge so limits the number of witnesses and one of the parties proposes to call an unscheduled witness in order to impeach a portion of the opposing party's testimony, it is not an abuse of the discretion of the judge to sustain an objection to the witness when the judge feels that the testimony to be impeached is collateral or irrelevant to the issues.¹⁹²

The judge may make attendance at the pre-trial conference mandatory on the part of the attorneys. When one of the attorneys does fail to

184. FLA. STAT. § 733.16 (1967).

185. *Grayson v. Maeder*, 186 So.2d 796 (Fla. 3d Dist. 1966).

186. *Nicholson Supply Co. v. First Fed. Sav. & Loan Ass'n*, 184 So.2d 438 (Fla. 2d Dist. 1966), 19 A.L.R.3d 1067.

187. FLA. R. CIV. P. 1.140.

188. Florida Rule of Civil Procedure 1.200(6) provides that one of the purposes of the pre-trial conference is to consider and determine, "[s]uch other matters as may aid the court in the disposition of the action." In the instant case, the defense considered was that of contributory negligence.

189. *Rice v. Clement*, 184 So.2d 678 (Fla. 4th Dist. 1966).

190. 181 So.2d 22 (Fla. 3d Dist. 1965).

191. FLA. R. CIV. P. 1.200.

192. *A.A. Holiday Rent-A-Car, Inc. v. Edwards*, 190 So.2d 362 (Fla. 3d Dist. 1966). See also *Hartstone Concrete Prods., Inc. v. Ivancevich*, 200 So.2d 234 (Fla. 2d Dist. 1967).

attend, the judge may dismiss the suit, strike the answer, or take such action as justice requires.¹⁹³ The judge may dismiss a pleading *sua sponte*. However, if the plaintiff has previously requested a jury trial and the defendant's answer has been stricken for failure to attend, it is error for the trial judge to enter final judgment without a jury trial as to damages.¹⁹⁴

VII. PARTIES

Rule 1.120(a) requires a party to raise the issue of a party's capacity to sue or be sued by a specific negative averment. A motion to dismiss for lack of jurisdiction over the person of the defendant¹⁹⁵ may not be utilized in order to raise the question of capacity.¹⁹⁶

In an action for conversion of an automobile which was owned jointly by a husband and wife, it was not an abuse of the trial judge's discretion¹⁹⁷ to order that the wife be joined as an indispensable party.¹⁹⁸

In *Bonded Rental Agency, Inc. v. City of Miami*,¹⁹⁹ the defendant filed a cross-claim but did not make proper service of process. The judge took the following actions: (1) granted the plaintiff's motion for summary final decree; (2) denied the defendant's motion for summary judgment; (3) granted the cross-defendant's motion to dismiss for lack of jurisdiction over the person, and (4) added the cross-defendant as a party defendant. In essence, the action was allowed to continue only between the defendant and the cross-defendant who had not been properly served, but who could be added as a party in accordance with the rules.²⁰⁰ The majority affirmed the action because, "the joinder of parties in equity is largely a matter of discretion . . ." ²⁰¹

VIII. INTERVENTION

At common law, the right to intervene was unknown. Prior to the latest revision to the Rules, the intervention procedure was contained only in the rules relating to equity²⁰² and it was generally held that there

193. FLA. R. CIV. P. 1.200.

194. *Bader Bros. Van Lines, Inc. v. Jay*, 183 So.2d 867 (Fla. 2d Dist. 1966).

195. FLA. R. CIV. P. 1.140(b).

196. *Seminole Tribe, Inc. v. Courson*, 183 So.2d 569 (Fla. 3d Dist. 1966).

197. FLA. R. CIV. P. 1.250.

198. *Scott v. Mico Auto Sales*, 187 So.2d 910 (Fla. 3d Dist. 1966); FLA. R. CIV. P. 1.210(a).

199. 192 So.2d 305 (Fla. 3d Dist. 1966).

200. FLA. R. CIV. P. 1.210(a), 1.250.

201. *Bonded Rental Agency, Inc. v. City of Miami*, 192 So.2d 305, 306 (Fla. 3d Dist. 1966). The dissent argued that the defendant should pursue the cross-defendant in an independent action and that under this decision, litigation might never come to an end. A long list of cases was cited in support of the statement that, ". . . [T]he general rule is that parties may be joined prior to the final decree but may not be joined subsequent to a final determination of the matter." *Id.* at 306.

202. See FLA. R. CIV. P. 3.4, 1965 Revision.

could be no intervention in an action at law.²⁰³ Even under the old rules, however, an intervention in a law action was recently allowed on the ground that it would be a waste of judicial effort if the intervention were not allowed.²⁰⁴ Under this standard, and with the merger of law and equity in the new rules, it is probable that intervention at law will be allowed.

Anyone claiming an interest in pending litigation may be permitted to assert his right by intervention.²⁰⁵ Whether a party will be permitted to intervene is within the discretion of the trial judge, and his determination will not be disturbed absent a showing of clear error.²⁰⁶

In determining whether intervention should be allowed the trial judge must decide whether the proposed intervenor's interest in the pending cause is sufficient. In an action for the wrongful death of a minor child, the mother had received a final judgment when the father who was divorced from the mother attempted to intervene, alleging that the statute vested the cause of action exclusively in him.²⁰⁷ The court noted that the mother had the legal custody of the child and was the administratrix of the child's estate.²⁰⁸ The court held that the father had no interest in the litigation or proceeds of recovery and had no right to intervene.²⁰⁹

A person does not have sufficient interest to intervene in a condemnation proceeding when he has no specific interest in the property to be condemned but only other property rights adversely affected by the action.²¹⁰ Further, a public-spirited citizen or taxpayer has no right to intervene because of his belief that one side or the other should prevail.²¹¹

An intervenor is bound by the record made at the time he intervenes. He cannot contest the plaintiff's claim against the defendant, but is limited to an assertion of his right to the *res*. He cannot challenge the sufficiency of the pleadings or the propriety of the procedure or move to dismiss or delay without the permission of the court.²¹²

IX. INTERPLEADER

In order for a plaintiff to be entitled to relief by interpleader, he must apply for that relief before a judgment at law has been rendered

203. *Warshaw-Seattle, Inc. v. Clark*, 85 So.2d 623 (Fla. 1955).

204. *Miller v. Townhouse Dev. Corp.*, 178 So.2d 730 (Fla. 2d Dist. 1965).

205. FLA. R. CIV. P. 1.230.

206. *Wogisch v. Tiger*, 193 So.2d 187 (Fla. 4th Dist. 1966).

207. FLA. STAT. § 768.03 (1967).

208. Citing *Haddock ex rel. Wiggins v. Florida Motor Lines Corp.*, 150 Fla. 848, 9 So.2d 98 (1942).

209. *Jordan v. Jordan*, 187 So.2d 68 (Fla. 3d Dist. 1966).

210. *Tampa Suburban Util. Corp. v. Hillsborough County Aviation Auth.*, 195 So.2d 568 (Fla. 2d Dist. 1967).

211. *Charlotte County Dev. Comm'n v. Lord*, 180 So.2d 198 (Fla. 2d Dist. 1965).

212. *United States v. State*, 179 So.2d 890 (Fla. 3d Dist. 1965).

in favor of any of the claimants to the common fund.²¹³ It would appear, however, that if the plaintiff alleges and proves any of the traditional grounds for a collateral attack on a prior judgment²¹⁴ in a suit for interpleader and injunction to restrain the enforcement of the judgment, the action will lie.²¹⁵

X. DEPOSITIONS AND DISCOVERY

A. Amendments

A new sentence has been added to Rule 1.390(b), Depositions of Expert Witnesses. It provides that "A deposition taken under this rule and any deposition taken of an expert witness under any other rule may be used in any manner permitted by Rule 1.280(d)." Rule 1.280(d) prescribes the conditions for use of depositions. In *Cook v. Lichtblau*,²¹⁶ the court held that a deposition of the plaintiff's expert witness, taken by the defendant for discovery purposes, could not be introduced into evidence by the plaintiff when the expert witness was ill²¹⁷ because the plaintiff had not complied with the rules for taking the deposition of an expert witness. The subcommittee notes indicate that the amendment was designed to end the confusion resulting from this case²¹⁸ and it seems clear that the courts will now allow such use of expert depositions.

The following sentence has been added to rule 1.410(b):

A party seeking production of evidence at trial which would be subject to a subpoena may compel such production by serving a notice to produce such evidence on an adverse party as provided in Rule 1.080(b). Such notice shall have the same effect and be subject to the same limitations as a subpoena served on the party.

The purpose of the amendment is to make the procedure for obtaining documentary evidence for trial easier.²¹⁹

B. Admissions of Fact

Rule 1.370(a) provides that under certain circumstances, if a party fails to make an admission or denial of fact, or an objection to the request for admission, the fact shall be deemed admitted. However, when

213. *Aetna Ins. Co. v. Evans*, 57 Fla. 311, 49 So. 57 (1909).

214. Fraud, collusion, lack of jurisdiction or failure of due process. *Goldfarb v. J.A. Cantor Associates, Inc.*, 123 So.2d 50 (Fla. 3d Dist. 1960).

215. *Montgomery v. Travelers Indem. Co.*, 192 So.2d 779 (Fla. 1st Dist. 1966).

216. 176 So.2d 523 (Fla. 2d Dist. 1964).

217. The use of a witness's deposition is normally allowed when the witness is ill. FLA. R. CIV. P. 1.280(d)(3).

218. *In re Florida Rules of Civil Procedure*, 1967 Revision, 187 So.2d 598, 637 (Fla. 1966).

219. *In re Florida Rules of Civil Procedure*, 1967 Revision, 187 So.2d 598, 637 (Fla. 1966).

only one member of a partnership answers the request for admissions on behalf of all the partners, this is not sufficient ground for disregarding the answers and charging the partnership with admissions of all the facts requested.²²⁰

C. *The Work Product Concept*

In interrogatories²²¹ to the plaintiff, the defendant asked several questions relating to the names and addresses of persons who had knowledge of the accident, injuries, disfigurement, physical and mental complaints, disability ratings, etc. Each of the interrogatories began with the phrase, "In your knowledge or that of your attorney" The court held that the plaintiff was required to answer the question requiring the plaintiff and his attorney to give the names and addresses of any persons who had knowledge of the facts of the accident because the Supreme Court of Florida had previously upheld the validity of such an interrogatory.²²² However, no answer was required to that portion of the other interrogatories which requested information within the knowledge of the attorney. Such information would be merely the impression of the attorney and would invade the work product.²²³

D. *Refusal to Make Discovery*

Rule 1.380(d)²²⁴ governs the penalties that may be imposed against a party who wilfully fails to appear for a deposition or answer interrogatories. Although the rule is silent on the matter, consistent interpretation now requires that before the penalties may be imposed, the trial judge must enter an order allowing the defaulting party a fixed amount of time to comply.²²⁵ The judge may not, without entering such an order, strike the defendant's answer for failure to respond to interrogatories even when the defendant tenders no valid excuse.²²⁶

After a judge has set a fixed time for response, he may take the action provided for in the rules. In *Southeastern Mobile Homes, Inc. v. Transit Homes, Inc.*,²²⁷ the trial judge denied the plaintiff's motion to strike the defendant's compulsory counterclaim because the defendant had failed for five months to respond to interrogatories. After a hearing,

220. *Siegel v. Raybro Elec. Supplies, Inc.*, 189 So.2d 497 (Fla. 3d Dist. 1966).

221. Florida Rule of Civil Procedure 1.340 provides that interrogatories may relate to any matters which can be inquired into under Rule 1.230(b).

222. *Dupree v. Better Way*, 86 So.2d 425 (Fla. 1956).

223. *Lopez v. Wallack*, 197 So.2d 327 (Fla. 3d Dist. 1967).

224. "[T]he court on motion and notice may strike out all or any part of any pleading of that party or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party." FLA. R. CIV. P. 1.380(d).

225. See Massey & Westen, *Civil Procedure, Seventh Survey of Florida Law*, 20 U. MIAMI L. REV. 662, 663 (1966).

226. *Remington Constr. Co. v. Hamilton Elec., Inc.*, 181 So.2d 183 (Fla. 3d Dist. 1966).

227. 192 So.2d 53 (Fla. 2d Dist. 1966).

the judge granted the defendant ten more days to respond. When there was no response, the court struck the counterclaim. No abuse of discretion was shown.

E. *Production of Documents and Things and Subpoena Duces Tecum*

An order to produce documents²²⁸ which requires the plaintiff to produce, ". . . any and all photographs, statements, reports, surveys, analysis data or any other data . . ." dealing with the condition of the defendant's auto at the time of, or subsequent to, an accident which is the subject matter of the litigation, is considered to be too extensive and should be quashed.²²⁹ The items should be set forth with more specificity. The question of whether good cause²³⁰ is shown is for the trial judge.²³¹ Further, the party moving for discovery and production of documents should specify in his motion, with particularity, the facts he intends to prove with the documents,²³² since the rule requires that they must contain or constitute evidence before an order for production will be entered.²³³

Although the documents to be produced should be set forth with specificity, the description need only be sufficiently certain to enable a party to comply with the order. The motion for production need not be verified, and it need not definitely allege that the documents sought constitute admissible evidence since this cannot be ruled upon by the judge until the trial.²³⁴

In a recent decision it was held that a subpoena duces tecum²³⁵ would run to a party at the time of trial.²³⁶ Among the questions left unanswered by the decision²³⁷ was whether a showing of good cause²³⁸ is a prerequisite for the issuance of the subpoena. In *Pembroke Park Lanes, Inc. v. High Ridge Water Co.*,²³⁹ some of the questions were answered. The party seeking to require a party to produce documents at a trial, need not show good cause prior to the issuance of a subpoena duces tecum. The party required to produce may ". . . promptly object by motion prior to the return date and thereupon, before compliance with the subpoena shall be required, the

228. FLA. R. CIV. P. 1.350. *See amended R.C.P. 1.410, 211 So.2d — (Fla. 1968)

229. *International Business Mach. Corp. v. Elder*, 187 So.2d 82 (Fla. 3d Dist. 1966).

230. Good cause must be shown before the court will enter an order for production.

FLA. R. CIV. P. 1.350.

231. *International Business Mach. Corp. v. Elder*, 187 So.2d 82, 84 (Fla. 3d Dist. 1966).

232. *Fryd Constr. Corp. v. Freeman*, 191 So.2d 487 (Fla. 3d Dist. 1966).

233. FLA. R. CIV. P. 1.350.

234. *Ormond Beach First Nat'l Bank v. J.M. Montgomery Roofing Co.*, 189 So.2d 239 (Fla. 1st Dist. 1966).

235. FLA. R. CIV. P. 1.410.

236. *Franklyn S., Inc. v. Riesenbeck*, 166 So.2d 831 (Fla. 3d Dist. 1964).

237. See Massey & Westen, *Civil Procedure, Seventh Survey of Florida Law*, 20. U. MIAMI L. REV. 665, 666 (1966).

238. FLA. R. CIV. P. 1.350.

239. 186 So.2d 85 (Fla. 3d Dist. 1966).

party causing its issuance must show good cause at a hearing on such motion.²⁴⁰ The court also held that Rule 1.410 must be read in *pari materia* with rule 1.350.

Obviously, under this decision, a showing of good cause is a prerequisite to the *enforcement* of the subpoena, but not to its *issuance*. The new procedure brought about by the recent amendments to the rules²⁴¹ is the same as that for a motion to produce, and good cause must be shown prior to the issuance of that order.²⁴²

Section 440.33(2) of the Florida Statutes prescribes the procedures which the Workmen's Compensation Commission must follow when a person neglects or refuses to produce pertinent documents after having been ordered to do so. The deputy must certify the facts to the appropriate court (the circuit court) which may then punish as if the failure were a contempt of the court. It is beyond a deputy's authority to dismiss a workmen's compensation petition for failure to produce.²⁴³

A private citizen, in contesting his tax assessment, has a right to compel production of the assessor's worksheets and copies of the returns of persons similarly situated, unless specifically barred by statute.²⁴⁴ The right exists with regard to tangible property taxes, but not with regard to intangible property taxes.²⁴⁵ A motion to produce is the proper method to use in order to obtain this information.²⁴⁶

F. *Scope of Discovery*

A deponent may usually be examined regarding any matter which is not privileged and is relevant²⁴⁷ to the pending action; it is not ground for objection that the testimony will be inadmissible if the information requested appears to be reasonably calculated to lead to the discovery of admissible evidence.²⁴⁸ In the absence of clear error, the appellate court will not disturb the broad discretion of the trial judge in ruling on objections to interrogatories²⁴⁹ or other discovery procedures.

Pure bill of discovery actions have not been eliminated by the Rules of Civil Procedure. They have so long been a subject of equity jurisdiction

240. *Id.* at 87.

241. *See* p. 478 *supra*.

242. FLA. R. CIV. P. 1.350. **See* amended R.C.P. 1.410, 211 So.2d — (Fla. 1968).

243. Kirk v. Publix Super Mkts., 185 So.2d 161 (Fla. 1966).

244. FLA. STAT. § 110.01 (1967).

245. FLA. STAT. § 199.101 (1967).

246. Maxwell v. Pine Gas Corp., 195 So.2d 602 (Fla. 4th Dist. 1967).

247. Any interrogatories concerning a private investigator hired by the husband which require disclosures of communications between the private investigator and the husband or his attorney need not be answered. Further, any questions which call for a conclusion as to what may occur in the future are improper. Novack v. Novack, 187 So.2d 385 (Fla. 3d Dist. 1966).

248. FLA. R. CIV. P. 1.280(b).

249. Disney v. Prudential Ins. Co. of America, 193 So.2d 657 (Fla. 1st Dist. 1967).

that statutes purporting to give other and simpler means of obtaining the identical relief are not regarded as ousting the equity jurisdiction unless there is a clear legislative declaration to that effect.²⁵⁰ There is no such declaration in the new rules.²⁵¹

In a divorce action, it is an abuse of the judge's discretion to grant a protective order²⁵² immunizing the husband from pre-trial discovery of his financial worth, on the basis that the husband has undertaken to answer any reasonable order for costs, fees or other allowances.²⁵³ This is the case even when the husband files a written admission or stipulation that he has assets in excess of five million dollars. The wife and the court are entitled to know primary, detailed facts instead of secondary, non-verifiable conclusions, in order to arrive at a just decision.²⁵⁴

Particularly when a wife is seeking to establish her rights to property in which she claims a special equity, the husband may not avoid responding to interrogatories concerning his financial situation by stipulating that he will pay any reasonable court order. This is because a husband's pecuniary ability to pay permanent alimony is an essential element in making an allowance to the wife in a divorce proceeding.²⁵⁵

In an action for assault, if the allegations of a complaint would justify allowances of punitive damages, then written interrogatories to the defendant concerning his financial worth are proper because it is then relevant to the subject matter involved. The fact that the plaintiff, at the time of seeking discovery, has produced no evidence to support an award of punitive damages is immaterial, as he may do so at the trial.²⁵⁶

It is proper in Florida to compel the production of the defendant's income tax returns in an action where the returns are relevant to the issues.²⁵⁷ The rule permits the court to order any party to ". . . produce and permit the inspection and copying or photographing . . ." of certain documents and things.²⁵⁸ Thus, because of the confidential nature of income tax returns, it is improper to order a party to *deliver copies* of the returns to the opposing party's counsel. Provision for the *examination* of copies should be made and the confidential nature of the returns should be reasonably protected.²⁵⁹ Further, the order requiring production is not enforceable unless it specifies the place and manner for making an inspection.²⁶⁰

250. First Nat'l Bank v. Dade-Broward Co., 125 Fla. 594, 171 So. 510 (1936).

251. Poling v. Petroleum Carrier Corp., 194 So.2d 925 (Fla. 1st Dist. 1967).

252. FLA. R. CIV. P. 1.310(b).

253. Orlowitz v. Orlowitz, 199 So.2d 97 (Fla. 1967); see 22 U. MIAMI L. REV. 195 (1967).

254. Parker v. Parker, 182 So.2d 498 (Fla. 4th Dist. 1966).

255. Novack v. Novack, 187 So.2d 385 (Fla. 3d Dist. 1966).

256. Lewis v. Moody, 195 So.2d 260 (Fla. 3d Dist. 1967).

257. Parker v. Parker, 182 So.2d 498 (Fla. 4th Dist. 1966).

258. FLA. R. CIV. P. 1.350.

259. Fryd Constr. Corp. v. Freeman, 191 So.2d 487 (Fla. 3d Dist. 1966).

260. *Id.* at 490; FLA. R. CIV. P. 1.350.

In a case in which no interrogatories were served, the third district has held that when interrogatories are appropriately utilized, the answering party is under an obligation to furnish the propounding party with any data discovered subsequent to the filing of the original answers if such data would have been appropriately furnished in the initial answers.²⁶¹ In this case, the defendant had taken the plaintiff's deposition and had secured production of certain documents. Subsequently, the plaintiff had further medical examinations which indicated more serious injuries. When evidence as to the plaintiff's more serious injuries was introduced at the trial, the defendant claimed surprise. The judge allowed the evidence and refused to grant a mistrial. In affirming, the appellate court held that an order for production may be construed to be continuing in nature only if its wording makes it so. Further, a party cannot claim surprise if he has not taken steps to protect himself, such as the use of a pre-trial conference, interrogatories to the plaintiff, a deposition of the plaintiff's physician or a request that the motion to produce be continuing. Had interrogatories been propounded, the party would have been under an obligation to furnish subsequent information.

The instant case leaves many questions unanswered. The holding concerning the continuing nature of interrogatories was not necessary to decide the case, and it cannot be stated with certainty what effect it will have on the other district courts of appeal. However, the court does have support in the federal decisions²⁶² for this position and it is submitted that parties, if put on notice, should be required to submit subsequently obtained data which would have been appropriate for the initial answer.

In obtaining an order to produce which will have a continuing effect, the question presents itself as to whether the movant will be entitled as of right to have the proper wording inserted in the order by the trial judge, or whether a particularly "good cause"²⁶³ must be shown. The practitioner would do well to request the proper wording in all orders to produce.

G. Use of Depositions

Rule 1.280(d) provides, *inter alia*, "The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds . . . (2) that the witness is at a greater distance than one hundred miles from the place of trial or hearing . . ." A difference between the districts has arisen concerning the kind of proof necessary to show that a witness is not within the designated radius of the court so that the deposition may be introduced.

In *Haverley v. Clann*,²⁶⁴ the trial judge accepted the unsworn state-

261. *Passino v. Sanburn*, 190 So.2d 61 (Fla. 3d Dist. 1966), *overruled by R.C.P. 1.340(d), 211 So.2d — (Fla. 1968).

262. *Chisholm v. Board of Pub. Educ.*, 33 F.R.D. 313 (E.D. Pa. 1963).

263. See FLA. R. Civ. P. 1.350.

264. 196 So.2d 38 (Fla. 2d Dist. 1967).

ment of a party's attorney that to the best of his knowledge, the witness was more than one hundred miles from the court. On appeal, the second district held that it was error to admit the deposition on the basis of such proof, stating that elementary due process required the proof to be in the form of evidence which is sworn.²⁶⁵

In *Fishman v. Liberty Associates, Inc.*,²⁶⁶ the third district was of a different opinion and held that it was not ground for a new trial that the witness's absence from the jurisdiction was established by an attorney's unsworn statement and the deposition was allowed as evidence on this basis. The court indicated that the trial judge could either require the attorney to be sworn, or, if opposing counsel does not object, accept an unsworn statement.²⁶⁷

Rule 1.280(d)(2) allows the use of a deposition of a party by an adverse party for "any purpose," subject, of course, to the normal rules of evidence. Although the rules allow an adverse party to be called as a hostile witness,²⁶⁸ the opposing counsel may choose to introduce the party's deposition instead,²⁶⁹ even if the party is available as a witness. However, in cases where the court has required counsel to call the opposing party as a hostile witness rather than permitting the introduction of the deposition and where the questions and answers were the same as those contained in the deposition, it has been held to be harmless error where no prejudice was shown.²⁷⁰ The same rule also applies, of course, to an officer, director, or managing agent of a public or private corporation, partnership or association which is a party.²⁷¹ Deputy county tax assessors have been held to be managing agents for purposes of the rule.²⁷²

In a case of first impression, the first district has held that when a party uses part of an opposing party's deposition to impeach his veracity,²⁷³ the impeached party may introduce the rest of the deposition to explain and clarify the answers.²⁷⁴ The court followed the federal construction of Rule 26(d)(4).²⁷⁵ Rule 1.280(d)(4) provides that "If only

265. Between the time of the ruling and the time of appeal, it was learned that the witness, who was thought to be more than one hundred miles away was actually in the common jail, in close proximity to the place of trial.

266. 196 So.2d 493 (Fla. 3d Dist. 1967).

267. On appeal in this case, it was proved that the witness was actually out of the jurisdiction.

268. FLA. R. CIV. P. 1.450(a).

269. *Monsalvatge & Co. v. Ryder Leasing, Inc.*, 151 So.2d 453 (Fla. 3d Dist. 1963).

270. *Cooper v. Atlantic Coast Line R.R.*, 187 So.2d 673 (Fla. 1st Dist. 1966); *Hill v. Sadler*, 186 So.2d 52 (Fla. 2d Dist. 1966).

271. *Cooper v. Atlantic Coast Line R.R.*, 187 So.2d 673 (Fla. 1st Dist. 1966); FLA. R. CIV. P. 1.280(d)(2).

272. *Haines v. Leonard L. Farber Co.*, 199 So.2d 311 (Fla. 2d Dist. 1967).

273. FLA. R. CIV. P. 1.280(d)(1).

274. *King v. Califano*, 183 So.2d 719 (Fla. 1st Dist. 1966).

275. FED R. CIV. P. 26(d)(4); *Westinghouse Elec. Corp. v. Wray Equip. Corp.*, 286 F.2d 491 (5th Cir. 1961).

a part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts." The fact that the impeaching party did not *offer part of the deposition in evidence*, but instead used it on *cross-examination*, is not controlling. It would be against the spirit and intent of the rules to allow one party to use them in order to take an unfair advantage of the other party by presenting a half truth and then objecting to an effort to present the whole truth from the same evidentiary source.²⁷⁶

H. *Place of Taking Depositions*

A person desiring to take the deposition of any person shall give reasonable notice of the time and place for taking the deposition²⁷⁷ but the court may, upon motion and good cause shown, order that the deposition be taken only in a designated place other than that stated in the notice.²⁷⁸ It has been held²⁷⁹ that the plaintiff is required, upon proper notice, to give his deposition in the forum where the action is pending.²⁸⁰ The court held that the plaintiff had selected the forum and may be forced to be deposed there, regardless of whether he lives and conducts business in the state.

I. *Interrogatories*

Normally, a plaintiff may introduce a defendant's answers to interrogatories into evidence. However, the defendant may not use his own answers as evidence, let alone impart a conclusive character to them. Not even the ancient device of compurgation went so far; it at least required the aid of oath takers.²⁸¹

When a plaintiff objects to the defendant's attempt to introduce answers to interrogatories which the plaintiff has served on the defendant, he must do so at the proper time and for a proper reason. When a plaintiff has had ample opportunity in advance of trial to cross-examine persons giving answers to the interrogatories and has not done so, an objection on this basis should be overruled. Further, even though answers are based on hearsay and are self-serving, a motion to strike after both sides have rested their cases comes too late.²⁸²

276. *King v. Califano*, 183 So.2d 719, 723 (Fla. 1st Dist. 1966).

277. FLA. R. CIV. P. 1.310(a).

278. FLA. R. CIV. P. 1.310(b).

279. The court followed the construction of Federal Rule of Civil Procedure 37 given in *Irwin Co. v. Tide Publishing Co.*, 13 F.R.D. 18 (S.D.N.Y. 1952).

280. *Ormond Beach First Nat'l Bank v. Montgomery Roofing Co.*, 189 So.2d 239 (Fla. 1st Dist. 1966).

281. *Lake v. Konstantinu*, 189 So.2d 171 (Fla. 2d Dist. 1966).

282. *Boutwell v. Bishop*, 194 So.2d 3 (Fla. 1st Dist. 1967).

XI. DISMISSAL OF ACTIONS

A. *Voluntary Dismissal*

The changes of the rules which were made in 1965 to broaden the plaintiff's right to a voluntary dismissal²⁸³ have been carried over into Rule 1.420. The plaintiff may take the voluntary dismissal by serving, or during trial, by stating on the record, a notice of dismissal (except in actions where property has been seized or is in the custody of the court) after all of the plaintiff's evidence is completed and the defendant has moved for a directed verdict.²⁸⁴ Similarly, the voluntary dismissal may be taken after all of the evidence is completed and the defendant has moved for a directed verdict.²⁸⁵ In both cases, the dismissal order should impose conditions designed to protect the defendant and his counsel from monetary loss occasioned by the dismissal.²⁸⁶

However, it has been held that it is not proper to allow the plaintiff to take a voluntary dismissal with prejudice against a co-party when the action might result in a higher award of compensatory damages against the remaining party who is only derivatively liable.²⁸⁷ In this case, a police officer and his employer were sued for assault and battery. Originally, compensatory damages were assessed against the individual defendant in the amount of 1,227.25 dollars and against the city in the amount of 32,627.25 dollars. A new trial for damages was awarded on the basis that the city could not be found liable in compensatory damages in excess of the amount assessed against the active tortfeasor. At the new trial, the officer was voluntarily dismissed, and the jury awarded 15,000.00 dollars in compensatory damages. The Supreme Court of Florida held that it was error to have allowed the dismissal of the police officer, and that ". . . an action shall not be dismissed at a party's instance save upon order of the court and upon such terms and conditions as the court deems proper."²⁸⁸

In *Cooper v. Cooper*,²⁸⁹ the defendant wife in a divorce action moved for temporary custody of the minor children. After the court set a date to hear the motion, the husband filed a notice of voluntary dismissal, but the judge held the hearing and granted the wife the relief requested and other relief. The appellate court held that Rule 1.420(a)(2)²⁹⁰ which primarily relates to counterclaims, was broad enough to sustain the wife's request

283. See Massey & Westen, *Civil Procedure, Seventh Survey of Florida Law*, 20 U. MIAMI L. REV. 641 (1966).

284. *Wellons v. Howe*, 181 So.2d 370 (Fla. 3d Dist. 1966).

285. *Florida E. Coast Ry. v. Chapin*, 179 So.2d 107 (Fla. 3d Dist. 1965).

286. *Id.*; see FLA. R. CRV. P. 1.420(d).

287. *Hutchins v. City of Hialeah*, 196 So.2d 741 (Fla. 1967).

288. *Id.* at 743; see FLA. R. CRV. P. 1.420(a)(2).

289. 194 So.2d 278 (Fla. 2d Dist. 1967).

290. Florida Rule of Civil Procedure 1.420(a)(2) provides that "if a counterclaim has been served by a defendant prior to the service upon him of the plaintiff's notice of dismissal, the action shall not be dismissed against defendant's objections unless the counterclaim can remain pending for independent adjudication by the court."

for affirmative relief concerning the minor children and preclude the requested dismissal. The court's holding was buttressed by the fact that an equity court has inherent jurisdiction to protect infants²⁹¹ and that section 65.14 of the Florida Statutes grants a court of equity the authority to make orders concerning children at any stage in a divorce action.

B. *Status of the Nonsuit*

In *Crews v. Dobson*,²⁹² the Supreme Court of Florida held that the continued existence of the nonsuit was inconsistent with the Rules of Civil Procedure.²⁹³ In doing so, the court upheld the lower court's disposition of the case which was to remand the cause to the trial court with instructions to dismiss with prejudice for failure to prosecute, a disposition which has not been free from criticism.²⁹⁴ Since that time, the supreme court²⁹⁵ and other courts²⁹⁶ have held that a decision of a lower court will not be condemned because it mistakenly refers to a nonsuit instead of a voluntary dismissal provided that the requirements for voluntary dismissal have been generally followed and the effect of the nonsuit is the same as that of a voluntary dismissal.

The disposition of the *Crews* case has been followed when it was not possible to square the purported nonsuit with the requirements for a voluntary dismissal. In *Dade County v. Peachy*,²⁹⁷ the plaintiff's attorney moved for a nonsuit after the jury had retired because he could not help overhearing the juror discussing an incorrect principle of law. After the motion was granted and the jury was discharged, but prior to the actual signing of the order of nonsuit, the defendant moved to dismiss with prejudice for failure of the plaintiff to prosecute.²⁹⁸ The motion was denied. The *Crews* case was decided subsequent to this but prior to the time of appeal. The appellate court held that since the jury had retired²⁹⁹ when the plaintiff moved for the nonsuit, there was no possible ground for treating the motion as a voluntary dismissal, and the *Crews* decision required a dismissal with prejudice for failure to prosecute.³⁰⁰ The supreme court denied the petition for writ of certiorari.³⁰¹

291. *Fisher v. Guidy*, 106 Fla. 94, 142 So. 818 (1932).

292. 177 So.2d 202 (Fla. 1965).

293. FLA. R. CIV. P. 1.35(a), 1962 Revision.

294. Massey & Westen, *Civil Procedure, Seventh Survey of Florida Law*, 20 U. MIAMI L. REV. 594, 644 (1966).

295. *Continental Aviation Corp. v. Southern Bell Tel. & Tel. Co.*, 183 So.2d 200 (Fla. 1966).

296. *Peaslee v. Michalski*, 184 So.2d 497 (Fla. 2d Dist. 1966).

297. 181 So.2d 353 (Fla. 3d Dist. 1965).

298. See FLA. R. CIV. P. 1.35(b), 1962 Revision.

299. FLA. R. CIV. P. 1.420(a)(1).

300. By the time this case reached the appellate court, the 1962 provision of Rule 1.35(b) relating to dismissal for failure to prosecute had been changed to require a dismissal only for failure to prosecute over a one year period. *In re Florida Rules of Civil Procedure*, 178 So.2d 15 (Fla. 1965). It would appear that the case could have been remanded with directions to dismiss without prejudice.

301. The dissenter felt that an error in granting a nonsuit cannot be urged on appeal

In a subsequent decision³⁰² the third district, in a case where the nonsuit could have been granted with the same effect as a voluntary dismissal, remanded the action so the trial judge could determine if the voluntary dismissal procedure would be appropriate.

If a judge treats a motion for voluntary dismissal as such and dismisses without prejudice, stating in his order that he is exercising his discretion, it is not ground for reversal that a colloquy between the judge and counsel indicates that the judge felt that the party had an absolute right to a nonsuit.³⁰³

Hopefully, the problems spawned by the *Crews* case have now been fully resolved by the courts.

C. *Involuntary Dismissal*

Rule 1.420(b) prescribes the grounds for involuntary dismissals. It provides that after a party has completed the presentation of his evidence in a case tried without a jury, any other party may move for dismissal on the ground that upon the facts and law no right to affirmative relief has been shown. Neither the court *sua sponte* nor the defendant is entitled to dismiss the plaintiff's case until the plaintiff has completed the presentation of his evidence.³⁰⁴ This is true even though the plaintiff's witnesses appear to uphold the defense to an action. Even if not required by the rules, it would be contrary to due process of law and fundamental justice to hold otherwise.³⁰⁵

When a defendant, at a pre-trial conference, has admitted liability to the extent of agreed compensatory damages, justice requires that the plaintiff be given every opportunity to prosecute the claim.³⁰⁶ This case presented a complicated fact situation in which the trial judge ordered plaintiff to formally elect to try the issue of damages against two defendants (one was in default) or to dismiss with prejudice against the non-defaulting defendant. When the plaintiff refused to make the election, the judge entered an involuntary dismissal against him. The appellate court affirmed the lower court's order, but remanded with directions to allow the plaintiff to withdraw what the court considered an election not to proceed.

D. *Presenting Defenses in a Motion to Dismiss*

Certain defenses may be presented by a motion to dismiss and "the grounds on which any of the enumerated defenses are based and the sub-

by a defendant who failed to present a motion to dismiss with prejudice for lack of prosecution in time to preserve the plaintiff's privilege of proceeding with the trial. In this case, the motion came after the jury was discharged, and the plaintiff had no option to proceed.

302. *Sanford v. F.A. Chastain Constr., Inc.*, 183 So.2d 222 (Fla. 3d Dist. 1966).

303. *Florida E. Coast Ry. v. Chapin*, 179 So.2d 107 (Fla. 3d Dist. 1965).

304. *Rath Co. v. Sun Coast Fruit Co.*, 186 So.2d 806 (Fla. 3d Dist. 1966).

305. *Sapp v. Radding*, 178 So.2d 204 (Fla. 1st Dist. 1965).

306. *Sideris v. Warrington Motor Co.*, 181 So.2d 650 (Fla. 1st Dist. 1966).

stantial matters of law intended to be argued shall be stated specifically and with particularity in the . . . motion."³⁰⁷ If the trial judge does not approve of the form or content of the motion to dismiss, he may strike the motion and grant the party time to file another responsive pleading, notwithstanding that portion of the rule³⁰⁸ which requires that the defenses shall be heard and determined before trial on application of any party unless deferred until trial. If there is error, it is made harmless by the granting of time in which to file another pleading.³⁰⁹

When a dismissal with prejudice for failure to state a cause of action³¹⁰ does not state the grounds for the dismissal, the appellee does not file a brief with the court, and the complaint does not obviously appear to fail to state a cause of action, the order may be reversed with instructions to permit an amended complaint.³¹¹

Prior to the time that third party practice was permitted in Florida,³¹² a defendant attempted to serve a third party who he claimed was liable to him. The claim was dismissed with prejudice. The former defendant then instituted a new action for indemnity against the original defendant. The trial judge granted the defendant's motion for judgment on the pleadings³¹³ and the plaintiff appealed. The court held that while it was proper in the first action for the court to designate a dismissal as being with prejudice in order to preclude the claim from being refiled in that cause, the "with prejudice" designation was no bar to the filing of the suit in a separate cause or court having jurisdiction.³¹⁴

When a party is duly served with process in a proper court, the existence of a prior action in another court does not necessarily show a lack of jurisdiction, and an action should not be dismissed on that basis. However, such a situation does present grounds for an abatement, and an appellate court may treat a dismissal for lack of jurisdiction as an abatement.³¹⁵

E. *Failure to Prosecute*

Rule 1.420(e) substantially incorporates the Florida statute which requires dismissal of an action if not prosecuted for a one-year period.³¹⁶ The dismissal is mandatory and the trial judge has no discretion in the matter. There need be no "evidentiary showing" before the judge may dismiss; it is based solely on the record, and the fact that the action is one

307. FLA. R. CIV. P. 1.140(b).

308. *Id.*

309. *City of Miami v. Aeroland Oil Co.*, 196 So.2d 31 (Fla. 3d Dist. 1967).

310. FLA. R. CIV. P. 1.140(b).

311. *Hunter v. Fairmount House, Inc.*, 191 So.2d 92 (Fla. 3d Dist. 1966).

312. The procedure was added in the 1965 revision.

313. FLA. R. CIV. P. 1.140(c).

314. *Miami Super Cold Co. v. Giffin Indus. Inc.*, 178 So.2d 604 (Fla. 3d Dist. 1965).

315. *Cicero v. Paradis*, 184 So.2d 212 (Fla. 2d Dist. 1966).

316. FLA. STAT. § 45.19 (1967). *See amended R.C.P. 1.420(e), 211 So.2d — (Fla. 1968).

for a declaratory decree is immaterial.³¹⁷ The fact that the United States is a party defendant does not preclude dismissal for lack of prosecution.³¹⁸

The question of what constitutes a lack of prosecution is a factual inquiry. When the only action taken by the plaintiff within the one year period was to file a motion for substitution of a party plaintiff, the trial judge did not err by denying the defendant's motion to dismiss. However, the court limited its holding to a situation where there is no sufficient showing that the motion was filed as an abuse of the statute because, "this procedure could be used as a device to extend litigation . . ." ³¹⁹ When, during the period considered, the plaintiff has attempted to take the defendant's deposition and moved to strike the defendant's answer the defendant has left the jurisdiction and his counsel has asked leave to withdraw, it is error to dismiss the plaintiff's cause for failure to prosecute.³²⁰

Actions dismissed for failure to prosecute may be reinstated for good cause shown if such a motion is served within one month after the order of dismissal.³²¹ The "good cause" standard for reinstatement is based upon evidence and controlled by applicable principles of law and equity, rather than a standard which is arbitrary in character, and the good cause must be made to appear in the petition for reinstatement.³²² It is not ground for reinstatement that the attorney's secretary failed to file certain documents, or that the judge has kept a motion under advisement for the one-year period.³²³ Out-of-court transactions between the attorneys is not good cause for reinstatement.³²⁴ However, under certain circumstances, when an opposing attorney files sham pleadings in order to delay the trial, reinstatement may be granted.³²⁵

F. *With or Without Prejudice*

In *Hardee v. Gordon Thompson Chevrolet, Inc.*,³²⁶ the court held that a dismissal with prejudice for failure to state a cause of action is proper when the insufficiencies of the complaint relate to some inherent defect in the case as shown by the facts alleged. However, the court held that if the insufficiency relates to a failure of the complaint to allege the necessary facts to state a cause of action, prejudicial dismissal is error. The 1965 amendment to Rule 1.35(b)³²⁷ was designed to overrule this

317. *Newman v. Bennefeld*, 193 So.2d 482 (Fla. 2d Dist. 1967).

318. *Air Control Products, Inc. v. Perma-Stress, Inc.*, 189 So.2d 412 (Fla. 1st Dist. 1966).

319. *Green v. Bursten*, 197 So.2d 326, 327 (Fla. 2d Dist. 1967).

320. *Owens v. Ken's Paint & Body Shop*, 196 So.2d 17 (Fla. 3d Dist. 1967); *Rosenfeld v. Glickstein*, 200 So.2d 242 (Fla. 1968).

321. FLA. STAT. § 45.19 (1967); FLA. R. CIV. P. 1.420(e).

322. *Moore v. Gannon*, 178 So.2d 618 (Fla. 3d Dist. 1965).

323. *Conklin v. Boyd*, 189 So.2d 401 (Fla. 1st Dist. 1966).

324. *Moore v. Gannon*, 178 So.2d 618 (Fla. 3d Dist. 1965).

325. *Young v. Pyle*, 193 So.2d 659 (Fla. 1st Dist. 1967).

326. 154 So.2d 174 (Fla. 1st Dist. 1963).

327. *In re Florida Rules of Civil Procedure*, 178 So.2d 15 (Fla. 1965). The rule is now numbered 1.420.

decision.³²⁸ During this Survey period however, the second district continued to adhere to the *Hardee* rule in cases which can best be described as confusing.³²⁹ However, the court has recognized that the 1966 amendment was designed to replace the doctrine. Thus, in the second district, orders dismissing causes between September 30, 1962 (the date when the 1962 amendments became effective), and January 1, 1966 (the date when the 1965 amendments became effective), must be in conformance with the *Hardee* decision.³³⁰

XII. JURY TRIALS

A. *Right to Jury Trial*

"The right of trial by jury as declared by the Constitution or by statute shall be preserved to the parties inviolate."³³¹ Even if constitutionally guaranteed, however, a party may be held to waive the right if he does not properly demand it.³³² Of course, since there was no provision for jury trials in actions formerly classed as equity, parties will not be entitled to such a trial because Florida is now a code pleading state.³³³ When a defendant files a compulsory legal counterclaim in an action originally brought in equity, the defendant is entitled to a jury trial for the counterclaim. However, when the two do not rest upon common issues the proper procedure is not to transfer the entire cause to the law side, but to resolve first the equitable issue and then transfer the legal counterclaim.³³⁴

When a plaintiff has demanded a jury trial and the defendant's answer is stricken for failure to attend a pre-trial conference, the defendant is still entitled to a jury trial to determine the question of damages.³³⁵

Section 73.101 of the Florida Statutes provides, *inter alia*, for a single award of damages by the jury and a subsequent apportionment among the various parties in interest by the court. In *Carter v. State Road Department*,³³⁶ two defendants moved for separate jury verdicts in a condemnation proceeding, contending that the statute was in violation of the

328. See Massey & Westen, *Civil Procedure, Seventh Survey of Florida Law*, 20 U. MIAMI L. REV. 594, 646 (1966).

329. *Drady v. Hillsborough County Aviation Auth.*, 193 So.2d 201 (Fla. 2d Dist. 1966); *Nelson v. Ward*, 190 So.2d 622 (Fla. 2d Dist. 1966).

330. *Drady v. Hillsborough County Aviation Auth.*, 193 So.2d 201 (Fla. 2d Dist. 1966).

331. FLA. R. CIV. P. 1.430(a).

332. FLA. R. CIV. P. 1.430(d).

333. The situation is the same in the federal courts. See 2 BARRON & HOLTZOFF, *FED. PRACTICE & PROCEDURE* §§ 872, 875 (Wright ed. 1961).

334. *Southwestern Life Ins. Co. v. Gerson*, 187 So.2d 63 (Fla. 3d Dist. 1966), *appeal dismissed*, 192 So.2d 495 (Fla. 1966); see also *Fink v. Bluestein*, 169 So.2d 335 (Fla. 3d Dist. 1964); Massey & Westen, *Civil Procedure, Seventh Survey of Florida Law*, 20 U. MIAMI L. REV. 594, 692 (1966). Compare *Hightower v. Bigoney*, 156 So.2d 501 (Fla. 1963) with 18 U. MIAMI L. REV. 745, 788-89 (1964).

335. *Bader Bros. Van Lines, Inc. v. Jay*, 183 So.2d 867 (Fla. 2d Dist. 1966).

336. 189 So.2d 793 (Fla. 1966).

Florida constitution.³³⁷ The supreme court held that the statute was valid and that the defendants had not been denied their right to a jury trial since such right did not exist at the time of the adoption of the constitution.

B. *Separate Trials for Liability and Damages*

"The court, in furtherance of convenience or to avoid prejudice may order separate trials of any claim"³³⁸ It is not an abuse of the judge's discretion to order one jury trial on the issue of liability and another to decide damages, when one trial for both issues would necessitate holding the jury over the weekend and forcing the plaintiff to incur additional expenses in order to retain the services of out-of-state expert witnesses.³³⁹ When the defendant impeaches the testimony of the plaintiff in the trial of liability, he may read that portion of the transcript to the jury in the trial for damages. If the defendant declines to do so, he cannot be heard to complain that he has been denied his right to a jury trial.³⁴⁰

C. *Verdicts*

When a jury returns a verdict awarding punitive, but not compensatory, damages, it is not error for the trial judge to reinstruct the jury that punitive damages may not be awarded unless there is some compensatory damage and resubmit the verdict to the jury. Until a verdict is received and recorded by the court, it is still within the control of the jury to correct and alter it in substance if the jury so desires.³⁴¹ Thus, it is error for the court to resubmit to the jury only the verdict for compensatory damages without allowing a reconsideration of the punitive award.³⁴²

It is also error for the judge to go into the jury room to hand the jurors a verdict form and while there to receive a statement from the foreman of the jury that the jurors had not previously understood the law as to compensatory damages.³⁴³ Although a judgment on a jury verdict comes to an appellate court with a presumption of correctness, when error is shown it will be reversed.³⁴⁴

A verdict wherein the jury derives the amount of damages based upon actuarial tables and a per diem amount is not a quotient verdict and is not a ground for reversal unless the verdict is clearly arbitrary or is so excessive³⁴⁵ as to shock the conscience of the court.³⁴⁶

337. FLA. CONST. DECL. OF RIGHTS § 3.

338. FLA. R. CIV. P. 1.270(b).

339. *Watts v. Mantooth*, 196 So.2d 230 (Fla. 2d Dist. 1967).

340. *Id.* at 232.

341. *E.g.*, *Tobin v. Garry*, 127 So.2d 698 (Fla. 2d Dist. 1961). *See R.C.P. 1.481, 211 So.2d — (Fla. 1968).

342. *Stevens Mkts., Inc. v. Markantonatos*, 189 So.2d 624 (Fla. 1966).

343. *Id.* at 627.

344. *Bull v. Roy*, 191 So.2d 285 (Fla. 2d Dist. 1966).

345. Excessive and inadequate verdicts are discussed *infra*, p. 503.

346. *Pensacola Greyhound Racing, Inc. v. Williams*, 193 So.2d 628 (Fla. 1st Dist. 1967). See Note, 22 U. MIAMI L. REV. 729 (1968).

D. Instructions

The Supreme Court of Florida has authorized the Supreme Court Committee on Standard Jury Instructions and The Florida Bar Association to publish and distribute standard jury instructions.³⁴⁷ In conjunction therewith, the court amended the rules to include new Rule 1.949³⁴⁸ which provides:

The forms of Florida Standard Jury Instructions published by The Florida Bar pursuant to authority of the Court may be used by the trial judges of this State in charging the jury in every civil case to the extent that the forms are applicable, unless the trial judge shall determine that an applicable form of instruction is erroneous or inadequate, in which event he shall modify or amend such form or give such other instruction as the trial judge shall determine to be necessary accurately and sufficiently to instruct the jury in the circumstances of the case; and, in such event, the trial judge shall state on the record or in a separate order the respect in which he finds the standard form erroneous or inadequate and the legal basis of his finding. Similarly, in all circumstances in which the notes accompanying the Florida Standard Jury Instructions contain a recommendation that a certain type of instruction not be given, the trial judge may follow such recommendation unless he shall determine that the giving of such an instruction is necessary accurately and sufficiently to instruct the jury, in which event he shall give such instructions as he shall deem appropriate and necessary; and, in such event, the trial judge shall state on the record or in a separate order the legal basis of his determination that such instruction is necessary.

The court approved the theory and technique of the standard instructions, but made no attempt to adjudicate the legal principles contained therein. Members of the bar and trial judges retain the right to object to their use.

Although a jury may, at its request, be reinstructed as to part of the court's charge and although it is not necessary for the court to repeat the entire charge,³⁴⁹ the trial judge is still the only source from which the jurors may properly obtain the law or definitions of legal terms. Thus, it is reversible error for the trial judge to permit the jury to have access to a dictionary.³⁵⁰ It is also error for the trial judge to give repetitious instructions, the effect of which tends to unduly emphasize a particular aspect of the case.³⁵¹

Prior to charging the jury, the judge will accept suggested charges from the parties and will thereafter hold a conference with counsel to

347. *In re* Standard Jury Instructions, 198 So.2d 319 (Fla. 1967).

348. *In re* Standard Jury Instructions, 198 So.2d 319, 320 (Fla. 1967).

349. *Zanetti v. Weissler*, 179 So.2d 383 (Fla. 3d Dist. 1965).

350. *Grissinger v. Griffen*, 186 So.2d 58 (Fla. 4th Dist. 1966).

351. *Collins Fruit Co. v. Giglio*, 184 So.2d 447 (Fla. 2d Dist. 1966).

settle the charge to be given.³⁵² Unless a party objects to an instruction at such time, he may not assign the giving of the instruction as error on appeal.³⁵³ When a party has asked for a particular instruction which is granted and the supreme court, after entry of final judgment but prior to argument on the appeal, rules that the statute which was the basis of the instruction is unconstitutional, the party may rely on the holding on appeal. An appellate court must decide a case according to the law applicable when argument is heard.³⁵⁴

The fact that one instruction was not proper is not necessarily grounds for reversal. An instruction must be judged in the light of all the other instructions given and the pleadings and evidence in the case. If the law appears to have been fairly presented to the jury an assignment of error based upon one instruction will not prevail.³⁵⁵

E. Prejudicial Remarks Before the Jury

In *Port Everglades Terminal Company v. Trans-Continental Traffic Service Bureau, Inc.*,³⁵⁶ the plaintiff had alleged conspiracy of two defendants. Each attorney cross-examined the other's client, but not his own. The judge commented unfavorably upon this procedure before the jury. On appeal, the court held that remarks of a trial judge accusing a lawyer of unfairness or holding him up to contempt was reversible error, particularly where the case involved an alleged conspiracy.

An attorney's remark in closing argument that if the jury allows certain damages, "then *you* are asking for it," may reasonably be interpreted as an appeal to the jury's passion or prejudice. However, such a remark is not reversible error if the judge properly instructs the jury to disregard it.³⁵⁷

XIII. CONTINUANCES

When a party moves for a continuance³⁵⁸ and sets forth proper grounds warranting it, the trial judge abuses his discretion by conditioning the granting of the motion upon the posting of a supersedeas bond. This is, in effect, placing a monetary value upon the party's day in court and cannot be condoned.³⁵⁹

352. FLA. R. CIV. P. 1.470(b).

353. *Sharpsteen v. Keesler*, 178 So.2d 623 (Fla. 3d Dist. 1965).

354. *Florida E. Coast Ry. v. Rouse*, 194 So.2d 260 (Fla. 1966). In this case, the defendant asked for an instruction on comparative negligence which was permitted by Florida Statutes, section 768.06 (1965). The statute was later declared unconstitutional.

355. *Keyser v. Brunette*, 188 So.2d 840 (Fla. 2d Dist. 1966).

356. 185 So.2d 501 (Fla. 3d Dist. 1966).

357. *Clark v. Yellow Cab Co.*, 195 So.2d 39 (Fla. 3d Dist. 1967).

358. FLA. R. CIV. P. 1.460.

359. *Johnson v. Fleming*, 180 So.2d 387 (Fla. 1st Dist. 1965).

XIV. DIRECTED VERDICT

A. *In General*

A party may move for a directed verdict at the close of the evidence offered by the adverse party without waiving the right to offer evidence if the motion is denied.³⁶⁰ However, if the moving party does present evidence after the denial, he has waived any error in the ruling, and if the defendant then renews the motion at the completion of all the evidence the judge's ruling must be based on a consideration of all the evidence, not just that presented by the plaintiff.³⁶¹ If the defendant's renewed motion is also denied, the district court may not hold that the trial court erred in failing to grant both of the defendant's motions if the appellate court has before it only the record of the plaintiff's evidence. Since the trial court's possible error in denying a directed verdict at the close of the plaintiff's evidence may be cured by subsequent testimony, ". . . the appellate record was obviously insufficient to permit such a determination . . ." by the district court of appeal.³⁶²

The purpose of a directed verdict is to conclude a trial when there is no evidence whatever that could, in law, support a verdict for the party opposing the motion.³⁶³ If the evidence is conflicting and permits different reasonable inferences³⁶⁴ or if the plaintiff has alleged and shown at least one fact which might lead to recovery,³⁶⁵ the issue should go to the jury. For purposes of the motion, the court must interpret all evidence in favor of the party opposing the motion,³⁶⁶ giving him the benefits of all reasonable intendments, inferences and deductions.³⁶⁷ The party who moves for the directed verdict admits all facts proved and every conclusion favorable to an adverse party that a jury might reasonably draw from the facts.³⁶⁸

In *Wilson v. Bailey-Lewis-Williams, Inc.*,³⁶⁹ the plaintiff sued for two claims of injury. At the close of the plaintiff's evidence, the judge granted the defendant's motion for directed verdict, but subsequently entered a final judgment which transferred one of the claims to the civil court of record. On appeal, the court did not find it necessary to rule on this procedure because the directed verdict was reversed. The court indicated that if a plaintiff fails to make a *prima facie* case for one of two injuries, the proper procedure would be to strike the evidence presented on this issue and instruct the jury accordingly.

360. FLA. R. CIV. P. 1.480.

361. 6551 Collins Ave. Corp. v. Millen, 104 So.2d 337 (Fla. 1958).

362. Gulf Heating & Refrigeration Co. v. Iowa Mut. Ins. Co., 193 So.2d 4 (Fla. 1966).

363. Paikin v. Beach Cabs, Inc., 187 So.2d 93 (Fla. 3d Dist. 1966).

364. John B. Reid & Assoc. v. Jimenez, 181 So.2d 575 (Fla. 3d Dist. 1965).

365. Reeves v. North Broward Hosp. Dist., 191 So.2d 307 (Fla. 4th Dist. 1966).

366. Scott v. Davis, 188 So.2d 864 (Fla. 1st Dist. 1966).

367. Paikin v. Beach Cabs, Inc., 187 So.2d 93 (Fla. 3d Dist. 1966).

368. *Wilson v. Bailey-Lewis-Williams, Inc.*, 194 So.2d 293 (Fla. 3d Dist. 1967).

369. 194 So.2d 293 (Fla. 3d Dist. 1967).

B. Presumptions

In *Hill v. American Home Assurance Co.*,³⁷⁰ the plaintiff sued as administratrix of the estate of her husband to recover upon an accidental death insurance policy. The husband had died as a result of being shot with his own rifle while alone, and the defendant alleged that the deceased had committed suicide. The plaintiff's evidence showed that the deceased had been in good spirits prior to his death and that there was no motive for suicide. A gunsmith testified that the weapon could be fired accidentally. The judge directed a verdict for the defendant at the close of the plaintiff's evidence. The appellate court held that, "The rule in this jurisdiction seems to be that when 'some' substantial, competent evidence is introduced consistent with the theory of accidental death, a presumption of law arises that it was not suicide."³⁷¹ Since the plaintiff's evidence when combined with the presumption, was sufficient to raise a *prima facie* showing of accidental death, the directed verdict was error.

C. Reserved Directed Verdict (*judgment n. o. v.*)

When a motion for a directed verdict at the close of all the evidence is denied, the judge is deemed to have reserved a decision, and the movant may renew the motion within ten days after the reception of a jury verdict.³⁷² The practice of reserving the ruling on the motion until after the jury has submitted its verdict even though the trial judge has previously decided that the motion should be granted is commended. In the event that the appellate court should reverse the judge's ruling, it would not be necessary to retry the action as the jury's verdict could be reinstated.³⁷³

When a jury is unable to come to a conclusion and a mistrial is declared, the party who has previously moved for a directed verdict may, within ten days, move for judgment in accordance with the previous motion, and it is not error for the trial judge to grant the motion.³⁷⁴

The validity of a judgment n.o.v. must be tested by the rules applicable to a motion for a directed verdict; the only difference between the two is that the former is entered after the jury has returned its verdict.³⁷⁵ Such a judgment should not be entered unless no evidence is presented on which a jury could lawfully return the verdict it has rendered.³⁷⁶

An order granting a motion for a new trial in the event that a judgment n. o. v. is reversed is authorized under Rule 1.480(c).³⁷⁷

370. 193 So.2d 638 (Fla. 2d Dist. 1966).

371. *Id.* at 642.

372. FLA. R. Civ. P. 1.480(b).

373. *Ditlow v. Kaplan*, 181 So.2d 226 (Fla. 3d Dist. 1965).

374. *Hall v. Container Corp. of America*, 189 So.2d 211 (Fla. 2d Dist. 1966).

375. *Smith v. Peninsular Ins. Co.*, 181 So.2d 212 (Fla. 1st Dist. 1965).

376. *Morgan v. Collier County Motors, Inc.*, 193 So.2d 35 (Fla. 2d Dist. 1966).

377. *Aucompaugh v. City of Punta Gorda*, 181 So.2d 713 (Fla. 2d Dist. 1966); FLA. R. Civ. P. 1.480(c).

XV. DEFAULT JUDGMENT

A single default rule, Rule 1.500, has taken the place of former rules 2.9, 3.9, 3.10 and 3.11. The Committee Notes indicate that the only substantial difference between the new rule and federal rule 55³⁷⁸ is that the clerk is now forbidden to enter a default against a party who has appeared. The court is required to enter such a default.³⁷⁹ The major differences between the new and the old rules are that: (1) The new rule provides for setting aside defaults in accordance with the rule providing relief from judgments;³⁸⁰ (2) In decree pro confesso (which is not mentioned in the new rule) a party is not specifically authorized to proceed ex parte after a default; (3) There is no longer a ten-day limit for a party to move to have a decree pro confesso set aside; (4) There are no proceedings in lieu of a decree pro confesso contained in the new rule.

In *Carroll's Inc. v. DeBarros*,³⁸¹ when the defendant did not answer, the clerk entered a default and the judge entered final judgment thereon. Twenty-one days later the defendant moved to dismiss for failure to state a cause of action and to vacate the judgment. The defendant also submitted an affidavit which controverted the allegations of the plaintiff's complaint. The judge vacated the judgment but not the default and granted the defendant time in which to answer. On appeal, the court held that there was no abuse of discretion in setting aside the final judgment, but the judge was in error in allowing the defendant to plead to the merits since he was entitled only to notice of application for final judgment and an opportunity to be heard on the question of damages.³⁸²

Where damages are unliquidated, the defendant against whom default has been entered for failure to answer is entitled to notice and an opportunity to be heard on the trial for damages.³⁸³

XVI. SUMMARY JUDGMENT AND JUDGMENT ON THE PLEADINGS

A. Summary Judgment

1. IN GENERAL

A party seeking any relief in an action may move for summary judgment after twenty days from the commencement of an action or after service of such a motion by the adverse party;³⁸⁴ the defending party may

378. FED. R. CIV. P. 55.

379. *In re* Florida Rules of Civil Procedure, 187 So.2d 598, 638 (Fla. 1966).

380. FLA. R. CIV. P. 1.540.

381. 182 So.2d 49 (Fla. 3d Dist. 1966).

382. It is submitted that this decision would be difficult to square with the rules as they then existed. Suffice it to say that the procedures would be very different today under Rule 1.500.

383. *Harbour Tower Dev. Corp. v. Seaboard Equip. Co.*, 179 So.2d 405 (Fla. 3d Dist. 1965).

384. FLA. R. CIV. P. 1.510(a).

move for summary judgment at any time.³⁸⁵ Such a judgment should be rendered only when pleadings and papers on file show that there is no genuine issue of fact and that the moving party is entitled to judgment as a matter of law.³⁸⁶

The burden of the party moving for summary judgment is a heavy one because the only question considered is the existence of any genuine issue of material fact,³⁸⁷ and the movant must demonstrate an absence of such an issue.³⁸⁸ All factual doubts must be resolved against the moving party,³⁸⁹ and if the judge has the slightest doubt as to the propriety of granting the motion, it should be denied.³⁹⁰ The judge must also exclude from consideration all facts which would be inadmissible as evidence.³⁹¹ For purposes of the motion the court is not permitted to consider the weight of the evidence, credibility of the witnesses or a party's chances of success at trial.³⁹²

The rule that a motion for summary judgment should not be granted before the defendant has answered unless it is clear that an issue of material fact *cannot* be presented should be applied to the situation where the defendant has moved to dismiss the cause of action prior to answering.³⁹³

Issues of negligence and contributory negligence are not ordinarily susceptible to summary disposition even when the evidence is not in dispute,³⁹⁴ and where the questions are close, doubt should *always* be resolved in favor of a jury trial.³⁹⁵ The fact that both parties have moved for summary judgment is not conclusive on the judge that there is no genuine material issue of fact.³⁹⁶

Rule 1.510(d), Florida Rules of Civil Procedure, provides that, if practicable, the judge shall, on a motion for summary judgment, ascertain what material facts exist without substantial controversy and what facts are in good faith controverted and enter an order specifying the two categories. The Author's Notes to the rule indicate that such an order is mandatory.³⁹⁷ The federal counterpart of the rule is similarly interpreted.³⁹⁸ However, when the record does not indicate that it is practicable

385. FLA. R. CIV. P. 1.510(b).

386. FLA. R. CIV. P. 1.510(c).

387. *Lake v. Konstantinu*, 189 So.2d 171 (Fla. 2d Dist. 1966).

388. *McNulty v. Garvey*, 189 So.2d 234 (Fla. 3d Dist. 1966).

389. *Enix v. Diamond T. Sales & Serv. Co.*, 188 So.2d 48 (Fla. 2d Dist. 1966).

390. *Stone v. Hamic*, 189 So.2d 908 (Fla. 2d Dist. 1966).

391. FLA. R. CIV. P. 1.510(e).

392. *White v. Pinellas County*, 185 So.2d 468 (Fla. 1966); *Strode v. Southern Steel Constr. Co.*, 188 So.2d 690 (Fla. 1st Dist. 1966); *Berlanti Constr. Co. v. Miami Beach Fed. Sav. & Loan Ass'n*, 183 So.2d 746 (Fla. 3d Dist. 1966).

393. *Casteel v. Malisch*, 189 So.2d 252 (Fla. 3d Dist. 1966).

394. *Booth v. Mary Carter Paint Co.*, 182 So.2d 292 (Fla. 2d Dist. 1966).

395. *Strickland v. Bradford County Hosp. Corp.*, 196 So.2d 765 (Fla. 1st Dist. 1967).

396. *Central Inv. v. Old S. Golf Util. Corp.*, 197 So.2d 17 (Fla. 4th Dist. 1967).

397. 31 FLA. STAT. ANN. § 55 (1967). The predecessor to the rule was numbered 1.36(d).

398. FED. R. CIV. P. 56(d); 6 MOORE, FEDERAL PRACTICE 2756 (2d ed. 1965).

for the judge to enter such an order, and neither party requested it in his motion to dismiss, an appellate court cannot say that it was practicable for the judge to enter the order and reverse on the ground that it was not entered.³⁹⁹

2. THE BURDEN OF PROOF

In *Holl v. Talcott*,⁴⁰⁰ a medical malpractice action, the defendants moved for summary judgment and supported the motion with affidavits which generally alleged that medical services performed for the plaintiff had been in accordance with established medical standards. The plaintiff filed an affidavit signed by an out-of-state physician which indicated malpractice. The plaintiff's affidavit was stricken for legal insufficiency and the defendant's motion for summary judgment was granted. The action was affirmed by the district court of appeal.

On certiorari,⁴⁰¹ the Supreme Court of Florida held that before it becomes necessary to consider the legal sufficiency of affidavits or evidence submitted by the party moved against for summary judgment, the movant must *conclusively* prove that there is no genuine issue of material fact.⁴⁰² Merely supporting the motion by affidavits or factual showings is not enough to shift the burden to the party opposing the motion and require him to show that a factual issue does exist.⁴⁰³ The court also held that in a malpractice case, the defendant's affidavits are not enough in themselves to show that there are no remaining issues of fact, for they do not explain what caused the plaintiff "to be reduced to the vegetable state so as to remove all doubt that the result was caused by their negligence as claimed by the petitioner."⁴⁰⁴

When the party moving for summary judgment attaches affidavits and exhibits to his motion in support of his request and the other party does nothing, this cannot be ground for granting the summary judgment.⁴⁰⁵ The rules authorize affidavits by a party against whom summary

399. *O'Brien Assoc., Inc. v. Tully*, 184 So.2d 202 (Fla. 4th Dist. 1966).

400. 171 So.2d 412 (Fla. 3d Dist. 1965). See note, 22 U. MIAMI L. REV. 424 (1967).

401. *Holl v. Talcott*, 191 So.2d 40 (Fla. 1966).

402. This point was followed in reversing another medical malpractice action in which summary judgment for the defendant had been affirmed. *Scanlon v. Litt*, 191 So.2d 553 (Fla. 1966). The situation arose again, and the court, evidently in the hope of finally making its point, stated in another action for malpractice, ". . . the burden of a party moving for summary judgment is greater, not less, than that of the plaintiff at trial. . . . [T]he party moving . . . must show *conclusively* that no material issues remain for trial." *Visingardi v. Tirone*, 193 So.2d 601, 604 (Fla. 1966); accord, *Thompkins v. Rosenburg*, 194 So.2d 688 (Fla. 3d Dist. 1967); *Deehl v. Sparks Constr. Co.*, 191 So.2d 605 (Fla. 3d Dist. 1966).

403. If the movant does meet his burden and the opposing party does not come forward and demonstrate a real issue between the parties, summary judgment will be affirmed. *Morton v. Mastan Co.*, 181 So.2d 575 (Fla. 3d Dist. 1966).

404. *Holl v. Talcott*, 191 So.2d 40, 45 (Fla. 1966).

405. *Trustees of the Internal Improvement Trust Fund v. Lord*, 189 So.2d 534 (Fla. 2d Dist. 1966).

judgment has been sought⁴⁰⁶ but do not require them. A party who is so moved against has no duty whatsoever to demonstrate the existence of a genuine issue of fact until after the movant has shown there is none.⁴⁰⁷ Thus, if the moving party's affidavits or exhibits show an issue of fact or there is otherwise such an issue, the motion for summary judgment should be denied.⁴⁰⁸

It would appear that "sufficient evidence" is no longer enough to support the motion; only conclusive evidence will now suffice.⁴⁰⁹

3. RAISING AFFIRMATIVE DEFENSES

An affirmative defense may be raised only by following the proper procedures.⁴¹⁰ The rules make no provision for raising an affirmative defense in a motion for a summary judgment. Thus, if the defendant is permitted to raise the questions of the statute of limitations and estoppel in such a motion, prior to the time that an answer to the complaint has been filed, it is reversible error.⁴¹¹ However, when the defendant alleges a full release and attaches a copy of it to his answer, he may then raise the defense in a motion for summary judgment. If the plaintiff does not deny the release, he has in effect admitted a complete bar to his action, and no genuine issue of fact exists.⁴¹²

A different situation exists when the party moved against denies the affirmative defense, and it is error to grant the defendant's motion for summary judgment on the basis that the statute of limitations has run if there is a question as to whether the statute has tolled because the defendant has been out of the jurisdiction.⁴¹³ When the party moving for summary judgment pleads the wrong statute of limitations, it is error for the trial court to correct the pleading and grant a motion for summary judgment on this basis. However, the party should be given an opportunity to amend.⁴¹⁴

Entry of summary judgment for the defendant is proper when only the plaintiff's unsworn complaint, which alleges an estoppel, controverts the defendant's allegation that the statute of limitations has run. The plaintiff should either file a sworn complaint or file affidavits in opposition to the motion.⁴¹⁵

406. FLA. R. CIV. P. 1.510(e).

407. *Hix v. Sirkis*, 190 So.2d 207 (Fla. 3d Dist. 1966).

408. *Reserve Ins. Co. v. Earle W. Day Co.*, 190 So.2d 803 (Fla. 2d Dist. 1966).

409. *See Harvey Bldg., Inc. v. Haley*, 175 So.2d 780 (Fla. 1965).

410. FLA. R. CIV. P. 1.110, 1.140.

411. *Meigs v. Lear*, 191 So.2d 286 (Fla. 1st Dist. 1966).

412. *Biscoe v. Evans*, 181 So.2d 564 (Fla. 1st Dist. 1966).

413. *Levy v. Kirk*, 187 So.2d 401 (Fla. 3d Dist. 1966).

414. *Board of Pub. Instruction v. Travelers Indem. Corp.*, 190 So.2d 32 (Fla. 2d Dist. 1966).

415. *A. & G Aircraft Serv., Inc. v. Johnson*, 192 So.2d 74 (Fla. 4th Dist. 1966).

4. FACTUAL QUESTIONS PRECLUDING SUMMARY JUDGMENT

There are certain factual situations which almost always preclude the entry of a summary judgment, and there are other situations which must of necessity be decided by a jury. In the former area are close cases of negligence and contributory negligence,⁴¹⁶ and cases involving complicated testimony, pleadings and proof.⁴¹⁷ In the latter category fall cases such as those where the relationship of the parties is in issue. The question of whether the defendant is the collection agent for, or the debtor of, the plaintiff is plainly one for the jury when each party alleges a different relationship.⁴¹⁸

When a defendant has, without dispute, violated a statute while being involved in an accident, the jury could draw conflicting inferences and there is a genuine issue of fact.⁴¹⁹ Only if the violation could not have in any way been the cause of the accident or have contributed to it, is the violator entitled to a summary judgment.⁴²⁰

The credibility of a witness may often be the determining factor in a trial, and for purposes of a motion for summary judgment, the judge may not determine this.⁴²¹ Thus, when an affiant who is interested in the action states that he acted under the direction of his superior who is now deceased and the statement cannot be contradicted, the issue must go to the jury.⁴²² The same result occurs when the record title holder of an automobile alleges that a sale was made prior to the accident to the person who was driving the vehicle and was killed in the accident.⁴²³

Certain facts must be proved in a specified way or they will not be admitted. In an action for debt on a foreign judgment, the existence of the judgment must be proved in the manner provided for by statute⁴²⁴ and a motion for summary judgment granted on the basis of a foreign creditor's affidavit is an error.⁴²⁵

5. SHAM PLEADINGS

Rule 1.150(a) provides that a party may move to strike a pleading as sham, and if sustained, the court may in its discretion enter summary judg-

416. *Vernatte v. First Nat'l Bank*, 198 So.2d 357 (Fla. 2d Dist. 1967); *Bailey v. Wilson*, 180 So.2d 492 (Fla. 3d Dist. 1965).

417. *Holl v. Talcott*, 191 So.2d 40 (Fla. 1966).

418. *DeBoliac Truck Equip. Co. v. Earl Wallace Ford, Inc.*, 188 So.2d 877 (Fla. 4th Dist. 1966).

419. *McNulty v. Garvey*, 189 So.2d 234 (Fla. 3d Dist. 1966).

420. *Booth v. Mary Carter Paint Co.*, 182 So.2d 292 (Fla. 2d Dist. 1966).

421. *St. Johns v. Michaels*, 178 So.2d 193 (Fla. 1965).

422. *Berlanti Constr. Co. v. Miami Beach Fed. Sav. & Loan Ass'n*, 183 So.2d 746 (Fla. 3d Dist. 1966).

423. *St. Johns v. Michaels*, 178 So.2d 193 (Fla. 1965).

424. *FLA. STAT. § 92.032* (1967).

425. *Jackson v. Stelco Employees' Credit Union, Ltd.*, 178 So.2d 58 (Fla. 2d Dist. 1965).

ment on the merits against the sham pleader. In *U. S. 1-163rd Street Corporation v. Gerardo*,⁴²⁶ the defendant entered a general denial. After taking the defendant's deposition, the plaintiff moved to strike the pleading as sham and for summary judgment. The granting of the motion was held to be proper.

6. LEGAL SUFFICIENCY OF AFFIDAVITS

A party may move for summary judgment with or without supporting affidavits,⁴²⁷ and the party moved against may serve opposing affidavits prior to the day of hearing on the motion.⁴²⁸ The affidavits shall be made on personal knowledge, shall set forth facts that would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.⁴²⁹

For a party to present a legally sufficient affidavit of an expert witness in opposition to a motion for summary judgment, it is not necessary that the affidavit contain all the details and formalities required to offer the testimony into evidence at trial, although the evidentiary matter presented must be relevant and competent.⁴³⁰ Further, the rule requiring that matters set out in the affidavit be admissible into evidence does not require that a party make out his whole case before the affidavit is admissible. If some of the facts set out are not inadmissible in that they fall outside the bounds of the complaint, are privileged, or are hearsay, etc., then these facts should not cause the affidavit to be declared legally insufficient.⁴³¹

In *Visingardi v. Tirone*,⁴³² the physician's affidavit filed by the plaintiff in opposition to a motion for summary judgment was stricken on the ground that it showed no causal relationship between the defendant's actions and the decedent's death. The court held that the causal relationship is a genuine fact question itself, and the *movant* is under an obligation to prove an absence of this relationship. Thus, an affidavit of a party opposing the motion cannot be legally insufficient on this basis unless the *movant* has first clearly shown that the relationship does not exist.⁴³³

An affidavit is legally insufficient when it contains assertions which are contrary to the natural laws, common knowledge or clearly incompatible with the circumstances of the case.⁴³⁴

426. 189 So.2d 506 (Fla. 3d Dist. 1966).

427. FLA. R. CIV. P. 1.510(a),(b).

428. FLA. R. CIV. P. 1.510(c).

429. FLA. R. CIV. P. 1.510(e).

430. *Holl v. Talcott*, 191 So.2d 40 (Fla. 1966).

431. *Visingardi v. Tirone*, 193 So.2d 601 (Fla. 1966).

432. 193 So.2d 601 (Fla. 1966).

433. *Id.* at 604.

434. *Watley v. Florida Power & Light Co.*, 192 So.2d 27 (Fla. 1st Dist. 1966).

In an action upon a negotiable instrument, section 52.08 of the Florida Statutes provides that it is not necessary for a plaintiff to prove consideration unless the same is impeached by the defendant under oath. When a defendant files an *unsworn* answer alleging a lack of consideration, the plaintiff is under no obligation to prove that fact. It is not sufficient that the defendant later files a sworn affidavit in support of a motion for summary judgment. First, the statute has been held to be invoked only by an answer.⁴³⁵ Second, if the motion for summary judgment is denied, the motion would drop out of the case leaving the record in the same condition as if no motion had been filed.⁴³⁶ Under these circumstances, the affidavit is legally insufficient.⁴³⁷

7. APPELLATE REVIEW

An order on a motion for summary judgment which in effect dismisses one count of the appellant's complaint is not immediately appealable, but may be reviewed on an appeal from an entry of final judgment.⁴³⁸

When the trial judge's order granting summary judgment for the defendant indicates that the judge has considered the plaintiff's answer and replies to interrogatories, and the plaintiff on appeal does not file a record containing the matter considered by the trial court, nor request the clerk to file such material, the judge's discretion will not be disturbed.⁴³⁹ However, when there were no depositions, admissions or affidavits before the trial court and nothing in the record to show that the movant proved his case, an entry of summary judgment was reversed.⁴⁴⁰

B. Judgment on the Pleadings

"After the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings."⁴⁴¹ The motion is quite similar to that for a summary judgment and the material allegations of the opposing party's pleadings are taken as true while all allegations of the movant's pleadings which have been denied are taken as false. When a defendant has moved to dismiss the plaintiff's complaint for failure to state a cause of action, and the motion has been denied, and the defendant thereafter raises an affirmative defense in his answer, it is error for the judge to then immediately grant the defendant's motion for judgment on the pleadings. Since the function of such a motion is to raise questions of law arising from the facts, it is obvious that the defendant's

435. *Mayflower, Inc. v. Suskind*, 112 So.2d 394 (Fla. 3d Dist. 1959).

436. *McSwiggan v. Edson*, 186 So.2d 13 (Fla. 1966).

437. *Chase Manhattan Bank v. Marger*, 184 So.2d 709 (Fla. 3d Dist. 1966).

438. *Jacobs v. Gould*, 197 So.2d 307 (Fla. 3d Dist. 1967). *Overruled by F.A.R. 4.2(a), 211 So.2d — (Fla. 1968).

439. *Althouse v. State Farm Fire & Cas. Co.*, 183 So.2d 859 (Fla. 2d Dist. 1966).

440. *Pan-American Life Ins. Co. v. Tunon*, 179 So.2d 382 (Fla. 3d Dist. 1965).

441. FLA. R. Civ. P. 1.140(c).

affirmative defense must be proved, and if the complaint was held to state a cause of action, there are remaining fact questions which preclude the entry of judgment on the pleadings.⁴⁴²

The rules do not provide for a partial judgment on the pleadings, and it is error for the judge to enter such an order which does not fully dispose of the case.⁴⁴³

XVII. NEW TRIAL MOTIONS

A. *In General*

The rules provide for motions for new trials or rehearings on any or all of the issues, if the motion is served within ten days or on the court's own motion.⁴⁴⁴ Most of the recent litigation in this area has involved the standard by which an appellate court will review the trial judge's order granting or denying a new trial.

Several cases have recently held that when the judge allows a case to go to the jury and there is evidence in the record supporting its verdict, and no prejudicial conduct, it is an abuse of the trial judge's discretion to grant a motion for a new trial on the basis that the jury verdict is contrary to the weight of the evidence.⁴⁴⁵ The rationale is that a jury verdict is entitled to a presumption of correctness, and that the jury, not the court, is the trier of the facts.⁴⁴⁶

Other cases have disagreed with this approach. In *Danek v. Hoffman*,⁴⁴⁷ the court held that the "substantial evidence rule" as espoused by the above-mentioned cases has been disapproved by the Supreme Court of Florida in *Cloud v. Fallis*,⁴⁴⁸ a leading case on the subject. The court stated that the "sound discretion rule" is the proper method of deciding such cases. If the judge grants a new trial on the basis that the jury verdict is against the weight of the evidence, his discretion should not be disturbed unless very clearly in error.⁴⁴⁹ The court admitted that under this doctrine it was difficult to find a standard by which to test the judge's discretion, but asserted that this was nevertheless the present rule in Florida.

When the judge's order granting a new trial is on the basis that the weight of the evidence is contrary to the jury verdict, his discretion is more conclusive on the appellate court than when the order is based on

442. *Wagner v. Wagner*, 196 So.2d 453 (Fla. 4th Dist. 1967).

443. *Bolen Int'l, Inc. v. Medow*, 191 So.2d 51 (Fla. 3d Dist. 1966).

444. FLA. R. CIV. P. 1.530.

445. *Smith v. Peninsular Ins. Co.*, 181 So.2d 212 (Fla. 1st Dist. 1965).

446. *Mansell v. Eidge*, 179 So.2d 624 (Fla. 3d Dist. 1965).

447. 189 So.2d 893 (Fla. 2d Dist. 1966).

448. 110 So.2d 669 (Fla. 1959).

449. *Lykes Bros., Inc. v. Singletary*, 190 So.2d 589 (Fla. 2d Dist. 1966); *Cross v. Atlantic Coast Line R.R.*, 190 So.2d 21 (Fla. 1st Dist. 1966).

a non-evidentiary ground.⁴⁵⁰ This distinction is made because the appellate court is poorly equipped to weigh evidence, but when the grant of a new trial is based on a question of law, the reviewing court is on a more nearly equal footing with the trial judge.⁴⁵¹ On this basis, when the judge refused to permit the plaintiff's counsel to argue last clear chance in a rebuttal to the defendant's closing argument concerning contributory negligence after the question of last clear chance had been raised by the testimony and an instruction thereon was given, it was prejudicial error. The granting of the plaintiff's motion for a new trial was not error.⁴⁵²

The courts also generally hold that a stronger showing is required to reverse an order granting a new trial than to reverse an order denying a new trial.⁴⁵³ In an action for damages to the plaintiff's aircraft allegedly caused by the negligence of the defendant, if there is no evidence concerning the ownership of the airplane which allegedly caused the damage, there is a vital deficiency in the case, and it is error to deny the defendant's motion for a new trial.⁴⁵⁴

In evidentiary matters, the trial judge must decide whether an appeal to the passion or prejudice of the jury has been prejudicial enough to warrant a new trial, and his discretion is seldom disturbed. In one case, plaintiff's counsel remarked to the jury that the defendant had spent three hours in a bar prior to the accident, and the judge sustained an objection to the statement. It was not clearly apparent that the jury had been influenced by passion or prejudice, so the judge's denial of the defendant's motion for a new trial was not erroneous.⁴⁵⁵ Further, when counsel intimates in his closing argument that the judge also feels that the defense is phony, it is not error to grant the defendant's motion for a new trial.⁴⁵⁶ However, it is error for a judge to grant a new trial on the basis that the horror of testimony concerning blood prejudiced the jury when the action is one for wrongful death allegedly caused by a hospital injecting the wrong type of blood into the decedent. Such a trial cannot be conducted without testimony concerning blood and its effect on the human body when mismatched.⁴⁵⁷

It is error for a trial judge to strike a motion for a new trial when it is filed within ten days of the rendition of final judgment, but the error is harmless if it would have been improper to grant the new trial.⁴⁵⁸

450. *Boutwell v. Bishop*, 194 So.2d 3 (Fla. 1st Dist. 1967).

451. *Collins Fruit Co. v. Giglio*, 184 So.2d 447 (Fla. 2d Dist. 1966).

452. *Id.*

453. *Pemberton v. Keel*, 195 So.2d 632 (Fla. 2d Dist. 1967).

454. *Atlantic Aircraft Corp. v. English*, 198 So.2d 862 (Fla. 3d Dist. 1967).

455. *Knuck v. Willoughby*, 198 So.2d 839 (Fla. 3d Dist. 1967).

456. *Matthews v. St. Petersburg Auto Auction, Inc.*, 190 So.2d 215 (Fla. 2d Dist. 1966).

457. *Ward v. Orange Memorial Hosp. Ass'n, Inc.*, 193 So.2d 492 (Fla. 4th Dist. 1966).

458. *American Equitable Assurance Co. v. Southern Indus. Sav. Bank*, 196 So.2d 770 (Fla. 3d Dist. 1967).

An appellant who files a notice of appeal before the entry of an order denying his motion for a new trial is deemed to have waived or abandoned the motion and vested jurisdiction in the appellate court.⁴⁵⁹

During this *Survey* period, the courts continued to follow strictly the requirement of Rule 1.530(f) and Florida Statutes, section 59.09(4) that orders granting new trials must recite the grounds therefor. If the requirement is not met, the order will be reversed.⁴⁶⁰

B. *Excessive or Inadequate Damages*

Damages for mental pain and suffering must bear some reasonable relation to the facts of the case, status of the parties, amount allowed as other compensatory damages and the philosophy and general trend of decisions affecting such cases. When a sixty-eight year old unemployed female is allowed six thousand dollars in other compensatory damages and nearly seventy-two thousand dollars in damages for pain and suffering, the amount is clearly excessive and a remittitur or a new trial for damages should have been ordered by the trial judge.⁴⁶¹

When a judge orders a new trial and the order contains general statements to the effect that the judicial conscience was shocked because of excessive damages, the jury did not understand the charge, etc., these statements must find a basis in the record or an abuse of discretion in granting the new trial is indicated.⁴⁶²

When the jury's verdict is so inadequate as to shock the conscience of the court, it is generally held that the trial judge's order granting a new trial will not be disturbed unless a clear abuse of discretion is shown.⁴⁶³ A different situation arises when the judge agrees with the verdict and refuses to grant a new trial for inadequate damages.

In *Roberts v. Bushore*,⁴⁶⁴ the court, purportedly relying on supreme court opinions,⁴⁶⁵ affirmed the trial court's denial of a motion for a new trial which alleged that the damages awarded were grossly inadequate. The court indicated that it was powerless to set aside the order because the supreme court's rulings had created a rule that grossly inadequate damages will ". . . not be set aside for the mere reason that they are less than the court thinks they should be." It must be shown that the verdict was "induced by prejudice or passion, some misconception of the law or

459. *Perez v. City of Tampa*, 181 So.2d 571 (Fla. 2d Dist. 1966).

460. *Travelers Indem. Co. v. Mary Boutique, Inc.*, 198 So.2d 343 (Fla. 3d Dist. 1967); *Hall v. American Distrib. Corp.*, 181 So.2d 711 (Fla. 3d Dist. 1966). *Overruled by R.C.P. 1.530(P), 211 So.2d — (Fla. 1968).

461. *Smith v. Goodpasture*, 179 So.2d 240 (Fla. 2d Dist. 1965).

462. *Ward v. Orange Memorial Hosp. Ass'n, Inc.*, 193 So.2d 492 (Fla. 4th Dist. 1966).

463. *Sutton v. Logan*, 184 So.2d 662 (Fla. 1st Dist. 1966).

464. 172 So.2d 853 (Fla. 1st Dist. 1965).

465. *Hayes v. Hatchell*, 166 So.2d 146 (Fla. 1964); *City of Miami v. Smith*, 165 So.2d 748 (Fla. 1964); *Shaw v. Puelo*, 159 So.2d 641 (Fla. 1964).

. . . that the jury did not consider all the elements of damage involved, missed a consideration of the issues submitted or failed to discharge their duty"⁴⁶⁶

The Supreme Court of Florida quashed the above-mentioned decision.⁴⁶⁷ The court stated that:

Our decisions . . . were not intended to indirectly preclude a review by the District Courts of Appeal of verdicts challenged for inadequacy. We reiterate that a verdict for grossly inadequate damages stands on the same ground as a verdict for excessive or extravagant damages. . . . [N]either the trial court nor the District Court is precluded from disturbing a verdict which as an end result is so grossly inadequate that it shocks the conscience of the court.⁴⁶⁸

The district court of appeal was directed to reconsider the case in the light of these principles.

On remand,⁴⁶⁹ the appellate court again affirmed the trial court's denial of a new trial. Judge Wigginton again reviewed the opinions of the supreme court and came to the conclusion that:

[T]he Supreme Court, by its several decisions . . . intended to promulgate a rule of law to the effect that although a trial judge has the privilege and duty . . . to set aside a jury verdict and grant a new trial under proper circumstances, such duty and privilege may be exercised by district courts of appeal only under exceptional circumstances not yet clearly defined by the decisional law of this state.⁴⁷⁰

The judge indicated that for all practical purposes an appellate court could not now determine whether a new trial should be granted on the ground of inadequate damages, and the lower court's judgment was reaffirmed.

When the jurors and the trial judge agree that the damages are adequate, the appellate court will not overturn the judge's denial of a motion for a new trial.⁴⁷¹

In a negligence action when a wife sues for damages related to her injuries and the husband sues for past, present and future medical expenses incurred as a result of the wife's injuries and for loss of society and consortium, it seems clear that a jury verdict which finds for the wife against the defendant and assesses damages, and also find for the husband but allows no damages, is in error. This is true whether the

466. *Radiant Oil Co. v. Herring*, 146 Fla. 154, 157, 200 So. 376, 377-78 (1941).

467. *Roberts v. Bushore*, 182 So.2d 401 (Fla. 1966).

468. *Id.* at 402.

469. *Roberts v. Bushore*, 183 So.2d 708 (Fla. 1st Dist. 1966).

470. *Id.* at 711.

471. *Miller v. James*, 187 So.2d 901 (Fla. 2d Dist. 1966).

verdict indicates zero damages⁴⁷² or the verdict form is left blank in the space where the husband's damages should be awarded.⁴⁷³ In both situations, the denial of the husband's motion for a new trial is error. It would appear that the jury has failed to consider all of the elements of damages.⁴⁷⁴ Further, when the wife receives a jury verdict for damages and the husband has sued only for loss of society, services and consortium and received no award, a new trial should be granted.⁴⁷⁵

C. Rehearing

The presumptions which favor the non-movant in a summary judgment proceeding must be applied throughout the entire consideration of the motion and should attend a motion for rehearing. The trial judge's discretion to deny the rehearing is narrowed in the summary judgment area.⁴⁷⁶

In *Pensacola Chrysler-Plymouth, Inc. v. Costa*,⁴⁷⁷ it was held that with respect to cases tried without a jury, an order granting a rehearing need not set out particular and specific grounds relied upon. The movant is not challenging the integrity of a jury verdict and an order granting such a rehearing does not necessitate impaneling a new jury as does an order granting a new jury trial. Thus, there is no more reason for a trial judge to state the reasons for granting the rehearing than there was under former practice in an equity action.

XVIII. RELIEF FROM JUDGMENTS, DECREES OR ORDERS

Most of the decisions interpreting Rule 1.540 have concerned either the procedure used to invoke the rule or whether the party's actions entitle him to relief.

A divorce decree may be set aside under the rule if the proper procedure is followed,⁴⁷⁸ but a party is not precluded from bringing an independent action for the purpose of setting aside the decree.⁴⁷⁹

In a case of first impression it was held that when a trial judge inadvertently enters a summary final decree, he may, *sua sponte*, vacate the judgment⁴⁸⁰ because it was entered by "mistake" or "inadvertence."⁴⁸¹

472. *Fejer v. Whitehall Laboratories, Inc.*, 182 So.2d 438 (Fla. 3d Dist. 1966).

473. *Correll v. Elkins*, 195 So.2d 27 (Fla. 1st Dist. 1967).

474. *Id.*

475. *Grant v. Williams*, 190 So.2d 23 (Fla. 2d Dist. 1966).

476. *Holl v. Talcott*, 191 So.2d 40 (Fla. 1966).

477. 195 So.2d 250 (Fla. 1st Dist. 1967).

478. *Vega v. Vega*, 110 So.2d 29 (Fla. 3d Dist. 1959).

479. *Corrigan v. Corrigan*, 184 So.2d 664 (Fla. 4th Dist. 1966).

480. *Polster v. General Guar. Mortgage Co.*, 180 So.2d 484 (Fla. 1st Dist. 1965).

481. FLA. R. Civ. P. 1.510(b)(1).

The court, following federal precedent,⁴⁸² held that the trial court should be afforded the greatest possible latitude in correcting its own errors.

Although notice to the adverse party is required when a party files a motion for relief, no new service of process is necessary.⁴⁸³

When a party files a motion for relief from a judgment on the ground that he has "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing,"⁴⁸⁴ he must, in the motion or attached exhibits, show facts to indicate that the evidence was not, or could not have been, readily available at trial. Otherwise, the motion for relief should not be granted, and it is an abuse of discretion to do so.⁴⁸⁵

The purpose of the rule authorizing relief from judgments because of mistake and inadvertence⁴⁸⁶ is not to help a party state a cause of action which, by oversight or inadvertence, he did not include in his pleadings.⁴⁸⁷ However, when counsel mistakenly calculates the twenty days which have been allotted in which to file an amended complaint from the date of written order rather than the date of the verbal order, it is error for the trial judge to deny the motion for relief. The court held that the rule was designed to alleviate such a situation and that judicial discretion should be exercised in favor of deciding issues on the merits.⁴⁸⁸

When a defendant fails to respond to the court's summons on two occasions and a default judgment is entered against him, "excusable neglect"⁴⁸⁹ is not established by alleging that a person involved in the matter, but not a party to the suit, told the defendant to forget about the complaint.⁴⁹⁰ Gross negligence is not a proper reason to set aside a judgment, and the fact that a corporation's president failed to obtain an attorney or appear at a hearing will not enable the corporation to set aside the default judgment.⁴⁹¹ However, when a corporation has its offices and its principal place of business in one county and most of the officers reside there and the plaintiff knows this fact and yet serves process on a minor officer in another county, it may be "excusable neglect" that the corporation did not appear. Under these circumstances, the motion for relief should be granted.⁴⁹²

482. The same construction is given to Federal Rule of Civil Procedure 60(b). *See McDowell v. Celebrezze*, 310 F.2d 43 (5th Cir. 1962).

483. *Bell v. All Persons Claiming Any Estate, Etc.*, 198 So.2d 35 (Fla. 3d Dist. 1967).

484. FLA. R. Civ. P. 1.540(b)(2).

485. *Hall v. American Distrib. Corp.*, 181 So.2d 711 (Fla. 3d Dist. 1966).

486. FLA. R. Civ. P. 1.540(b)(1).

487. *International Advertising, Inc. v. Congress Enterprises, Inc.*, 187 So.2d 364 (Fla. 3d Dist. 1966).

488. *English v. Hecht*, 189 So.2d 366 (Fla. 3d Dist. 1966).

489. FLA. R. Civ. P. 1.540(b)(1).

490. *Austin Burke, Inc. v. Vigilant Ins. Co.*, 179 So.2d 600 (Fla. 3d Dist. 1965).

491. *Winter Park Arms, Inc. v. Akerman*, 199 So.2d 107 (Fla. 4th Dist. 1967).

492. *Imperial Towers, Inc. v. Dade Home Serv., Inc.*, 199 So.2d 518 (Fla. 4th Dist. 1967).

In *McCormick v. McCormick*,⁴⁹³ the husband and wife had entered into a stipulation and agreement regarding alimony and division of property which was incorporated into the divorce decree. The wife subsequently moved for relief from the judgment on the ground of fraud.⁴⁹⁴ The court held that when it appeared from the facts that the husband had not made a full disclosure to his wife and the wife's attorney merely relied on the representations of the husband, there was ground for providing the relief sought.

XIX. DECLARATORY RELIEF

The test of the sufficiency of a complaint for a declaratory decree is not whether the complaint shows that the plaintiff will succeed in getting a declaration in accordance with his theory and contention, but whether he is entitled to a declaration of his rights at all. Regardless of the comprehensive language of the statute authorizing such relief,⁴⁹⁵ the scope of a declaratory decree proceeding is not limitless.⁴⁹⁶

It is not error for a trial judge to issue a final decree of dismissal in a declaratory decree action when the plaintiff has filed three amended complaints, all defective because of failure to show a justiciable issue, and where it appears that the plaintiff's cause of action, if any, is at law.⁴⁹⁷

XX. INJUNCTIONS

In *Daniel v. Williams*,⁴⁹⁸ the trial judge, in an action for an injunction, issued a temporary restraining order. The plaintiff alleged that the defendants were carrying on a business under an unconstitutional statute and causing irreparable injury and damaging plaintiff's business. On appeal, the court reversed, holding that since the crux of the complaint was to enjoin the enforcement of a statute, it should have been filed against the appropriate state agencies. The relief sought was to enjoin individuals from enjoying the benefits of a presumably constitutional statute. However, there can be no collateral attack on the constitutionality of statutes. Furthermore, alleged loss of business to a competitor is not sufficient to invoke equity jurisdiction.

493. 181 So.2d 220 (Fla. 2d Dist. 1965).

494. FLA. R. CIV. P. 1.540(b)(3).

495. FLA. STAT. § 87.02 (1967).

496. R-C-B-S Corp. v. City of Atlantic Beach, 178 So.2d 906 (Fla. 1st Dist. 1965).

497. Smith v. Jacksonville Terminal Employees Fed. Credit Union, 193 So.2d 436 (Fla. 1st Dist. 1967).

498. 189 So.2d 640 (Fla. 2d Dist. 1966).