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## Civil Procedure

M. Minnette Massey  
*University of Miami School of Law*

Nancy Little Hoffmann

Larry C. Linder

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## CIVIL PROCEDURE

M. MINNETTE MASSEY,\* NANCY LITTLE HOFFMANN\*\* AND  
LARRY C. LINDER\*\*

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\* Professor of Law, University of Miami School of Law.

\*\* Members, Editorial Board, University of Miami Law Review; Student Instructors, Freshman Research and Writing.

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There were several amendments to procedural statutes and the Florida Rules of Civil Procedure during the period surveyed.<sup>1</sup> Substantial changes will be indicated within the appropriate topic.

## I. COURTS, JUDGES AND ATTORNEYS

### A. *Jurisdiction of the Courts*

The revision of article V of the Florida Constitution,<sup>2</sup> effective January 1, 1973, eliminated various courts and necessarily changed the jurisdiction of those remaining. Of the multitude of trial courts, circuit courts and county courts alone survived.<sup>3</sup> County courts now have original jurisdiction, *inter alia*, "of all actions at law in which the matter in controversy does not exceed the sum of \$2,500, exclusive of interest and costs, except those within the exclusive jurisdiction of the circuit courts."<sup>4</sup>

The civil actions at law of which the circuit court has exclusive jurisdiction regardless of the amount in controversy are "all cases involving [the] legality of any tax assessment or toll;"<sup>5</sup> ejectment actions;<sup>6</sup> actions involving the title, boundaries, or right of possession of real property;<sup>7</sup> and "all actions at law not cognizable by the county courts."<sup>8</sup>

1. This Survey covers cases reported in volumes 248 through 281 of the Southern Reporter, Second Series, and laws enacted by the 1972 and 1973 Regular and Special Sessions of the Florida legislature.

2. See Foreword to Article V—Judiciary, 26 FLA. STAT. ANN. 13 (Supp. 1973).

3. Compare FLA. CONST. art. 5, § 1 (1973) with FLA. CONST. art. 5, § 1 (1968). As amended, article 5, section 1 provides that "the judicial power shall be vested in a supreme court, district courts of appeal, circuit courts and county courts. No other courts may be established by the state, any political subdivision or any municipality." See also FLA. STAT. § 39.01(1) (1973) (this amendment to section 39.01 specifies that "juvenile court" means "circuit court").

4. FLA. STAT. § 34.01 (1973). The Rules of Summary Procedure apply to all actions of a civil nature in the county courts where the amount in controversy does not exceed \$1,500. *In Re* Rules of Summary Procedure, 270 So. 2d 729 (Fla. 1972).

5. FLA. STAT. § 26.012(2)(e) (1973).

6. FLA. STAT. § 26.012(2)(f) (1973).

7. FLA. STAT. § 26.012(2)(g) (1973).

8. FLA. STAT. § 26.012(2)(a) (1973). See also State *ex rel.* Price v. Duncan, 280 So. 2d

The last subdivision obviously refers to all actions at law over which jurisdiction is not specifically conferred upon the circuit court but in which the amount or matter in controversy exceeds the sum of \$2,500.

The amount in controversy was, of course, a jurisdictional determinant before the constitutional and statutory amendments. Accordingly, once it is determined that the requisite jurisdictional amount has been in good faith claimed, the court does not lose jurisdiction although it appears upon trial that the claimant is entitled to an amount less than the jurisdictional minimum of the court.<sup>9</sup> If an action is in good faith pleaded within the equity jurisdiction of a court, and upon the final hearing it appears that only legal remedies are warranted, the court has jurisdiction to enter the judgment even though it is for an amount less than the jurisdictional minimum of the "law side" of the court.<sup>10</sup>

Several cases involving special jurisdictional questions arose during the survey period. In *Moore v. City of St. Petersburg*,<sup>11</sup> the District Court of Appeal, Second District, in affirming the trial court's entry of a directed verdict in favor of the city, held that "[g]overnmental immunity [was] not an affirmative defense, but [was] jurisdictional and [therefore] may be raised at any time."<sup>12</sup> Likewise, failure to exhaust administrative remedies provided by statute deprives the trial court of jurisdiction over the subject matter.<sup>13</sup> When the subject matter of the action is an alleged federally prohibited unfair labor practice, jurisdiction, unless relinquished, is exclusively in the National Labor Relations Board.<sup>14</sup>

A trial court's jurisdiction once established does not continue indefinitely. For example, after the time for rehearing of a final judgment of dissolution of marriage has passed, the court loses jurisdiction over matters incidental to the "divorce" action.<sup>15</sup> Similarly, a trial court is without jurisdiction to grant a motion to file a second amended complaint once the time allowed for reconsideration of the order dismissing the first amended complaint with prejudice has expired.<sup>16</sup> Nor does a court

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422 (Fla. 1973), where the court stated that:

Under our Constitution, if the Legislature recognizes a class of cases or creates a cause of action without specifying which of our two levels of trial court has jurisdiction, that jurisdiction automatically lies in the Circuit Courts.

*Id.* at 423. Equity jurisdiction is conferred on the circuit courts by FLA. STAT. § 26.012(2)(c) (1973).

9. *Massachusetts Cas. Ins. Co. v. Johansen*, 270 So. 2d 397 (Fla. 3d Dist. 1972).

10. *Emery v. International Glass & Mfg., Inc.*, 249 So. 2d 496 (Fla. 2d Dist. 1971). In this connection, see rule 1.110(b), providing that "[e]very complaint shall be considered to pray for general relief." FLA. R. CRV. P. 1.110(b).

11. 281 So. 2d 549 (Fla. 2d Dist. 1973).

12. *Id.* at 550, citing *Schmauss v. Snoll*, 245 So. 2d 112 (Fla. 3d Dist. 1971).

13. *Pushkin v. Lombard*, 279 So. 2d 79 (Fla. 3d Dist. 1973).

14. *Carpenters Dist. Council v. Waybright*, 279 So. 2d 300 (Fla. 1973), *rev'g* 248 So. 2d 179 (Fla. 1st Dist. 1971).

15. *Wood v. Wood*, 276 So. 2d 527 (Fla. 3d Dist. 1973).

16. *State ex rel. Terminal Transp. Co. v. Earnest*, 262 So. 2d 469 (Fla. 3d Dist. 1972).

have jurisdiction pursuant to rule 1.540(b) to set aside a 21-month-old judgment allegedly procured by fraud upon that court; an independent action is necessary.<sup>17</sup> The institution of an interlocutory appeal, however, suspends only the power of the trial court to make orders tending toward an extension or enforcement of the order appealed from.<sup>18</sup>

### B. Court Costs<sup>19</sup>

The award of court costs is an important monetary consideration. Perhaps in order not to frustrate such a worthy consideration, the Supreme Court of Florida in *Roberts v. Askew*<sup>20</sup> held that a motion to tax costs filed approximately four months after the dismissal of the appeal was not untimely.<sup>21</sup> However, the time to assess costs in an action dismissed under rule 1.420 is at the time the action is dismissed.<sup>22</sup>

More important than the time of assessment is the question of to whom the costs are assessed. Generally, "costs follow the judgment"<sup>23</sup> but costs may be assessed against the prevailing party if the sound discretion of the trial judge so dictates.<sup>24</sup>

Also largely discretionary with the trial court is what expense items will be taxed as costs.<sup>25</sup> In one case<sup>26</sup> the cost of representation of the defendant at a deposition taken by the plaintiff was allowed where the deposition took place in Dallas, Texas. In another case the estimated price of the reporter's transcription of the record of an incomplete trial was not taxed against the plaintiff who voluntarily dismissed near the completion of trial.<sup>27</sup>

Apparently conflicting decisions of the District Court of Appeal, Third District, were reported in regard to the taxing of costs of a suc-

See also *Investment Corp. v. Florida Thoroughbred Breeders Ass'n*, 256 So. 2d 227 (Fla. 3d Dist. 1972).

17. *Board of Pub. Instr. v. Dinkines*, 278 So. 2d 663 (Fla. 3d Dist. 1973).

18. *Sexton v. Panning Lumber Co.*, 260 So. 2d 898 (Fla. 4th Dist. 1972).

19. Allowance of attorneys' fees as costs will be discussed in section I, D *infra*.

20. 260 So. 2d 492 (Fla. 1972).

21. *Id.* at 494. Although the question presented to the court involved a motion to tax costs after the conclusion of an appeal, the opinion states that:

We now hold that costs may be adjudicated after final judgment, after the expiration of the appeal period, during the pendency of an appeal, and even after the appeal has been concluded. However, the motion to tax costs should be made within a reasonable time after the appeal has been concluded.

*Id.* at 494.

22. FLA. R. CIV. P. 1.420(d) states: "Costs in any action dismissed under this rule shall be assessed and judgment for costs entered in that action." This portion of the rule was quoted in *Troutman Enterprises, Inc. v. Robertson*, 273 So. 2d 11 (Fla. 1st Dist. 1973), which reversed the trial court's order denying defendant's motion to tax costs of a deposition against the plaintiff who voluntarily dismissed the action pursuant to rule 1.420(a)(1)(i) three days before trial.

23. *Foley v. Peckham*, 256 So. 2d 65, 67 (Fla. 3d Dist. 1971); accord, FLA. STAT. § 57.041 (1973).

24. *Foley v. Peckham*, 256 So. 2d 65 (Fla. 3d Dist. 1971).

25. See, e.g., *Keener v. Dunning*, 238 So. 2d 113 (Fla. 4th Dist. 1970).

26. *Bill Kelly Chevrolet, Inc. v. Kerr*, 258 So. 2d 280 (Fla. 3d Dist. 1972).

27. *Granoff v. Cherin*, 270 So. 2d 430 (Fla. 3d Dist. 1972).

successful defendant against the plaintiff, which costs in turn were assessed against an unsuccessful co-defendant. In *Bill Kelly Chevrolet, Inc. v. Kerr*,<sup>28</sup> the appellate court approved the lower court's judgment which allowed the plaintiff to transfer the burden of the cost judgment entered in favor of one successful defendant, General Motors, to the unsuccessful defendant. But in *Van Devander v. Knesik*,<sup>29</sup> the same appellate court held that "the costs awarded to the successful defendants against the plaintiff could not properly be added to the costs claimed against the unsuccessful defendants and charged against them in a cost judgment."<sup>30</sup>

### C. Judges

Disqualification of judges has been, during the survey period, a much litigated topic. The procedure for disqualification of a judge for prejudice is found in section 38.10 of the Florida Statutes. If the procedure is not carefully followed, the disqualification, rather than being mandatory, is discretionary with the trial judge.<sup>31</sup> If the procedure is followed and the application is well-founded, then any orders or judgments entered subsequent to the application are done so without authority.<sup>32</sup>

After a judge has been disqualified or is otherwise unable to govern the proceedings, "a successor judge cannot review, modify or reverse, upon the merits on the same facts, the final orders of his predecessor in the absence of mistake or fraud."<sup>33</sup>

### D. Attorneys

The primary themes of the cases reported during the survey period concerning attorneys have been the substitution of counsel and the propriety of allowing attorneys' fees as costs.

Rule 1.030(e) specifies that "[a]ttorneys for a party may be substituted at any time by order of court."<sup>34</sup> This permissive language was utilized by the Supreme Court of Florida in reversing a judgment of criminal contempt rendered against a defense attorney for an insurance company.<sup>35</sup> After learning of the insolvency of the insurance company, but before the case had been docketed for trial, the attorney notified the insured of his intention to withdraw and then moved to withdraw as counsel. The motion was granted and then was set aside. After three

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28. 258 So. 2d 280 (Fla. 3d Dist. 1972).

29. 281 So. 2d 57, 58 (Fla. 3d Dist. 1973).

30. *Id.* at 58 (citation omitted), citing 20 C.J.S. Costs § 113 (1940).

31. *In re A.S.*, 275 So. 2d 286 (Fla. 3d Dist. 1973); *Foley v. Peckham*, 256 So. 2d 65 (Fla. 3d Dist. 1971).

32. *Orlando Sports Stadium, Inc. v. Sentinel Star Co.*, 273 So. 2d 83 (Fla. 4th Dist. 1973).

33. *Balfe v. Gulf Oil Co.-Latin America*, 279 So. 2d 94, 95 (Fla. 3d Dist. 1973). The appellate court remanded the case so that the judge who entered the final summary judgment could rule on the petition for rehearing of that judgment.

34. FLA. R. Crv. P. 1.030(e).

35. *Fisher v. State*, 248 So. 2d 479 (Fla. 1971).

unsuccessful appellate reviews of the order of reinstatement of counsel, the attorney failed to appear and represent the insured at the trial. As previously indicated, a judgment of criminal contempt was entered. On petition for a writ of habeas corpus, the supreme court opined that

in a civil case any attorney of record has the right to terminate the attorney-client relationship and to withdraw as an attorney of record upon due notice to his client and approval by the court. Approval by the court should be rarely withheld and then only upon a determination that to grant said request would interfere with the efficient and proper functioning of the court.<sup>36</sup>

The opinion intimates that the interference "with the efficient and proper functioning of the court" probably will be present only if the withdrawal of counsel would necessitate a continuance of the case.<sup>37</sup>

The attorney who withdraws as counsel will want to be compensated for services he performed prior to withdrawal. To effectuate this desire, rule 1.030(e) provides that "[t]he court may condition . . . substitution upon payment of or security for the substituted attorney's fee . . . ."<sup>38</sup> Furthermore, the supreme court in *Hill v. Douglass*<sup>39</sup> held that an attorney who withdrew because he had to be a witness was, in the absence of bad faith or evidence of shaded testimony, entitled to reasonable compensation for services rendered before he learned that "he would probably become a witness in the matter . . . ."<sup>40</sup>

The allowance as costs or other recovery of attorney's fees is proper only where authorized by statute, where provided for by contract or "where awarded for services performed by an attorney in creating or bringing into the court a fund or other property."<sup>41</sup> This settled rule is apparently under attack by the District Court of Appeal, First District. The court, in a per curiam opinion,<sup>42</sup> held that the plaintiff failed to demonstrate that the lower court erred in awarding attorney's fees to the defendant after the plaintiff voluntarily dismissed before trial his negligence action. The cases cited to support the holding do not do so,<sup>43</sup> nor did the case fall within the above mentioned categories; therefor it should be looked upon as a thoughtful aberration.<sup>44</sup>

An imaginative decision was the product of the District Court of

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36. *Id.* at 486.

37. *Id.* at 484-86.

38. FLA. R. CIV. P. 1.030(e).

39. 271 So. 2d 1 (Fla. 1973).

40. *Id.* at 6.

41. *Kittel v. Kittel*, 210 So. 2d 1, 3 (Fla. 1968); *accord*, *Lee v. Watsco, Inc.*, 263 So. 2d 241 (Fla. 3d Dist. 1972).

42. *Royal-Globe Ins. Co. v. Indian River Gas Co.*, 281 So. 2d 380 (Fla. 1st Dist. 1973) (2-1 decision) [hereinafter cited as *Royal Globe*].

43. *Id.* at 381 (Wigginton, Acting C.J., dissenting).

44. Conflict obviously exists between *Royal Globe* and *Granoff v. Cherin*, 270 So. 2d 430 (Fla. 3d Dist. 1972). In *Granoff*, the court held that attorney's fees could not be assessed against a plaintiff who voluntarily dismissed an automobile negligence action near the completion of trial.

Appeal, Second District, in *Zwak v. Brown*.<sup>45</sup> The appellate court affirmed the lower court's allowance of attorney's fees incurred by the defendant as costs against the plaintiff. The court reasoned that since the defendant was contractually obligated to hold his sureties harmless, the attorney's fees incurred in doing so were proper cost items. Both courts failed to give effect to the facts that the defense was primarily for the benefit of the defendant, Brown, and more importantly, that the plaintiff was not contractually obligated to pay the defendant's attorney's fees.

The statute allowing attorney's fees in insurance actions<sup>46</sup> has received substantial attention. Although the statute must be strictly construed because it abrogates common law,<sup>47</sup> it has nevertheless been judicially expanded to allow the recovery of attorney's fees by both the insured and the injured third party garnishor in a garnishment action.<sup>48</sup> The expansion of the statute continued with a supreme court decision allowing an *implied assignee* of an insured's loss claim to recover attorney's fees.<sup>49</sup>

Recently, however, the supreme court, perhaps in retreat from its decisional exercise of "legislative powers," held in *Wilder v. Wright*<sup>50</sup> that a tort claimant who was successful in a direct action contesting the issue of liability—not liability coverage—against the insured and the insurer was not entitled to attorney's fees under Florida Statutes section 627.428. The court recited that:

It is clear to us that § 627.428, Fla. Stat., F.S.A., was intended to govern the relationship between the contracting parties to the insurance policy. While the injured party may become a third party beneficiary under the policy, as stated in *Shingleton v. Bussey*, . . . that third party may not automatically invoke all the provisions of the contract or statutes governing the rights and responsibilities flowing between insurer and insured.<sup>51</sup>

Thus, the court now appears to be construing the statute in a manner consistent with its express wording.

## II. JURISDICTION OVER THE PERSON

### A. *In General*

Jurisdiction over the person, one of three prerequisites to a civil action,<sup>52</sup> is effectuated by the use of three basic methods of service.<sup>53</sup>

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45. 251 So. 2d 358 (Fla. 2d Dist. 1971).

46. FLA. STAT. § 627.428 (1973), *formerly* § 627.0127 (1969).

47. *See, e.g.,* American Bankers Ins. Co. v. Benson, 254 So. 2d 851 (Fla. 3d Dist. 1971).

48. *Queen v. Travelers Ins. Co.*, 258 So. 2d 35 (Fla. 3d Dist. 1972), *citing* *Coblentz v. American Sur. Co.*, 421 F.2d 187 (5th Cir. 1969), and *Caplan v. Johnson*, 414 F.2d 615 (5th Cir. 1969).

49. *All Ways Reliable Bldg. Maint., Inc. v. Moore*, 261 So. 2d 131 (Fla. 1972), *quashing* 251 So. 2d 11 (Fla. 4th Dist. 1971).

50. 278 So. 2d 1 (Fla. 1973).

51. *Wilder v. Wright*, 278 So. 2d 1, 3 (Fla. 1973).

52. *See Massey & Klock, Civil Procedure, 1970-71 Survey of Florida Law*, 26 U. MIAMI L. REV. 469, 477 (1972) [hereinafter cited as *Massey & Klock*].



The method utilized depends upon the type of action before the court.<sup>54</sup> If the action is one in personam,<sup>55</sup> either personal or substituted service, depending upon the residence or business activity of the defendant, may be available.<sup>56</sup> If the action is in rem<sup>57</sup> or quasi in rem,<sup>58</sup> constructive service by publication may be a proper method.<sup>59</sup>

### B. Personal Service

Personal service is, as the name implies, service of the complaint and summons upon the person named therein.<sup>60</sup> Although personal service means personal delivery<sup>61</sup> and at one time may have been thought to require hand-to-hand delivery, it is now generally conceded that much less is sufficient.<sup>62</sup> For example, where the person to be served ran into his house upon seeing the process server approach but later was observed removing the summons and complaint from his mailbox, it was held that personal service upon the defendant had been effected.<sup>63</sup> Restrictions, both statutory and judicial, are imposed upon the availability of and procedure for effecting personal service in certain situations. For example, if the person to be served is a minor or an incompetent, Florida Statutes section 48.041 specifies, *inter alia*, that the process must be read to both the guardian and the minor or incompetent.<sup>64</sup> In *Campbell v. Stoner*,<sup>65</sup> the special procedures for service upon an incompetent were

53. The methods are actual or substituted service of the summons and complaint or constructive service by publication.

54. See FLA. STAT. chs. 48 & 49 (1973).

55. An in personam action is one in which the plaintiff "either seeks to subject the defendant's general assets to execution in order to satisfy a money judgment," or to secure a judgment "directing [a] defendant to do an act or refrain from doing an act under sanction of the court's contempt powers."

Massey & Klock, *supra* note 52, at 478 (footnote omitted).

56. See FLA. STAT. ch. 48 (1973).

57. In rem actions are those which seek to affect the interests of all persons in a specific thing. The thing commonly is land. See Massey & Klock, *supra* note 52, at 478.

58. Quasi in rem actions are those which seek to affect the interests of a limited number of persons in a specific thing. See Massey & Klock, *supra* note 52, at 478.

59. See FLA. STAT. ch. 49 (1973).

60. If the "person" to be served is a legal entity rather than an individual, various statutes designate the natural persons upon whom service may be made in order to effect personal service upon the entity. See FLA. STAT. §§ 48.061-151 (1973). See also *Ludlum Enterprises, Inc. v. Outdoor Media, Inc.*, 250 So. 2d 649 (Fla. 4th Dist. 1971) (construing section 48.081(1)); *Iberia Lineas Aereas de Espana, S.A. v. Knapp*, 260 So. 2d 868 (Fla. 3d Dist. 1972) (construing section 48.081(3)); and *Youngblood v. Citrus Assoc. of the N.Y. Cotton Exch., Inc.*, 276 So. 2d 505 (Fla. 4th Dist. 1973), where the court held that even though the vice president of the defendant foreign corporation was served in Florida pursuant to section 48.081(1), service upon the corporation was not effective since the "doing business" requirements of section 48.181 (see section II, C *infra*) were not met.

61. See FLA. STAT. § 48.031 (1973).

62. See, e.g., *Olin Corp. v. Haney*, 245 So. 2d 669 (Fla. 4th Dist. 1971); *Haney v. Olin Corp.*, 245 So. 2d 671 (Fla. 4th Dist. 1971), discussed in Massey & Klock, *supra* note 52, at 479.

63. *Liberman v. Commercial Nat'l Bank*, 256 So. 2d 63 (Fla. 4th Dist. 1971).

64. FLA. STAT. § 48.041(1) (1973).

65. 249 So. 2d 474 (Fla. 3d Dist. 1971).

found to be unnecessary even though the defendant was served while involuntarily confined to a hospital pending determination of his competency. The court held that a record showing that the person served was an adjudged incompetent or was incompetent in fact at the time of service was required.<sup>66</sup>

A judicially imposed restriction upon the availability of personal service of process was demonstrated in *Murphy & Jordan, Inc. v. Insurance Co. of North America*.<sup>67</sup> In this case the complaint named as defendants Murphy & Jordan, Inc. of Florida; Murphy & Jordan, Inc. of New York; Murphy & Jordan, Inc. of New Jersey; Thomas Jordan and William Murphy. William Murphy was the secretary of the defendant corporations; Thomas Jordan was president. Service had been effected only upon Murphy & Jordan, Inc. of Florida at the time Thomas Jordan, a New York resident, and William Murphy, a New Jersey resident, came to Florida to be deposed as officers of the defendant Florida corporation. On the day of the deposition, both were served in their individual capacities. William Murphy was served as an officer of the other defendants, Murphy & Jordan of New York and of New Jersey. The lower court's order denying the defendant's motion to quash process and service of process was reversed by the District Court of Appeal, Third District, because, as the court noted:

It is well established in Florida that witnesses and suitors in attendance in court outside of the territorial jurisdiction of their residence are immune from service of process while attending court and for a reasonable time before and after going to court and in returning to their homes.<sup>68</sup>

The attempted service upon the New York and New Jersey corporations through service upon William Murphy as secretary of each was also quashed since Florida Statutes section 48.081 requires that service on the corporation president be unavailable before service on a subordinate officer can be sustained.

Personal service has been given a wider range of application in a recently enacted long arm statute.<sup>69</sup> This statute, effective July 13, 1973, was designed to supplement other Florida long arm statutes<sup>70</sup> and to repeal section 48.182 which related to service on nonresidents whose wrongful acts performed out of state caused injuries within the state.<sup>71</sup> Subsection (2) of section 48.193 provides:

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66. *Id.*

67. 278 So. 2d 296 (Fla. 3d Dist. 1973).

68. *Id.* at 297, citing *Rorick v. Chancey*, 130 Fla. 442, 178 So. 112 (1938).

69. See FLA. STAT. §§ 48.193-94 (1973).

70. See FLA. STAT. § 48.193(4) (1973), which states that "[n]othing contained in this section shall limit or affect the right to serve any process in any other manner now or hereinafter provided by law."

71. See FLA. STAT. § 48.194(2) (1973).

Service of process upon any person who is subject to the jurisdiction of the courts of this state, as provided in this section,<sup>72</sup> may be made by personally serving the process upon the defendant outside this state, as provided in § 48.194.<sup>73</sup> The service shall have the same effect as if it has [sic] been personally served within this state.<sup>74</sup>

### C. Substituted Service

Substituted service of process is allowed in actions involving resident as well as nonresident defendants. Florida Statutes section 48.031, which relates primarily to service upon residents, specifies that "[s]ervice of original process [may be] made . . . by leaving such copies at his usual place of abode with some person of the family over fifteen years of age and informing such person of their contents."<sup>75</sup> In this connection, it was held that the defendant's aunt, a British subject, who had visited with the defendant for only about four months during the winter season was a "person of the family" within the meaning of the statute.<sup>76</sup>

Substituted service of process upon nonresidents was the subject

72. The portion referred to specifies that:

(1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection, thereby submits that person and, if he is a natural person, his personal representative, to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following:

(a) Operates, conducts, engages in, or carries on a business or business venture in this state or has an office or agency in this state.

(b) Commits a tortious act within this state.

(c) Owns, uses, or possesses any real property within this state.

(d) Contracts to insure any person, property, or risk located within this state at the time of contracting.

(e) With respect to proceedings for alimony, child support, or division of property in connection with an action to dissolve a marriage, or with respect to an independent action for support of dependents, maintains a matrimonial domicile in this state at the time of the commencement of this action, or if the defendant resided in this state preceding the commencement of the action, whether cohabiting during that time or not. This paragraph does not change the residency requirement for filing an action for dissolution of marriage.

(f) Causes injury to persons or property within this state arising out of an act or omission outside of this state by the defendant; provided that at the time of the injury either the defendant was engaged in solicitation or service activities within this state which resulted in such injury or products, materials, or things processed, serviced, or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of commerce, trade or use; and the use or consumption resulted in the injury.

(g) Breaches a contract in this state by failing to perform acts required by the contract to be performed in this state.

FLA. STAT. § 48.193(1) (1973).

73. FLA. STAT. § 48.194(1) (1973) provides that:

Service of process on persons outside of this state shall be made in the same manner as service within this state by any officer authorized to serve process in the state where the person is served. No order of court is required. An affidavit of the officer shall be filed stating the time, manner, and place of service. The court may consider the affidavit, or any other competent evidence, in determining whether service has been properly made.

74. FLA. STAT. § 48.193(2) (1973).

75. FLA. STAT. § 48.031 (1973).

76. Sangmeister v. McElnea, 278 So. 2d 675 (Fla. 3d Dist. 1973).

of an interesting but apparently unauthoritative district court of appeal decision<sup>77</sup> involving a nonresident pedestrian who was struck by an uninsured motorist and was taken to a hospital, where he died nine months later. The pedestrian's uninsured motorist insurance carrier paid the pedestrian's guardian, who then turned the proceeds over to the co-administrators of the deceased pedestrian's estate. The hospital, which had treated the deceased but had not been paid, sued the insurance carrier and alleged a wrongful distribution of proceeds. The insurance carrier thereupon filed a third party complaint against the nonresident co-administrators and their fiduciary bondholders. The trial court denied the third party defendants' motion to quash service of process.

In affirming the lower court order, the appellate court held that the nonresident co-administrators were subject to service of process under Florida Statutes section 48.161(2), which allows service upon the personal representative of one who before death would have been subject to substituted service of process. The court stated that "[e]ven though the deceased was a pedestrian, we think the 'long-arm' statute, § 48.171, is applicable to the deceased . . . ."<sup>78</sup> Since section 48.171 governs only substituted service upon nonresident owners or operators of motor vehicles,<sup>79</sup> not pedestrians, this judicial thought conflicts with the general rule that "[s]tatutes providing for substituted service must be strictly construed . . . ."<sup>80</sup> The court alternatively, but no less surprisingly, held that the co-administrators were also subject to substituted service because the decedent would have been subject to service under section 48.181, a "doing business" long arm statute.<sup>81</sup> This latter holding was based upon the decedent's act of contracting with the hospital for medical services, but the cases cited to support this holding are distinguishable.<sup>82</sup> Consequently, this case should be looked upon as an aberration in the law of substituted service of process.

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77. *Maryland Cas. Co. v. Hartford Accident & Indem. Co.*, 264 So. 2d 842 (Fla. 1st Dist. 1972).

78. *Id.* at 843.

79. See FLA. STAT. § 48.171 (1973).

80. See, e.g., *Fleischman v. Morris*, 260 So. 2d 278, 279 (Fla. 3d Dist. 1972). See also *Central Nat'l Bank v. Kelly*, 253 So. 2d 141 (Fla. 3d Dist. 1971), where substituted service upon the executor of the estate of a pilot who allegedly caused the death of a passenger in his aircraft was ordered quashed. The court noted that even though the provision relating to service upon nonresident owners or operators of aircraft had been inadvertently omitted from the 1967 statutory revision, it was nevertheless absent from the statutes and therefore could not be used to effect service of process under section 48.061.

81. See FLA. STAT. § 48.181 (1973).

82. The court cited *McCarthy v. Little River Bank & Trust Co.*, 224 So. 2d 338 (Fla. 3d Dist. 1969), which dealt with a nephew who in expectation of pecuniary gain from his uncle's estate entered into numerous transactions within the state in order to hasten the realization of the expectation; and *Marion County Hosp. Dist. v. Namer*, 225 So. 2d 442 (Fla. 1st Dist. 1969), where the party who contracted with the hospital was a nonresident motorist and therefore was subject to substituted service pursuant to a strict construction of section 48.171. *Maryland Cas. Co. v. Hartford Accident & Indem. Co.*, 264 So. 2d 842, 844 (Fla. 1st Dist. 1972).

Most of the cases reported during the survey period involving substituted service of process upon nonresidents construed Florida Statutes section 48.181,<sup>83</sup> the "doing business" statute. The party desiring the use of substituted service pursuant to this statute has the burden of presenting a situation clearly justifying its use.<sup>84</sup> The burden was met in one case by allegations that a franchisor-defendant "exert[ed] control over the franchisee and others so that the franchise [was] breached";<sup>85</sup> and in another, *Reader's Digest Association v. State ex rel. Conner*,<sup>86</sup> by alleged "massive solicitation" of Florida citizens by mail.<sup>87</sup> The burden was not sustained, however, where the business activity alleged was merely the signing of a contract in Florida for the purchase of a Florida home,<sup>88</sup> nor where the activity alleged consisted of the execution of a contract outside the state for the purchase of all the stock of a Florida corporation.<sup>89</sup> Additionally, the substituted service authorized by Florida Statutes section 48.181 must be accomplished pursuant to the procedure provided in section 48.161. Thus, any judgment based upon the purported service is void if the plaintiff failed forthwith to send a copy of the process and notice of service upon the Secretary of State of Florida to the defendant.<sup>90</sup>

#### D. Constructive Service

Constructive service of process by publication is governed by chapter 49 of the Florida Statutes. Generally, constructive service is authorized in actions involving property within the jurisdiction of the courts

83. FLA. STAT. § 48.181 (1973).

84. *Citizens & So. Bank v. Popkin*, 281 So. 2d 522 (Fla. 3d Dist. 1973); *Youngblood v. Citrus Assoc. of the N.Y. Cotton Exch., Inc.*, 276 So. 2d 505 (Fla. 4th Dist. 1973); *Fleischman v. Morris*, 260 So. 2d 278 (Fla. 3d Dist. 1972).

85. *Fashion Two Twenty, Inc. v. Ralph & Reba, Inc.*, 254 So. 2d 49, 50 (Fla. 3d Dist. 1971).

86. 251 So. 2d 552 (Fla. 1st Dist. 1971).

87. Other cases in which the defendant was held to be "doing business" for the purposes of substituted service of process under section 48.181 are as follows: *Sonnenblick-Goldman Corp. v. Feldman*, 266 So. 2d 48 (Fla. 3d Dist. 1972) (branch office in Florida); *Richard Bertram & Co. v. American Marine, Ltd.*, 258 So. 2d 335 (Fla. 3d Dist. 1972) (dealership agreement); *Lustig v. Feinberg*, 257 So. 2d 299 (Fla. 1st Dist. 1972) (motel purchased and leased by defendants on the same day); *4th Dimension Interiors, Inc. v. Decorator Serv. Ltd.*, 256 So. 2d 571 (Fla. 3d Dist. 1972) (extensive purchases in Florida); *Eder Instrument Co. v. Allen*, 253 So. 2d 902 (Fla. 3d Dist. 1971) (sporadic sales of gastroscopes); and *Horace v. American Nat'l Bank & Trust Co.*, 251 So. 2d 33 (Fla. 4th Dist. 1971) (acts of corporation represented by an individual charged to that individual in action upon a debt guaranteed by the individual).

88. *Lyster v. Round*, 276 So. 2d 186 (Fla. 1st Dist. 1973). *But cf.* *Maryland Cas. Co. v. Hartford Accident & Indem. Co.*, 264 So. 2d 842 (Fla. 1st Dist. 1972); text accompanying note 81 *supra*.

89. *Compugide v. Sachs*, 259 So. 2d 513 (Fla. 3d Dist. 1972).

90. *See Atlas Van Lines, Inc. v. Rossmoore*, 271 So. 2d 31 (Fla. 2d Dist. 1972); *Parish Mortgage Corp. v. Davis*, 251 So. 2d 342 (Fla. 3d Dist. 1971).

of Florida<sup>91</sup> "[w]here personal service of process cannot be had"<sup>92</sup> upon persons whose interests will be directly affected by a judgment concerning the property. Although constructive service of process may be resorted to in an action for dissolution or annulment of marriage,<sup>93</sup> the court does not thereby obtain jurisdiction to award custody of a child,<sup>94</sup> to assess payments for child support<sup>95</sup> or to assess the amount of alimony to be paid by the disappointed or disappointing spouse.<sup>96</sup> Nor is constructive service effective to acquire personal jurisdiction over a nonresident defendant in an action upon a contract.<sup>97</sup> However, constructive service is effective to acquire jurisdiction over nonresident stockholders in an action in the nature of a declaratory judgment action to determine the ownership of shares in a Florida corporation.<sup>98</sup> Such service was also upheld in *Harvey v. Deeland*.<sup>99</sup> In this suit to quiet title and seeking partition, the final judgment was held not subject to attack based on the service of process by publication.

The fact that there might always appear on the horizon some interested claimant claiming from a one hundred year since deceased title holder, who was not known at the time of [the] filing of [the] complaint, does not render void or voidable process by publication if made pursuant to statute . . . .<sup>100</sup>

### III. VENUE

#### A. *In General*

Venue is the defendant's privilege, extended by statute, to defend an action in a specific geographical area.<sup>101</sup> This privilege may be waived contractually<sup>102</sup> or by failure to timely assert it.<sup>103</sup> If an action is based upon common law or upon a statute which lacks a venue provision,<sup>104</sup> the general venue statute<sup>105</sup> governs the selection of the county in which the action may be initiated.<sup>106</sup>

91. See Massey & Klock, *supra* note 52, at 482.

92. FLA. STAT. § 49.021 (1973).

93. FLA. STAT. § 49.011(4) (1973).

94. *Carnes v. Carnes*, 256 So. 2d 550 (Fla. 4th Dist. 1972).

95. *Id.*

96. *Wood v. Wood*, 276 So. 2d 527 (Fla. 3d Dist. 1973).

97. *Clark v. Realty Inv. Center, Inc.*, 252 So. 2d 589 (Fla. 3d Dist. 1971).

98. *Wolf v. Indus. Guar. Bancorp.*, 281 So. 2d 598 (Fla. 3d Dist. 1973).

99. 276 So. 2d 518 (Fla. 1st Dist. 1973).

100. *Id.* at 519.

101. *Stewart v. Carr*, 218 So. 2d 525 (Fla. 2d Dist. 1969). See generally FLA. STAT. ch. 47 (1973).

102. *Tropicana Pools, Inc. v. Brown*, 270 So. 2d 751 (Fla. 2d Dist. 1972).

103. See FLA. R. CIV. P. 1.140(b), (h).

104. Some of the actions based upon statutes which include venue provisions are: bastardy actions, FLA. STAT. § 742.021 (1973); adoption proceedings, FLA. STAT. § 63.021 (1973); and actions against collection agencies, FLA. STAT. § 559.77 (1973).

105. FLA. STAT. § 47.011 (1973).

106. *Stewart v. Carr*, 218 So. 2d 525 (Fla. 2d Dist. 1969).

Under the general statute, "actions shall be brought only in the county . . . where [the] defendant resides, or where the cause of action accrued, or where the property in litigation is located."<sup>107</sup> The clauses of this statute concerning the defendant's residence and the accrual of the cause of action have recently received judicial consideration. An adjudged and involuntarily institutionalized incompetent, the respondent in a suit for dissolution of marriage, was held to reside in the county where the institution was located rather than in the county where he previously had maintained the marital home.<sup>108</sup>

When considering where a cause of action accrued, the courts have not changed the long established rule that a cause of action for failure to pay money when contractually due accrues in the county where the creditor resides unless the contract provides for payment elsewhere.<sup>109</sup> The novel question of where a cause of action for dissolution of marriage arises was resolved in *Arnold v. Arnold*.<sup>110</sup> The court decided that the place where the marriage is alleged to have become irretrievably broken is the locus of the cause of action under the venue statute; but if contested, the judge must decide where that event occurred.

#### B. *Transfer or Dismissal; Multiple Defendants*

If venue has been incorrectly laid in a county, "the court may transfer the action . . . to the proper court in any county or district where it might have been brought in accordance with the venue statutes."<sup>111</sup> Of course, the defendant ordinarily must move<sup>112</sup> the court to transfer the action if venue is improper. The motion may be accompanied by an affidavit,<sup>113</sup> but in any case, the party attacking venue has the burden of showing it to be improper.<sup>114</sup> This burden is met only by "specific averments negativ[ing] a right of the plaintiff to maintain the suit or action in the county where brought."<sup>115</sup>

Even if venue is not improper where laid, the court may, "[f]or the convenience of the parties or witnesses or in the interest of justice,"<sup>116</sup> transfer the action "to any other court of record in which it might have been brought."<sup>117</sup> In *England v. Cook*,<sup>118</sup> the defendants moved to transfer

107. FLA. STAT. § 47.011 (1973). The last clause is applicable only to local actions.

108. *Hunt v. Hunt*, 280 So. 2d 63 (Fla. 4th Dist. 1973).

109. *Merrill Stevens Yachts, Inc. v. Irwin Yacht & Marine Corp.*, 276 So. 2d 230 (Fla. 3d Dist. 1973); *Jones v. Hichman*, 263 So. 2d 275 (Fla. 3d Dist. 1973); *Lakeport Water Ass'n v. David B. Smith Eng'rs, Inc.*, 257 So. 2d 589 (Fla. 1st Dist. 1972).

110. 273 So. 2d 405 (Fla. 2d Dist. 1973).

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

112. See FLA. R. CIV. P. 1.140(b).

113. See, e.g., *Coggin Pontiac, Inc. v. Putnam Auto Sales, Inc.*, 278 So. 2d 647 (Fla. 1st Dist. 1973).

114. *Id.*

115. *Id.* at 649.

116. FLA. STAT. § 47.122 (1973). \*

117. *Id.*

118. 256 So. 2d 403 (Fla. 3d Dist. 1972).

the libel action from Dade County to Marion County, alleging not only that venue was proper in Marion County (a necessary condition), but also that all the witnesses for the defense resided or worked there. The appellate court, in reversing and remanding with directions to transfer the cause to Marion County, held that the trial court abused its discretion in denying the defendants' motion for change of venue, apparently in light of the inconvenient distance of all the witnesses from the original forum.

With an increase in the number of defendants asserting a venue privilege, the venue problem becomes more complex. In an action against a foreign corporation doing business in Florida, venue is proper in any county where the corporation "resides" in the sense that it has an agent or other representative in that county.<sup>119</sup> If a foreign corporation is joined with an individual defendant, the individual retains his venue privilege if it is timely asserted,<sup>120</sup> despite the statute specifying that "[a]ctions against two or more defendants in different counties . . . may be brought in any county . . . in which any defendant resides."<sup>121</sup> Conversely, if venue is properly laid in the county where one of multiple defendants resides, the subsequent dismissal of that defendant does not alone require a transfer.<sup>122</sup>

### C. *Third Party Defendants*

Third party defendants, as opposed to multiple defendants, do not have an "absolute" venue privilege. This was decided in *Dorr-Oliver, Inc. v. Linder Industrial Machinery Co.*,<sup>123</sup> a case of first impression. In *Dorr-Oliver*, the plaintiff sued the defendant in the Dade County Circuit Court for injuries sustained while working on allegedly defective equipment sold by the defendant to the plaintiff's employer. The defendant then filed, pursuant to rule 1.180, a third party complaint against the designer-appellee. The third party defendant-appellee thereupon moved to dismiss for improper venue,<sup>124</sup> which motion was granted. The District Court of Appeal, Third District, sifted three views espoused by various federal opinions dealing with a third party defendant's venue privilege

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119. See FLA. STAT. § 47.051 (1973).

120. *Allen v. Summers*, 273 So. 2d 13 (Fla. 3d Dist. 1973).

121. FLA. STAT. § 47.021 (1973).

122. *Iseminger v. Morris*, 249 So. 2d 488 (Fla. 1st Dist. 1971). The court expressed concern that a plaintiff "may include enough defendants to justify the laying of venue in the County which the plaintiff thinks would be more susceptible to his cause of action, and thereafter . . . dismissing [*sic*] such defendants." *Id.* at 489. For a somewhat related problem, see FLA. STAT. § 47.041 (1971), regarding venue for several causes of action, and *Costner v. Costner*, 263 S. 2d 852 (Fla. 1st Dist. 1972), wherein this statute was construed.

123. 263 So. 2d 237 (Fla. 3d Dist. 1972) [hereinafter referred to as *Dorr-Oliver*].

124. In an affidavit accompanying the motion, the third-party defendant asserted that its *home and main* office was in Lakeland, Florida, and that it transacted business with the third party plaintiff only in Lakeland, Florida or Fort Mead, Florida. The latter assertion was apparently for the venue purpose of determining where the cause of action accrued.



under the comparable federal rule<sup>125</sup> and concluded—in line with what the court considered to be the majority federal view—that “the venue asserted by [the third-party defendant] was not as a matter of right, but one within the sound discretion of the trial judge . . . .”<sup>126</sup> Since no abuse of that discretion was found, the trial court’s dismissal of the third party complaint was affirmed.

#### IV. THE INITIAL PHASES OF AN ACTION

##### A. *Setting Forth a Cause of Action*

##### 1. COMPLAINT

The requisites of a complaint are detailed in rule 1.110(b). The rule provides that in addition to stating a cause of action, the complaint must contain “a short and plain statement” of (1) the court’s jurisdictional grounds, “(2) the ultimate facts showing that the pleader is entitled to relief and (3) a demand for judgment for [that] relief . . . .”<sup>127</sup> Essentially, the complaint must “apprise the [defendant] of the substance of the claim [so that he will have] a fair chance to meet the proofs and prepare a defense.”<sup>128</sup>

If certain “special matters” are pleaded, rule 1.120 requires a greater degree of specificity or particularity with which the facts must be alleged. Thus, if fraud is to be pleaded, “the circumstances constituting fraud . . . shall be stated with such particularity as the circumstances may permit.”<sup>129</sup> Malice, on the other hand, “may be averred generally.”<sup>130</sup> Special damages, as another special matter included in rule 1.120, must also be “specifically stated.”<sup>131</sup>

Initial failure to satisfy the pleading requirements should not be fatal to the action. Accordingly, it has been held as error for a trial court to enter an order of dismissal of a complaint for failure of the pleader to satisfy the requirements of rule 1.110 without including in that order leave to amend the pleading.<sup>132</sup>

125. FED. R. CIV. P. 14.

126. *Dorr-Oliver, Inc. v. Linder Indus. Mach. Co.*, 263 So. 2d 237, 240 (Fla. 3d Dist. 1972).

127. FLA. R. CIV. P. 1.110(b). *See also* *Foerman v. Seaboard Coastline R.R.*, 279 So. 2d 825 (Fla. 1973); *Orlando Sports Stadium, Inc. v. State ex rel. Powell*, 262 So. 2d 881 (Fla. 1972); *Holiday Dinner Theatres of America, Inc. v. Bartke*, 281 So. 2d 376 (Fla. 2d Dist. 1973); *Van Meter v. Bank of Clearwater*, 276 So. 2d 241 (Fla. 2d Dist. 1973).

128. *Byrum v. Williams*, 276 So. 2d 836, 837 (Fla. 4th Dist. 1973).

129. FLA. R. CIV. P. 1.120(b).

130. FLA. R. CIV. P. 1.120(b); *Gangelhoff v. Lokey Motors Co.*, 270 So. 2d 59 (Fla. 2d Dist. 1972). Other conditions of the mind, such as intent, mental attitude and knowledge need not be pleaded with particularity.

131. FLA. R. CIV. P. 1.120(g). *See also* *Hutchison v. Tompkins*, 259 So. 2d 129 (Fla. 1972) (special and general damages distinguished).

132. *E.g.*, *L.C. Morris, Inc. v. Allison*, 277 So. 2d 28 (Fla. 3d Dist. 1973), *citing* *Bowen v. GHC Properties, Ltd.*, 251 So. 2d 359 (Fla. 1st Dist. 1971).

## 2. COUNTERCLAIMS, CROSSCLAIMS AND THIRD PARTY COMPLAINTS

Counterclaims (claims against an opposing party) may be either compulsory or permissive.<sup>133</sup> If compulsory, the counterclaim must be pleaded or the claim will be barred.<sup>134</sup> The crucial characteristic<sup>135</sup> of a compulsory counterclaim is that it "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim . . .".<sup>136</sup> A logical relationship test was used in *Stone v. Pembroke Lakes Trailer Park, Inc.*,<sup>137</sup> to determine whether the claim arose out of "the transaction or occurrence" involved in a prior action. The defendant in *Stone* contended that the plaintiff should have counterclaimed for return of the deposit in the prior action brought by the present defendant for the balance of a commission the present defendant allegedly earned. The lower court rejected the defense that the claim was barred by virtue of rule 1.170(a) and ordered judgment for the amount of the deposit. The appellate court, in reversing the lower court's judgment, considered federal cases construing the federal counterpart<sup>138</sup> of rule 1.170(a). From this examination, the court concluded that "any claim that is *logically related* to another claim that is being sued on is properly the basis for a compulsory counterclaim."<sup>139</sup> The court further noted that the logical relationship is easily found when the failure of the plaintiff's claim establishes a foundation for the counterclaim.<sup>140</sup> Hence, the court concluded that the logical relationship existed because "the plaintiff's present suit [seeking return of the deposit] needed only the failure of the defendant's prior suit [for the balance of the commission allegedly earned] to establish a foundation for this suit."<sup>141</sup> Consequently, the present action was deemed barred by the plaintiff's failure to assert it as a counterclaim in the previous action.

If the claim is one against a co-party, the pleading is a crossclaim. The only significant case relating to crossclaims arising during the survey period was *Williams v. Banning*.<sup>142</sup> In *Williams*, the insurer moved to

133. See FLA. R. CIV. P. 1.170(a), (b).

134. *Stone v. Pembroke Lakes Trailer Park, Inc.*, 268 So. 2d 400 (Fla. 4th Dist. 1972); *McDonald Air Conditioning v. 1041 Corp.*, 251 So. 2d 319 (Fla. 1st Dist. 1971).

135. Compare FLA. R. CIV. P. 1.170(a) with FLA. R. CIV. P. 1.170(b).

136. FLA. R. CIV. P. 1.170(a). This rule further specifies that a counterclaim is not compulsory if it:

- (1) requires for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction
- (2) is the subject of another pending action, or
- (3) is in opposition to a claim brought by attachment or other process which did not give the court jurisdiction to render a personal judgment on the claim and the pleader is not stating a counterclaim under this rule.

137. 268 So. 2d 400 (Fla. 4th Dist. 1972) [hereinafter referred to as *Stone*].

138. FED. R. CIV. P. 13.

139. *Stone v. Pembroke Lakes Trailer Park, Inc.*, 268 So. 2d 400, 402 (Fla. 4th Dist. 1972) (original emphasis).

140. *Id.* at 402.

141. *Id.* at 402 (citations omitted).

142. 259 So. 2d 725 (Fla. 2d Dist. 1972) [hereinafter referred to as *Williams*].

limit its liability to \$10,000 after a jury verdict in the amount of \$30,000 was returned against the insured and the insurer. The lower court granted the motion without conducting an adversary hearing and without receiving into evidence the actual policy issued by the insurer to the insured. On appeal, the District Court of Appeal, Second District, held that this non-adversary procedure was improper.

It is indicated to us that something more than a mere allegation in a motion to limit liability is necessary for the insured to have his day in court. We believe that the proper procedure to follow in a *post-trial* action to limit judgment in the same action where the judgment was rendered, . . . is to file a pleading in the nature of a crossclaim as provided in Rule 1.170(g) . . . with service hereof upon all parties as provided in the Rules of Civil Procedure and thereafter proceed treating such cross-claim as an initial pleading with the right to respond thereto in the parties against whom the claim is made.<sup>143</sup>

If the counterclaim or crossclaim seeks damages in excess of the jurisdictional limits of the court in which the original claim was filed, the court must transfer the cause to a court with jurisdiction.<sup>144</sup> A 1972 amendment to rule 1.170(j) requires the defendant who files a counterclaim or crossclaim in excess of the jurisdictional amount of the court in which the action is pending to deposit "with the court having jurisdiction a sum sufficient to pay the clerk's service charge . . ."<sup>145</sup>

A party against whom a demand has been made, either by way of an original complaint<sup>146</sup> or a counterclaim<sup>147</sup> may bring in a third party "who is or may be liable to him for all or part of the plaintiff's [or counterclaimant's] claim against him."<sup>148</sup> If the third party plaintiff fails to file the third party complaint within 20 days after filing the answer, leave of court must be obtained to do so.<sup>149</sup> The motion for leave to file a third party complaint should be allowed if it is "'show[n] that the proposed third party defendant [is] or may be liable' to [the third party plaintiff]."<sup>150</sup>

### 3. CLASS ACTIONS

Class actions have, without notable exception, fared poorly during the period surveyed. In line with the brevity of Florida rule 1.220 regu-

143. *Id.* at 726 (original emphasis). *Stella v. Craine*, 281 So. 2d 584 (Fla. 4th Dist. 1973), suggests that in order to avoid the post-trial problems evident in *Williams*, the insurance limit should be fully disclosed at pretrial conference. The pretrial order could then incorporate the insurance limits as a guide to the entry of the final judgment.

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

145. *Id.*

146. FLA. R. CIV. P. 1.180(a).

147. FLA. R. CIV. P. 1.180(b).

148. FLA. R. CIV. P. 1.180(a).

149. *Id.*

150. *Peebles v. Kilday*, 257 So. 2d 627, 629 (Fla. 1st Dist. 1972), citing *Boling v. Barnes*, 198 So. 2d 377 (Fla. 2d Dist. 1967).

lating class actions,<sup>151</sup> the reasons given for dismissing the actions are few. The principal reasons given have been a failure to allege an amount of damages suffered by *each* purported member of the class sufficient to satisfy jurisdictional requirements,<sup>152</sup> and a failure to exhibit a "community of interest" of the members of the alleged class in a common recovery.<sup>153</sup> As one opinion noted, "[m]erely, 'touching all the bases', . . . with general allegations is an insufficient foundation for a true class action."<sup>154</sup>

In a positive sense, a sufficient and impliedly necessary foundation for a class action was suggested in *Watnick v. Florida Commercial Banks, Inc.*<sup>155</sup> The court observed that actions in which the community of interest had been found to exist "involve[d] issues created by *governmental acts* that affect[ed] an identifiable class of citizens who involuntarily became involved by virtue of their position as taxpayers, property holders, etc."<sup>156</sup> Additionally, in a practical sense, if the class action complaint is defective as they were in all cases reported during the survey period, all is not lost since the court should grant leave to amend or leave to prosecute separate actions, rather than dismiss the action with prejudice.<sup>157</sup>

#### 4. AMENDING THE PLEADINGS

The liberality of the Florida rules is perhaps best exemplified by the rule regarding amendment of pleadings. The rule<sup>158</sup> gives a pleader a right to amend his pleading before he is served with a responsive plead-

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151. Compare FLA. R. CIV. P. 1.220 with FED. R. CIV. P. 23. The Florida class action rule provides that: "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole." FLA. R. CIV. P. 1.220.

152. *Curtis Publishing Co. v. Bader*, 266 So. 2d 78 (Fla. 3d Dist. 1972) (alleged loss of \$3.95 by each member for prepaid subscription to the Saturday Evening Post; remanded for transfer to a court of lesser jurisdiction); *Daniels v. National Brands Tire Co.*, 270 So. 2d 448 (Fla. 3d Dist. 1972) (by implication).

153. *Equitable Life Assurance Soc'y of the United States v. Fuller*, 275 So. 2d 568 (Fla. 3d Dist. 1973) (separate medical insurance policies); *Watnick v. Florida Commercial Banks, Inc.*, 275 So. 2d 278 (Fla. 3d Dist. 1973) (individual BankAmericard account holders); *Federated Dep't Stores, Inc. v. Pasco*, 275 So. 2d 46 (Fla. 3d Dist. 1973) (revolving charge account holders); *Wilson v. First Nat'l Bank*, 254 So. 2d 362 (Fla. 3d Dist. 1971) (holders of checks dishonored by defendant bank). An oft-cited Florida case dealing with the "community of interest" aspect of a class action is *Osceola Groves, Inc. v. Wiley*, 78 So. 2d 700 (Fla. 1955).

154. *Winn Dixie Stores, Inc. v. Sams*, 281 So. 2d 47, 47 (Fla. 3d Dist. 1973).

155. 275 So. 2d 278 (Fla. 3d Dist. 1973).

156. *Watnick v. Florida Commercial Banks, Inc.*, 275 So. 2d 278, 280 (Fla. 3d Dist. 1973) (emphasis added). For a case in which the members of the alleged class had "position" or "status" but "governmental action" was lacking, see *Harrell v. Hess Oil & Chem. Corp.*, 272 So. 2d 542 (Fla. 1st Dist. 1973). This class action brought by owners of property bordering a waterway for damages caused by defendants' alleged pollution of the waters was dismissed.

157. See *Equitable Life Assurance Soc'y of the United States v. Fuller*, 275 So. 2d 568 (Fla. 3d Dist. 1973); *Wilson v. First Nat'l Bank*, 254 So. 2d 362 (Fla. 3d Dist. 1971).

158. FLA. R. CIV. P. 1.190.

ing; or if a responsive pleading is not permitted<sup>159</sup> and the action has not been placed upon the trial calendar, the pleader may amend the pleading within 20 days of its service.<sup>160</sup> In all other circumstances, amendment is a privilege, the exercise of which is dependent upon written consent of the adverse party or leave of court.<sup>161</sup>

Rule 1.190 directs that "leave [to amend] shall be given freely when justice so requires."<sup>162</sup> Accordingly, it was held in one case<sup>163</sup> that the trial judge had abused his discretion in refusing to allow as an amendment to the *sixth* amended complaint the substitution of the correct bill for the one mistakenly attached to the complaint. In contrast, another court "umpirishly" decided that the lower court correctly denied the pleader's motion to amend the third amended third party complaint. The reason given: " 'Three strikes are out' in a baseball game; [the pleader] has been at bat four times."<sup>164</sup> The phrase "when justice so requires" is, of course, an express but rather amorphous restriction on the exercise of a judge's discretionary power to grant leave to amend a pleading. Justice apparently does not require the granting of leave to amend when the proposed amendment would change the cause of action<sup>165</sup> or would result in delay unduly prejudicing the other party.<sup>166</sup> Nor will justice allow an amendment which would be inconsistent with numerous sworn statements of the parties.<sup>167</sup>

If the pleader does not recognize the desirability of an amendment to the pleadings before trial, the provisions of rule 1.190(b) allow amendments even after judgment, to conform with the evidence adduced at trial.<sup>168</sup>

Recent cases have illustrated other possible consequences of pretrial amendments of pleadings. One desirable effect is an avoidance of a

159. See FLA. R. CIV. P. 1.100(a) for the responsive pleadings permitted.

160. FLA. R. CIV. P. 1.190(a).

161. *Id.*

162. *Id.*

163. *Penn Cork & Closures, Inc. v. Piggy-back Shippers Ass'n*, 281 So. 2d 46 (Fla. 3d Dist. 1973).

164. *Florida Gas Co. v. Arkla Air Conditioning Co.*, 260 So. 2d 220, 221 (Fla. 1st Dist. 1972).

165. See *Turner v. Trade-Mor, Inc.*, 252 So. 2d 383 (Fla. 4th Dist. 1971). The court there noted that:

The test of whether an amendment offered by a party sets forth a "new cause of action" is not whether the cause of action stated in the amended pleading is identical to that stated in the original. Rather, the test is whether the pleading as amended is based upon the same specific conduct, transaction or occurrence . . . upon which the plaintiff tried to enforce his original claim.

*Id.* at 384.

166. *Brown v. Montgomery Ward & Co.*, 252 So. 2d 817 (Fla. 1971) (motion to amend filed within 2 weeks of trial date).

167. See *Keller v. Penovich*, 262 So. 2d 243 (Fla. 4th Dist. 1972).

168. FLA. R. CIV. P. 1.190(b). See, e.g., *Free Bond, Inc. v. Comaza Int'l, Inc.*, 267 So. 2d 853 (Fla. 4th Dist. 1972); *National Bank & Trust Co. v. Batchelor*, 266 So. 2d 185 (Fla. 4th Dist. 1972); *Ocala Mfg. Ice & Packing Co. v. Canal Authority*, 249 So. 2d 729 (Fla. 1st Dist. 1971).

statute of limitations by relation back of an amendment made subsequent to the running of a statute of limitations. An amendment relates back to the date of an earlier pleading if it arises "out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading . . . ."<sup>169</sup> Accordingly, it has been held that the substitution of<sup>170</sup> and also the addition of a party plaintiff<sup>171</sup> after the running of the applicable statute of limitations relate back to the time of the original complaint. Additionally, a plaintiff who requests leave to amend a dismissed pleading and who receives a written order granting the requested leave waives any possible grounds for appealing the dismissal.<sup>172</sup>

## B. Defenses

### 1. PLEADING DEFENSES IN GENERAL

As a general rule, defenses must be affirmatively set forth in a responsive pleading.<sup>173</sup> One exception to this general rule allows the seven defenses specified in rule 1.140(b)<sup>174</sup> to be raised by motion before the filing of a responsive pleading.<sup>175</sup> Another exception provides that an "[a]ffirmative defense *appearing on the face of a prior pleading* may be asserted as grounds for a motion or defense under [r]ule 1.140(b) . . . ."<sup>176</sup>

In line with the general rule that a defense must be alleged in a

169. FLA. R. Civ. P. 1.190(c).

170. *Thermo Air Contractors, Inc. v. Travelers Indem. Co.*, 277 So. 2d 47 (Fla. 3d Dist. 1973).

171. *Handley v. Anclote Manor Foundation*, 253 So. 2d 501 (Fla. 2d Dist. 1971), *cert. denied*, 262 So. 2d 445 (Fla. 1972). In *Handley*, the guardian of a minor was joined by amendment as a plaintiff with the administrator of the estate of the deceased mother of the minor after the two-year statute of limitations for institution of a wrongful death action had run. The court impliedly recognized that it was departing from existing law (a new cause of action was involved), but justified the result on the inability of defendants to show prejudice to their defense. "The defendants knew upon the filing of the original complaint that there was a child who survived the decedent and who might plausibly claim under the wrongful death statute on the same allegations of fact. There is no surprise . . . ." *Id.* at 502.

172. *Miami Auto Auction, Inc. v. Friendly Enterprises, Inc.*, 257 So. 2d 69 (Fla. 3d Dist. 1972).

173. See FLA. R. Civ. P. 1.110(d), 1.140(b).

174. Rule 1.140(b) provides that

the following defenses may be made by motion at the option of the pleader:

- (1) lack of jurisdiction over the subject matter,
- (2) lack of jurisdiction over the person,
- (3) improper venue,
- (4) insufficiency of process,
- (5) insufficiency of service of process,
- (6) failure to state a cause of action,
- (7) failure to join indispensable parties.

FLA. R. Civ. P. 1.140(b).

175. FLA. R. Civ. P. 1.140(b).

176. FLA. R. Civ. P. 1.110(d) (emphasis added). For cases in which a motion to dismiss improperly included defenses not "appearing on the face of a prior pleading," see *Stern v. First Nat'l Bank*, 275 So. 2d 58 (Fla. 3d Dist. 1973) (defense of failure to timely file claim against decedent's estate pursuant to section 733.16, Florida Statutes), and *Daniel v. Department of Transp.*, 259 So. 2d 771 (Fla. 1st 1972) (*res judicata*).

responsive pleading, it has been held that a defense was not properly raised when it appeared in the defendant's correspondence with the trial judge<sup>177</sup> or in an affidavit in opposition to a motion for summary judgment.<sup>178</sup>

If a party fails to plead an affirmative defense as required, it is deemed waived.<sup>179</sup> Furthermore, a 1972 amendment to rule 1.110(a) requires the opposing party to reply to a defense appearing in an answer or third party answer if the party seeks to *avoid* the defense.<sup>180</sup>

## 2. LIMITATIONS

Statutes of limitations were repeatedly interposed as defenses during the survey period. As a result, certain guidelines relating to the commencement and termination of the limitation period were decided by the Supreme Court of Florida. One of these decisions resolved a conflict regarding the point at which the statute of limitations for legal malpractice begins to run.<sup>181</sup> The court concluded that

[t]he event which triggers the running of the statute of limitations is notice to or knowledge by the injured party that a cause of action has accrued in his favor, and not the date on which the negligent act which caused the damages was actually committed.<sup>182</sup>

This holding is consistent with the general rule regarding the commencement of the running of a statute of limitations.<sup>183</sup> The other supreme court opinion<sup>184</sup> adopted an appellate court holding that when the last day of the limitation period in which to file a wrongful death action falls on a Sunday, a complaint filed on the following day is timely.

The adverse effect of overlapping statutes of limitations was impressed upon the plaintiff who sought wages from a decedent's estate in *Azaroglu v. Jordan*.<sup>185</sup> The decedent had helped the plaintiff to come to

177. *Walker v. Walker*, 254 So. 2d 832 (Fla. 1st Dist. 1971).

178. *Accurate Metal Finishing Corp. v. Carmel*, 254 So. 2d 556 (Fla. 3d Dist. 1971); *Liberman v. Rhyne*, 248 So. 2d 242 (Fla. 3d Dist. 1971).

179. See, e.g., FLA. R. Civ. P. 1.140(g); *State ex rel. Outrigger Club, Inc. v. Barkdull*, 277 So. 2d 15 (Fla. 1973); *Sottile v. Gaines Constr. Co.*, 281 So. 2d 558 (Fla. 3d Dist. 1973).

180. FLA. R. Civ. P. 1.110(a). See generally *Trawick, To Reply or Not To Reply?*, 47 FLA. B.J. 702 (1973).

181. *Edwards v. Ford*, 279 So. 2d 851 (Fla. 1973).

182. *Id.* at 853, *adopting the language of* *Downing v. Vaine*, 228 So. 2d 622 (Fla. 1st Dist. 1969).

183. See *Massey & Klock*, *supra* note 52, at 498. But see *Mendlein v. United States Fidelity & Guar. Co.*, 277 So. 2d 538 (Fla. 3d Dist. 1973), where it was held that the statute of limitations regarding an uninsured motorist claim began to run on the date of the accident, rather than on the date it was discovered that the motorist was uninsured.

184. *Black & Decker Mfg. Co. v. Herrero*, 281 So. 2d 18 (Fla. 1973), *adopting the decision in* *Herrero v. Black & Decker Mfg. Co.*, 275 So. 2d 54 (Fla. 3d Dist. 1973). The district court of appeal opinion states: "The general view [is] that if the last day of a period of limitation for commencing an action falls on a Sunday or on a legal holiday, the period is extended and the action may be commenced on the following . . . business day." *Herrero v. Black & Decker Mfg. Co.*, 275 So. 2d 54, 55 (Fla. 3d Dist. 1973).

185. 270 So. 2d 422 (Fla. 3d Dist. 1972) [hereinafter referred to as *Azaroglu*].

America in 1963 and at that time had orally promised to pay the plaintiff for personal services. After the death of the decedent in 1969, the plaintiff timely filed a claim for compensation against the estate in accordance with section 733.16(1), Florida Statutes (1969). The appellate court, in affirming the lower court's denial of recovery, held that the plaintiff's claim was for wages, and that the claim was barred because the statute of limitations for wages, section 95.11(7)(b), Florida Statutes (1969), had run even though the statute of limitations for claims against decedent's estate had not. The court noted that "in Florida when two statutes of limitation are applicable to a particular situation, both statutes limit the time in which an action may be brought and the dilatory litigant is caught by whichever runs first."<sup>186</sup>

### 3. MOTION PRACTICE

Certain defenses may, as previously mentioned, be made by motion.<sup>187</sup> Among the motions not previously mentioned is a motion to strike. The recent amendment of rule 1.140(f) has separated the motion to strike an insufficient defense and the motion to strike redundant, immaterial, impertinent or scandalous matter into two subdivisions of rule 1.140.<sup>188</sup> Along with this separation have come other changes. The motion to strike redundant, etc., matter from a pleading now may be made at any time<sup>189</sup> and it will no longer alter the time for filing a responsive pleading.<sup>190</sup>

Recent cases construing rule 1.140 motions to strike have shown that when the motion is to strike an insufficient defense, the defense should not be stricken if it "presents a bona fide question of fact . . . ."<sup>191</sup> However, if the movant seeks to have stricken redundant, etc., matters, the motion should not be granted unless "the material is wholly irrelevant, [and] can have . . . no influence on the decision."<sup>192</sup>

The two motions to strike provided for in rule 1.140 should be distinguished from the rule 1.150 motion to strike a sham pleading. "Sham pleadings are those which are inherently false and must have been known by the interposing party to be untrue."<sup>193</sup> Further distinctions are that a motion to strike a pleading as sham must be verified<sup>194</sup> and must be filed "before the cause is set for trial . . . ."<sup>195</sup>

A defense commonly asserted by motion before a responsive plead-

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186. *Id.* at 423, citing *Lucom v. Atlantic Nat'l Bank*, 354 F.2d 51 (5th Cir. 1965).

187. See section IV, B, 1 *supra*.

188. Compare FLA. R. CIV. P. 1.140(f) (1971) with FLA. R. CIV. P. 1.140(b), (f) (1972).

189. FLA. R. CIV. P. 1.140(f).

190. See FLA. R. CIV. P. 1.140(a).

191. *Pentecostal Holiness Church, Inc. v. Mauney*, 270 So. 2d 762 (Fla. 4th Dist. 1972). See also *Con-Dev, Inc. v. Casano*, 272 So. 2d 203 (Fla. 4th Dist. 1973).

192. *Pentecostal Holiness Church, Inc. v. Mauney*, 270 So. 2d 762, 769 (Fla. 4th Dist. 1972).

193. *Id.* at 769.

194. FLA. R. CIV. P. 1.150(b). A verified pleading or motion is one sworn to and signed by the party.

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



ing is failure to state a cause of action.<sup>196</sup> The test used to determine if the complaint sufficiently states a cause of action is: "Whether, if the factual allegations of the complaint are established by proof or otherwise, the plaintiff will be legally or equitably entitled to the claimed relief against the defendant."<sup>197</sup> The test requires that the material allegations of the complaint be taken as true<sup>198</sup> and that "all reasonable inferences [be] allowed in favor of the complainant's case."<sup>199</sup> "The court 'must confine itself strictly to the allegations within the four corners of the complaint.'<sup>200</sup> Thus, only when the grounds for an affirmative defense appear on the face of the complaint may the defense be considered in ruling on the motion to dismiss for failure to state a cause of action.<sup>201</sup> After a consideration of the above principles, the court should dismiss the complaint for insufficiency only if "it appears . . . that [the] plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim."<sup>202</sup>

"After the pleadings are closed,<sup>203</sup> but within such time as not to delay the trial, any party may move for judgment on the pleadings."<sup>204</sup> For purposes of this motion, the movant is deemed to have admitted all well-pleaded allegations of the non-moving party's pleadings.<sup>205</sup> If these allegations raise an issue of fact, an entry of a judgment on the pleadings is improper.<sup>206</sup> Accordingly, where essential elements of the counterclaimants' cause of action for malicious prosecution were denied by counterdefendants' answer, and therefore were in issue, the granting of the counterclaimants' motion for judgment on the pleadings was reversed.<sup>207</sup>

196. See FLA. R. Civ. P. 1.140(b)(6); note 175 *supra* and accompanying text.

197. Pizzi v. Central Bank & Trust Co., 250 So. 2d 895, 896 (Fla. 1971), quoting *Hankins v. Title & Trust Co.*, 169 So. 2d 526, 528 (Fla. 1st Dist. 1964).

198. See *Hembree v. Reaves*, 266 So. 2d 362 (Fla. 1st Dist. 1972) (citations omitted).

199. *Orlando Sports Stadium, Inc. v. State ex rel. Powell*, 262 So. 2d 881, 883 (Fla. 1972).

200. Pizzi v. Central Bank & Trust Co., 250 So. 2d 895, 897 (Fla. 1971), quoting *Kest v. Nathanson*, 216 So. 2d 233, 235 (Fla. 4th Dist. 1968). It should be noted that "[a]ny exhibit attached to a pleading shall be considered a part thereof for all purposes." FLA. R. Civ. P. 1.130(b). See also *Sachse v. Tampa Music Co.*, 262 So. 2d 17 (Fla. 2d Dist. 1972); *Pletts v. Pletts*, 258 So. 2d 297 (Fla. 3d Dist. 1972).

201. See *Stern v. First Nat'l Bank*, 275 So. 2d 58 (Fla. 3d Dist. 1973); note 176 *supra*.

202. *Coral Ridge Golf Course, Inc. v. City of Fort Lauderdale*, 253 So. 2d 485, 489 (Fla. 4th Dist. 1971) (emphasis deleted) (dissenting opinion), quoting *Ellison v. City of Fort Lauderdale*, 175 So. 2d 198, 200 (Fla. 1965).

203. The pleadings are generally closed after a complaint and an answer have been filed. See FLA. R. Civ. P. 1.100(a); *White v. Dyer*, 261 So. 2d 863 (Fla. 2d Dist. 1972). Since the 1972 amendment to rule 1.100(a) requires the filing of a reply by one seeking to avoid an affirmative defense which appears in an answer, the pleadings should not be deemed "closed" until the reply is filed, or the time for filing it (see rule 1.140(a)) has expired.

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

205. See *Pinellas County v. Dynamic Investments, Inc.*, 279 So. 2d 97 (Fla. 2d Dist. 1973).

206. *Id.* See also *Pelle v. Gluckman*, 269 So. 2d 33 (Fla. 3d Dist. 1972).

207. *Pelle v. Gluckman*, 269 So. 2d 33 (Fla. 3d Dist. 1972).

### C. Pretrial Conference

Although the pretrial conference, as provided for by rule 1.200, is "designed to expedite the disposition of litigation,"<sup>208</sup> it is discretionary<sup>209</sup> with the court in the absence of a timely<sup>210</sup> motion by a party. A motion for a pretrial conference is not proper until the action is "at issue;"<sup>211</sup> the action is not "at issue" until the disposition of all motions directed to the last pleading served, or if no motions were so directed, then 20 days after service of the last pleading.<sup>212</sup> In this connection, one district court of appeal held that an action was not at issue even though a party filed the last responsive pleading required by the rules because the party simultaneously filed a motion to strike the pleading to which the party was responding.<sup>213</sup> Although the filing of the responsive pleading, according to a literal reading of the rule<sup>214</sup> satisfies the definition of "at issue," the holding comports with the spirit of the rules of civil procedure.<sup>215</sup>

An action may be quickly expedited if any attorney for a party fails to appear at a pretrial conference, because the court is authorized to "dismiss the action, . . . strike the answer or take such [other] action as justice requires."<sup>216</sup> However, in each of three cases<sup>217</sup> decided during the survey period, the trial court's order imposing one of the authorized sanctions for failure to appear at a pretrial conference was reversed. In one of these cases,<sup>218</sup> the trial court was found to have abused its discretion in striking the pleadings of the defendant, whose attorneys did not appear for a rescheduled pretrial conference. The absent attorneys' excuse, supported by affidavits, that they never received the court's order of rescheduling (which was not in the record) after they had requested the rescheduling, was held to justify the attorneys' absence.

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208. *Crystal Lake Golf Course, Inc. v. Kalin*, 252 So. 2d 379, 381 (Fla. 4th Dist. 1971).

209. See FLA. R. CIV. P. 1.200(a).

210. The word "timely" was added by a 1972 amendment. "This [was] done to avoid motions for pretrial conferences made a short time before trial and requests for a continuance of the trial as a result of the pretrial conference order." *In re The Florida Bar: Rules of Civil Procedure*, 265 So. 2d 21, 25 (Fla. 1972) (Committee note to rule 1.200).

211. *Id.* at 25.

212. FLA. R. CIV. P. 1.440(a).

213. *Leeds v. C.C. Chem. Corp.*, 280 So. 2d 718 (Fla. 3d Dist. 1973).

214. FLA. R. CIV. P. 1.440(a).

215. See FLA. R. CIV. P. 1.010, where it is instructed that "[t]hese rules shall be construed to secure the just, speedy and inexpensive determination of every action." *Id.* (emphasis added).

216. FLA. R. CIV. P. 1.200(b).

217. *Radio Commun. Corp. v. Oki Electronics of America, Inc.*, 277 So. 2d 289 (Fla. 4th Dist. 1973); *Clark v. Suncoast Peach Corp.*, 263 So. 2d 247 (Fla. 2d Dist. 1972); *Crystal Lake Golf Course, Inc. v. Kalin*, 252 So. 2d 379 (Fla. 4th Dist. 1971).

218. *Radio Commun. Corp. v. Oki Electronics of America, Inc.*, 277 So. 2d 289 (Fla. 4th Dist. 1973).

## V. PARTIES

A. *Necessary and Proper Parties*

"All persons having an interest in the subject of the action and in obtaining the relief demanded"<sup>219</sup> are proper parties plaintiff according to rule 1.210(a). The Supreme Court of Florida has ruled, in a wrongful death action, that all persons who suffer loss as a result of the death and who are entitled to recover are proper parties;<sup>220</sup> this is in effect a judicial expansion of a statutory right, liberally construed by the court because of the statute's remedial purpose.<sup>221</sup> Thus, a decedent's illegitimate children and their mother were allowed to bring a wrongful death action, although by the terms of the Wrongful Death Act<sup>222</sup> they would not be proper parties. The court explained that "where . . . the family relationships have ruptured or divided, or where step-parent relationships exist, it is proper to allow the additional classes to intervene."<sup>223</sup>

Proper parties to bring an action have also been held to include vendees under an executory contract of sale, where the subject matter of the sale was damaged;<sup>224</sup> either parent or both together in an action for injury of a child,<sup>225</sup> and the Attorney General in an appeal of a trial court judgment where a state statute was found unconstitutional, even though he was not a party to the trial court proceedings.<sup>226</sup>

Rule 1.210(a) further provides for joining as a party any person whose presence is "necessary or proper" to a complete determination of the cause.<sup>227</sup> In some situations the controversy cannot be settled unless certain persons are made parties. For example, the supreme court recently ruled that *both* parents of an injured child are necessary parties to a malpractice action against the child's pediatrician.<sup>228</sup> Although an insured

219. FLA. R. CIV. P. 1.210(a). The related problem of standing to sue is beyond the scope of this survey; however, of the several cases during the survey period, two may be of interest in this area. For example, an unemancipated child continues to be unable to maintain a negligence action against his father. *Webb v. Allstate Ins. Co.*, 258 So. 2d 840 (Fla. 3d Dist. 1972). A potential putative father was held to lack the requisite standing to restrain the mother of an unborn child from obtaining an abortion. *Jones v. Smith*, 278 So. 2d 339 (Fla. 4th Dist. 1973).

220. *Garner v. Ward*, 251 So. 2d 252 (Fla. 1971).

221. *Evans v. Atlantic Cement Co.*, 272 So. 2d 538 (Fla. 4th Dist. 1973).

222. FLA. STAT. § 768.02 (1969), *repealed by* Fla. Laws 1972, ch. 72-35, *creating* FLA. STAT. §§ 768.16-27 (Supp. 1972).

223. *Evans v. Atlantic Cement Co.*, 272 So. 2d 538, 541 (Fla. 4th Dist. 1973).

224. *Anchorage Yacht Haven, Inc. v. Robertson*, 264 So. 2d 57 (Fla. 4th Dist. 1972).

225. *Yordon v. Savage*, 279 So. 2d 844 (Fla. 1973). See note 228 *infra*.

226. *State ex rel. Shevin v. Kerwin*, 279 So. 2d 836 (Fla. 1973), the court held that the state is a proper, but not a necessary, party to any determination of the constitutionality of a state statute.

227. FLA. R. CIV. P. 1.210(a).

228. *Yordon v. Savage*, 279 So. 2d 844 (Fla. 1973). If only one parent files, he or she must either file as trustee for the other, or

name the other as a party defendant where service of process can be perfected, and, where required by special circumstances, the trial court may, in its discretion, name a guardian ad litem to protect the interest of the non-participating parent. If

tortfeasor's liability insurer may be joined as a co-defendant in an action against the insured,<sup>229</sup> the insured is an indispensable party to the suit and the injured plaintiff may not sue the insurer alone.<sup>230</sup> A judgment will be vacated for failure to join an indispensable party;<sup>231</sup> however, where a corporation is dissolved during pendency of the action, a judgment against it will not be set aside merely because not all of the trustees of the dissolved corporation were made parties thereto.<sup>232</sup>

Rule 1.210(b) provides for the representation of infants or incompetents and for appointment of a guardian ad litem if the infant or incompetent has no representative. These provisions are not mandatory in all cases. For example, where a defendant moved to dismiss a minor's paternity suit because the minor was not represented by a guardian ad litem or next friend, the trial court erred in dismissing the action. Rather, it should have considered whether, in view of the nature of this action and the circumstances, it was necessary to appoint a guardian ad litem, and if so, it should have appointed one or permitted the plaintiff to amend her complaint to include her mother as next friend.<sup>233</sup>

Trustees are proper and necessary parties to represent the beneficiaries of a trust, according to rule 1.210(c); the beneficiaries are not necessary parties, but the court may order such persons beneficially interested to be made parties.<sup>234</sup> If the trustee fails to appear and defend a suit against the trust, the beneficiaries may do so, and it is error for a trial court to enter a default in such a case.<sup>235</sup>

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one parent receives a judgment as Trustee for the other, all such trust funds shall be paid into the Registry of the Court, and paid to the absent parent, or used for such lawful purposes as the justice of the case may require.

*Id.* at 847.

229. See note 244 *infra* and accompanying text.

230. *Kephart v. Pickens*, 271 So. 2d 163 (Fla. 4th Dist. 1972). The rule of this case was followed in *Insurance Co. of N. America v. Braddon*, 285 So. 2d 634 (Fla. 3d Dist. 1973).

231. FLA. R. Civ. P. 1.140(h).

232. *Chapman v. L & N Grove, Inc.*, 265 So. 2d 725 (Fla. 2d Dist. 1972). The court noted the absurdity of permitting the judgment to be vacated under the given circumstances: if a corporation saw the case going against it, it could become dissolved and then have the judgment against it vacated.

233. *Smith v. Langford*, 255 So. 2d 294 (Fla. 1st Dist. 1971). The court noted that rule 1.210(b) is merely procedural in nature, not jurisdictional.

234. FLA. R. Civ. P. 1.210(c). In *First Nat'l Bank v. Broward Nat'l Bank*, 265 So. 2d 377 (Fla. 4th Dist. 1972), the appellate court held that the trustee of a trust from which the executor sought contribution for estate taxes was an indispensable party to proceedings therefor in the county judge's court. Since the trustee had not been included, the trial court correctly dismissed a subsequent circuit court action for apportionment of estate taxes. In affirming, the court explained:

It was not enough that some of the beneficiaries were parties as the interests and duties of the trustee and beneficiaries are not the same. It is legally impermissible for the County Judge's Court to, in effect, sever the trustee from the trust with the characterization that the trustee is a "stranger" and then proceed to invade the corpus of the trust. If it has jurisdiction to adjudicate such claims against the trust . . . , it has the power, jurisdiction and duty to include the trustee as a party to the proceedings and to give it an opportunity to participate and be heard along with such defenses as it may have and wish to assert.

*Id.* at 378.

235. *Cowen v. Knott*, 252 So. 2d 400 (Fla. 2d Dist. 1971).

## B. Joinder and Severance

## 1. IN GENERAL

Parties may be added by order of court on its own initiative, or on a motion of any party at any stage of the proceedings.<sup>236</sup> Furthermore, parties may be added once as a matter of course,<sup>237</sup> or in an amended pleading.<sup>238</sup>

Parties may also be dropped by an adverse party as provided in the voluntary dismissal rule,<sup>239</sup> and by order of court on its own initiative or on motion of any party.<sup>240</sup>

Finally, misjoinder of parties or of causes of action is not a proper basis for dismissal of a complaint.<sup>241</sup> The proper procedure is to sever the claims and to thereafter proceed separately with such thereof as to which the court has jurisdiction, dismissing only as to those parties or causes of action where jurisdiction is lacking.<sup>242</sup> Rule 1.270(b) provides the authority for severance of claims "in furtherance of convenience or to avoid prejudice . . ."<sup>243</sup>

## 2. JOINDER AND SEVERANCE OF INSURERS

Since 1969, an injured plaintiff in Florida has had the right to join the tortfeasor's liability insurer as a co-defendant.<sup>244</sup> One cannot sue the insurer directly without joining the insured in the action, since the insured's liability must first be determined;<sup>245</sup> however, once a judgment has been obtained against the insured, the plaintiff may then maintain an action against the insurer alone for recovery of the amount of judgment in excess of policy limits, based upon the insurer's bad faith in its conduct of the suit.<sup>246</sup> Where the insurer is joined as a co-defendant in the initial action establishing liability and the verdict rendered exceeds policy limits, a question arises as to the proper procedure for the trial court to follow in a post-trial action to limit judgment.<sup>247</sup> This question

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236. FLA. R. CIV. P. 1.250(c).

237. *Id.* (within the time period that amendment of pleadings is permitted under FLA. R. CIV. P. 1.190(a)).

238. FLA. R. CIV. P. 1.250(c).

239. FLA. R. CIV. P. 1.250(b), *referring to* FLA. R. CIV. P. 1.420(a)(1). See section VII, A *infra*.

240. FLA. R. CIV. P. 1.250(b).

241. FLA. R. CIV. P. 1.250(a).

242. *Roberts v. Keystone Trucking Co.*, 259 So. 2d 171 (Fla. 4th Dist. 1972).

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

244. *Shingleton v. Bussey*, 223 So. 2d 713 (Fla. 1969), *aff'g* 211 So. 2d 593 (Fla. 1st Dist. 1968). See *Massey & Klock*, *supra* note 52, at 505-10. Refusal to allow joinder is reversible error. *Quinones v. Coral Rock, Inc.*, 258 So. 2d 485 (Fla. 3d Dist. 1972).

245. *Kephart v. Pickens*, 271 So. 2d 163 (Fla. 4th Dist. 1972). See note 230 *supra*.

246. *Thompson v. Commercial Union Ins. Co.*, 250 So. 2d 259 (Fla. 1971). Bad faith must be alleged, the insurer is not strictly liable for the full amount. *Welborn v. American Liberty Ins. Co.*, 260 So. 2d 229 (Fla. 1st Dist. 1972).

247. *Williams v. Banning*, 259 So. 2d 725 (Fla. 2d Dist. 1972).

was answered in a case of first impression<sup>248</sup> as follows: The insurer should file a pleading in the nature of a cross-claim,<sup>249</sup> with service thereof on all parties; the court should then treat the cross-claim as an initial pleading, with the right of all parties against whom the claim is made to respond.<sup>250</sup>

An interesting question related to joinder of insurers was raised in *Mulholland v. Dellinger*,<sup>251</sup> where the plaintiff's motion to join the defendant's liability insurer was countered with a motion by the defendants to join the plaintiff's attorneys as parties-plaintiff. The trial judge granted the defendant's motion on the theory that a contingent fee arrangement results in attorneys being interested parties since they stand to receive part of the proceeds. The appellate court disagreed. In reversing, the court explained that contingent fee contracts cannot be compared to insurance contracts; in the latter, the insured contracts with the insurance company to defend against claims, and presumably the premium pays the costs of any resulting litigation. This is the basis for the supreme court's statement<sup>252</sup> that insurers are the real parties in interest.<sup>253</sup>

Probably the most crucial question arising in the last two years in this area concerns the severance of insurers once they have been joined as co-defendants. The Supreme Court of Florida in *Godshall v. Unigard Insurance Co.*<sup>254</sup> recently stated its position that:

[I]f the trial court grants severance absent a justiciable issue relating to insurance, such as a question of coverage or of the applicability or interpretation of the insurance policy or other such valid dispute on the matter of insurance coverage, such court commits harmful error.<sup>255</sup>

Prior to the supreme court's opinion in *Godshall*, the Florida courts had developed conflicting interpretations in the application of *Shingleton v. Bussey*.<sup>256</sup> Chronologically, the first case to deal with the severance problem during the survey period, a District Court of Appeal, Second District, opinion, held that the trial court committed reversible error in

248. *Id.*

249. FLA. R. CIV. P. 1.170(g). See notes 142 & 143 *supra* and accompanying text.

250. *Williams v. Banning*, 259 So. 2d 725 (Fla. 2d Dist. 1972). The procedure actually followed by the trial court and reversed here was to grant the insurer's motion to limit its liability to the policy limit, and to order that this should not be res judicata in any subsequent "bad faith" proceedings brought by the plaintiff or the insured. The appellate court was of the opinion that such a procedure did not adequately provide for the insured's day in court.

251. 275 So. 2d 607 (Fla. 2d Dist. 1972).

252. *Shingleton v. Bussey*, 223 So. 2d 713 (Fla. 1969), *aff'g* 211 So. 2d 593 (Fla. 1st Dist. 1968).

253. *Mulholland v. Dellinger*, 275 So. 2d 607 (Fla. 2d Dist. 1972). The court further noted that were it to accept the trial court's theory, logically doctors, hospitals, court reporters and so on could be joined, since they too would receive part of the proceeds.

254. 281 So. 2d 499 (Fla. 1973).

255. *Id.* at 502.

256. 223 So. 2d 713 (Fla. 1969), *aff'g* 211 So. 2d 593 (Fla. 1st Dist. 1968).

denying severance where complete pretrial proceedings were had and the sole issues remaining to be tried were negligence and compensatory damages.<sup>257</sup> The court was concerned with the possibility of prejudicing the jury by allowing the injection of insurance matters into the trial where it no longer served a relevant function.<sup>258</sup>

Shortly thereafter, the District Court of Appeal, Third District, held that the question of severance was a matter of the trial court's discretion and affirmed the trial court's denial of severance where the mention of insurance was slight and not prejudicial, and the judge gave a curative instruction.<sup>259</sup>

Meanwhile, the District Court of Appeal, Second District, attempted to clarify its own position on the severance question in view of the conflicts in its prior holdings.<sup>260</sup> In a split decision, the court cited the need for uniformity and predictability and established, in dicta, the following rule for the future: "[T]rial judges *should* grant severance unless some reason for the insurer's participation at trial is shown by the plaintiff . . . ."<sup>261</sup>

The supreme court then addressed the subject in *Stecher v. Pomeroy*.<sup>262</sup> The court held that severance of insurers *should not* be granted as a matter of course; rather, it should be granted only where there exists a justiciable issue between insurer and insured relating to insurance itself.

The District Court of Appeal, Fourth District, was then heard from, affirming the trial court's severance of an insurer.<sup>263</sup> The supreme court granted conflict certiorari and quashed the decision, remanding it for

257. *Utica Mut. Ins. Co. v. Clonts*, 248 So. 2d 511 (Fla. 2d Dist. 1971).

258. [A]fter all the "cards" have been laid "on the table" and the ultimate purposes of *Shingleton* have been satisfied, and after full and complete pretrial proceedings there remains no triable issues in the case save the issues of liability and compensatory damages as between the plaintiff and the insured, it is a reversible abuse of discretion to deny a motion . . . which seeks a trial of such issues free from any reference to insurance, insurance coverage or joinder in the suit of the insurer as a co-defendant. The injection of such matters before the jury, without any redeeming relevance, leaves remaining as the sole residuum only the risk of irreparable prejudice. This is the fatal vice.

*Id.* at 513-514 (footnotes omitted). Noting that its decision conflicted with *Stecher v. Pomeroy*, 244 So. 2d 488 (Fla. 4th Dist. 1971), and *Hartford Acc. & Indem. Co. v. Myers*, 247 So. 2d 83 (Fla. 2d Dist. 1971), the court certified the question to the supreme court for clarification.

259. *Compania Dominicana de Aviacion v. Knapp*, 251 So. 2d 18 (Fla. 3d Dist. 1971).

260. *Compare* *Utica Mut. Ins. Co. v. Clonts*, 248 So. 2d 511 (Fla. 2d Dist. 1971) with *Hartford Acc. & Indem. Co. v. Myers*, 247 So. 2d 83 (Fla. 2d Dist. 1971).

261. *Kratz v. Newsom*, 251 So. 2d 539, 539 (Fla. 2d Dist. 1971) (emphasis added). The court affirmed denial of severance in the instant case, however, because of the supreme court's prior pronouncement that trial judges have discretion in this area. *Id.* at 541.

262. 253 So. 2d 421 (Fla. 1971), *discharging petition for cert.*, 244 So. 2d 488 (Fla. 4th Dist. 1971) [hereinafter cited as *Stecher*]. For a complete discussion of this case, see Massey & Klock, *supra* note 52, at 508-10; Note, *The Post-Shingleton and Beta Eta Confusion Clarified—Somewhat*, 26 U. MIAMI L. REV. 255 (1971).

263. *Godshall v. Unigard Ins. Co.*, 252 So. 2d 875 (Fla. 4th Dist. 1971), *quashed*, 255 So. 2d 680 (Fla. 1971).

reconsideration in light of *Stecher*.<sup>264</sup> The district court of appeal, however, reaffirmed its original opinion, finding that although the trial court did err in ordering severance, the error was harmless since the only possible prejudice which the plaintiff could claim as a result of the severance order would be that the jury was prevented from considering insurance coverage in connection with its deliberations on the issues of liability and damages—and *Stecher* itself said that insurance coverage has no bearing on those issues.<sup>265</sup>

The supreme court had the last word in the matter, quashing and remanding the opinion once again, maintaining that the plaintiff's interest in retaining the insurer as a real party in interest so as to reflect the presence of financial responsibility is a legitimate purpose to be served by joining the insurer.<sup>266</sup>

In a related matter, the supreme court reasserted its sole authority to promulgate rules and procedures for the courts, and struck a Florida statute<sup>267</sup> providing for automatic severance of a governmental body's liability insurer.<sup>268</sup> The court explained that "where rules and construing opinions have been promulgated by this Court relating to the practice and procedure of all courts and a statutory provision provides a contrary practice or procedure, the statute must fall."<sup>269</sup>

### C. Intervention

Intervention in an action is permitted to anyone claiming an interest in the litigation, provided it is in subordination to, and recognizes the propriety of, the main proceeding.<sup>270</sup> The degree of interest necessary has been characterized on the one hand as "direct interest"; for example, a county which had the authority to establish drainage programs was allowed to intervene in an action to create a drainage district.<sup>271</sup> On the other hand, property owners bordering on a condemnee's property were not allowed to intervene in an eminent domain proceeding, upon the ground that they lacked sufficient interest to warrant intervention.<sup>272</sup> The supreme court has ruled that all persons who suffer loss are proper

264. *Godshall v. Unigard Ins. Co.*, 255 So. 2d 680 (Fla. 1971).

265. *Godshall v. Unigard Ins. Co.*, 267 So. 2d 383 (Fla. 4th Dist. 1972).

266. *Godshall v. Unigard Ins. Co.*, 281 So. 2d 499 (Fla. 1973). See note 254 *supra* and accompanying text.

267. FLA. STAT. § 455.06(2) (1971).

268. *School Board v. Surette*, 281 So. 2d 481 (Fla. 1973).

269. *Id.* at 483. Thus the trial court was correct in denying severance, following *Stecher's* interpretation of FLA. R. Civ. P. 1.270(b).

270. FLA. R. Civ. P. 1.230.

271. *In re West Water Mgt. District*, 269 So. 2d 405 (Fla. 2d Dist. 1972).

272. *Department of Transp. v. Rice*, 276 So. 2d 544 (Fla. 4th Dist. 1973). The court held:

[T]he interest which will entitle a person to intervene under this provision . . . must be in the matter in litigation, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment.

*Id.* at 545, quoting *Morgareidge v. Howey*, 75 Fla. 234, 78 So. 14 (1918).



parties<sup>273</sup> and has allowed a decedent's first wife to intervene in a wrongful death action brought by the second wife.<sup>274</sup>

Rule 1.230 does not restrict the time during which one may be permitted to intervene in a pending action;<sup>275</sup> the limiting factor is that the intervention must be in subordination to the propriety of the main proceeding, unless the court's discretion dictates otherwise. Presumably, intervention would not be permitted after a final order had been entered; yet one case during the survey period affirmed the allowance of intervention after final order as no more than harmless error, since a motion for rehearing had been timely filed and thus the order was not final at the time intervention was permitted by the trial judge.<sup>276</sup>

Once a party has successfully intervened in a lawsuit, the subordinate position, according to a long-standing supreme court opinion,<sup>277</sup> would prevent the intervenor from moving to dismiss the cause. Apparently, however, this was accomplished in a proceeding for a mandatory injunction to require issuance of a building permit, where the city intervened as a party defendant and its motion to dismiss was granted and affirmed over a strong dissent.<sup>278</sup>

## VI. DISCOVERY

### A. Scope

Rule 1.280(b) prescribes generally the scope of matters which may be discovered by use of the various discovery devices.<sup>279</sup> The rule provides that discovery must relate to unprivileged matter that is relevant to the subject matter of the pending action.<sup>280</sup> The inadmissibility at trial of the information sought is not a ground for objection as long as "the infor-

273. See note 220 *supra* and accompanying text.

274. *Garner v. Ward*, 251 So. 2d 552 (Fla. 1971); *accord*, *Evans v. Atlantic Cement Co.*, 272 So. 2d 538 (Fla. 4th Dist. 1973).

275. Intervention may, however, be barred by laches. *Murrell v. Jupiter Corp.*, 274 So. 2d 550 (Fla. 3d Dist. 1973). Nor can a party intervene in an action which was previously dismissed. *Commercial Standard Ins. Co. v. Miller*, 274 So. 2d 588 (Fla. 1st Dist. 1973).

276. *Hardwick v. Metropolitan Dade County*, 256 So. 2d 387 (Fla. 3d Dist. 1972).

277. In *Krouse v. Palmer*, 131 Fla. 444, 447, 179 So. 762, 763 (1938), the court explained:

The law is settled that an intervenor is bound by the record made at the time he intervenes and must take the suit as he finds it. 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 sufficiency of the pleadings or the propriety of the procedure, nor can he move to dismiss or delay the cause without permission of the chancellor.

278. *Coral Ridge Golf Course v. City of Ft. Lauderdale*, 253 So. 2d 485 (Fla. 4th Dist. 1971). The passage quoted in note 277 *supra* was quoted in the dissent; no reference to the defendant's status was made in the majority opinion.

279. Rule 1.280(b) begins with the language: "Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows . . ." Many of the rules governing the various discovery devices refer back to 1.280(b) when the scope of the device is mentioned. *E.g.*, FLA. R. CIV. P. 1.340(b) (interrogatories to parties); FLA. R. CIV. P. 1.350(a) (production of documents and entry upon land); FLA. R. CIV. P. 1.370(a) (requests for admissions).

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

mation sought appears reasonably calculated to lead to the discovery of admissible evidence.<sup>281</sup>

The relevancy of various matters to the subject matters of the actions has been decided during the survey period. One case decided that the net earnings reports of each of 500 partners for a stated period would not be relevant to the determination of the financial worth of the defendant partnership for punitive damages purposes.<sup>282</sup> Another case held that discovery of the former wife's financial status would be relevant to her former husband's motion for reduction of alimony although the sole ground for his motion was a change in his financial ability.<sup>283</sup>

The directive that inadmissibility of the requested information at trial is not a ground for objection to its discovery if it is reasonably calculated to lead to the discovery of admissible evidence<sup>284</sup> has recently been followed. In *Buga v. Wiener*,<sup>285</sup> the court held that this objection would not relieve the physician, a defendant in a medical malpractice action, from answering interrogatories requesting the names of medical texts upon which the doctor relied in treating the plaintiff. In a mortgage foreclosure suit where the defense of usury was raised, the same reason was given for allowing the defendant to question the plaintiff about all other loan transactions the plaintiff may have entered into in Florida.<sup>286</sup> Proof of other usurious loans was allegedly the admissible evidence the question was calculated to produce.

### 1. WORK PRODUCT

Work product, comprised of "documents and tangible things . . . prepared in anticipation of litigation or for trial by or for another party or . . . [its] representative,"<sup>287</sup> is given a qualified immunity from discovery.<sup>288</sup> The qualifications of the immunity, as specified in rule 1.280(b), which was amended in 1972 to mirror federal rule 26(b)(3),<sup>289</sup> require a party seeking to discover work product materials to show that he "has need of the materials in the preparation of [his] case and that [he] is unable without undue hardship to obtain the substantial equivalent of the materials by other means."<sup>290</sup> However, *materials* which contain

281. *Id.*

282. *See* Ernst & Ernst v. Reedus, 260 So. 2d 258 (Fla. 3d Dist. 1972). The court stated that: "Evidence of a defendant's net earnings for some limited recent period could have little bearing on his or its net worth or financial ability . . ." *Id.* at 259 n.1 (citations omitted).

283. Tsavaris v. Tsavaris, 281 So. 2d 593 (Fla. 2d Dist. 1973).

284. *See* note 281 *supra* and accompanying text.

285. 277 So. 2d 296 (Fla. 4th Dist. 1973).

286. Continental Mortgage Investors v. Village By The Sea, Inc., 252 So. 2d 833 (Fla. 4th Dist. 1971).

287. FLA. R. CIV. P. 1.280(b)(2); FED. R. CIV. P. 26(b)(3).

288. *See generally* 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE 211-12 (1970) [hereinafter cited as WRIGHT & MILLER].

289. *See In re The Florida Bar: Rules of Civil Procedure*, 265 So. 2d 21, 28 (Fla. 1972) (Committee Note to rule 1.280).

290. FLA. R. CIV. P. 1.280(b)(2).

"mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation"<sup>291</sup> enjoy an absolute immunity from discovery.<sup>292</sup> Discovery of facts known and opinions held by experts who acquired or developed them in anticipation of litigation or for trial will be discussed in a later section.<sup>293</sup>

Courts which decided work product claims during most of the period surveyed did so without benefit of the definitive guidelines now contained in rule 1.280.<sup>294</sup> Nevertheless, the decisions generally conform to those guidelines. For example, when the Pinellas County Sheriff's office, defendant in an automobile negligence action, claimed that an accident report it prepared regarding a collision between one of its police vehicles and the plaintiff's vehicle was work product, the claim was denied.<sup>295</sup> The court reasoned that the statutorily imposed duty of the sheriff's office to investigate automobile accidents generally negated a finding that the accident report was "obtained . . . in preparation of trial."<sup>296</sup> Also consistent with present rule 1.280(c) concerning protective orders was the trial court's order to the defendant insurance company to produce documents written by its claim adjusters for in camera inspection for the purposes of determining whether the documents were work product as claimed by the defendant.<sup>297</sup>

A decision not consistent with the present rule is *Fogarty Brothers Transfer Co. v. Perkins*.<sup>298</sup> In *Fogarty*, the court held that accident reports prepared by employees of the defendant transfer company "whether for the private use of [the defendant] or to be filed with a federal agency . . . were work product."<sup>299</sup>

291. *Id.*

292. See FLA. R. CIV. P. 1.280(b)(2); WRIGHT & MILLER, *supra* note 288, at 229-32. The mental impressions, conclusions, opinions or legal theories may be obtained to a limited extent by the use of interrogatories (rule 1.340) or requests for admissions (rule 1.370). Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, 48 F.R.D. 487, 502 (1970) (Advisory Committee's Note to federal rule 26(b)(3)) [hereinafter cited as Proposed Amendments]. See notes 322-324 *infra* and accompanying text.

293. See section VI, A, 2 *infra*.

294. The 1972 amendments did not become effective until January 1, 1973. *In re The Florida Bar: Rules of Civil Procedure*, 265 So. 2d 21, 22 (Fla. 1972).

295. *Nationwide Ins. Co. v. Monroe*, 276 So. 2d 547 (Fla. 2d Dist. 1973).

296. *Id.* at 548 (emphasis omitted). *But see* *Dade County v. Monroe*, 237 So. 2d 598 (Fla. 3d Dist. 1970). Nor are the statements or photographs exempt if to be presented as evidence at trial. *Nationwide Ins. Co. v. Monroe*, 276 So. 2d 547, 548 n.1 (Fla. 2d Dist. 1973), *citing* *Surf Drugs, Inc. v. Vermette*, 236 So. 2d 108 (Fla. 1970).

297. *Travelers Indem. Co. v. Fields*, 262 So. 2d 222 (Fla. 1st Dist. 1972).

298. 250 So. 2d 655 (Fla. 2d Dist. 1971) [hereinafter referred to as *Fogarty*].

299. *Fogarty Bros. Transfer Co. v. Perkins*, 250 So. 2d 655 (Fla. 2d Dist. 1971). See also *Sligar v. Tucker*, 267 So. 2d 54 (Fla. 4th Dist. 1972), where the court held that hospital "incident reports" routinely processed by hospital staff were not discoverable because the reports were "privileged" but the court used words indicating that work product was the actual and proper reason for the nondiscoverability. "[The] reports were submitted at the request of the respective insurers, for use in connection with the anticipated settlement or defense of the claim if and when it materialized." *Id.* at 55.

## 2. DISCOVERY FROM EXPERTS

The opinions of experts have become increasingly important to litigants in this era of exponentially increasing knowledge and technology. Knowing this, attorneys have sought experts who will espouse the desired opinions for a price—and generally have been successful.<sup>300</sup> This success may have been in part a result of the inability to discover expert opinions prior to trial. The expert, knowing of the protection given his opinions, did not have to fear a searching cross-examination by the attorney for the opposition since that attorney did not have time adequately to research either the expert's opinion or the facts, tests or data upon which the expert based the opinion.<sup>301</sup> Impeachment of the "professional" expert based upon an opinion unearthed for the first time at trial was almost impossible.

Inability to discover expert opinion not only fostered the expert-for-hire abuse but also ran counter to the basic theory of the discovery rules. The discovery rules were designed to help narrow the issues before trial<sup>302</sup> and to eliminate surprise at trial. Neither of these results was promoted when an attorney could not learn the opinion of the opposition's expert and consequently could not narrow the issues by determining how that opinion differed from the opinion of his own expert.<sup>303</sup>

In an effort to correct these problems, the Florida rules were amended to provide for "[d]iscovery of facts known and opinions held by experts . . . ."<sup>304</sup> Rule 1.280(b)(3) now controls discovery of facts or opinions which experts "acquired or developed in anticipation of litigation or for trial . . . ."<sup>305</sup> The rule divides experts into two classes: experts a party expects to call as such at trial,<sup>306</sup> and those a party does not expect to call at trial but who have been retained or specially employed in anticipation of litigation or in preparation for trial.<sup>307</sup>

If an expert is in the first class, a party may by interrogatory require any other party "to state the subject matter on which the expert is ex-

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300. See Long, *Discovery and Experts Under the Federal Rules of Civil Procedure*, 38 F.R.D. 111 (1966) [hereinafter cited as Long].

301. See Long, *supra* note 300; Proposed Amendments, *supra* note 292, at 503-05 (Advisory Committee's Note to federal rule 26(b)(4)).

302. See Proposed Amendments, *supra* note 292, at 504 (Advisory Committee's note to federal rule 26(b)(4)).

303. Long, *supra* note 300, at 129.

304. FLA. R. CIV. P. 1.280(b)(3). See also FLA. R. CIV. P. 1.390, which defines "expert witness" and regulates the use of depositions of expert witnesses at trial.

305. FLA. R. CIV. P. 1.280(b)(3). Facts or opinions obtained by experts as actors or viewers of the actual happenings leading to the suit are not governed by this rule. These facts and opinions are discoverable as are those of an ordinary witness since they were not "acquired or developed in anticipation of litigation." See 8 WRIGHT & MILLER, *supra* note 288, at § 2033; Proposed Amendments, *supra* note 292, at 503 (Advisory Committee's note to federal rule 26(b)(4)).

306. FLA. R. CIV. P. 1.280(b)(3)(A).

307. FLA. R. CIV. P. 1.280(b)(3)(B).

pected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.<sup>308</sup> This provision does not place an undue burden on the party who has retained an expert to testify at trial because at this stage in the trial preparation the expert probably has already delivered this information to the attorney. Nor does this provision unfairly benefit the party seeking the information because he has most assuredly developed his case prior to the time when the other party has decided upon the experts he expects to call as witnesses at trial.<sup>309</sup>

Should an attorney fail to completely answer the prescribed interrogatories<sup>310</sup> or should other grounds exist, the court upon motion may order further discovery by other means.<sup>311</sup> The possibility of abuse of this procedure should be reduced<sup>312</sup> by the discretion given the court<sup>313</sup> to condition the granting of this motion upon the moving party's agreement to pay not only the expert for the time he would expend in the further discovery, but also the other party for a reasonable part of the past expense incurred in obtaining the facts or opinions from the expert.

Facts or opinions held by an expert of the other class,<sup>314</sup> *i.e.*, an expert specially retained but not expected to be called as a witness at trial, may be discovered "only as provided in Rule 1.360(b) [reports of examining physicians]<sup>315</sup> or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means."<sup>316</sup> This higher burden of showing "exceptional circumstances" placed upon a party seeking to discover facts and opinions of a non-witness expert is consonant with the reasons discussed earlier for allowing discovery of experts generally since a non-testifying expert cannot surprise the opposition at trial. Additionally, the court must require "the party seeking discovery to pay the other party a fair part of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert."<sup>317</sup>

308. FLA. R. CIV. P. 1.280(b)(3)(A).

309. See Proposed Amendments, *supra* note 292, at 504 (Advisory Committee's note to federal rule 26(b)(4)).

310. See text accompanying note 308 *supra*.

311. FLA. R. CIV. P. 1.280(b)(3)(A).

312. See Proposed Amendment, *supra* note 292, at 504 (Advisory Committee's note to federal rule 26(b)(4)).

313. Rule 1.280(b)(3)(A) provides, *inter alia*, that "[u]pon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions pursuant to subdivision (b)(3)(C) of this rule concerning fees and expenses as the court may deem appropriate." *Id.* (emphasis added).

314. See FLA. R. CIV. P. 1.280(b)(3)(B).

315. See section VI, B, 5 *infra*.

316. FLA. R. CIV. P. 1.280(b)(3)(B).

317. FLA. R. CIV. P. 1.280(b)(3)(C).

B. *Discovery Devices*

## 1. INTERROGATORIES TO PARTIES

Rule 1.340, governing interrogatories to parties has been extensively changed by the 1972 amendments.<sup>318</sup> The time for answering the interrogatories has been extended to 30 days after service, except that a defendant need not answer them before the expiration of 45 days after being served with process.<sup>319</sup> No longer are hearings on objections automatically necessary;<sup>320</sup> now the interrogating party may, but need not, "move for an order under rule 1.380(a) with respect to any objection to or other failure to answer an interrogatory."<sup>321</sup>

Also removed is the previous distinction<sup>322</sup> which existed between facts and opinions, contentions and conclusions based upon facts.<sup>323</sup> All may now be inquired into by interrogatory.<sup>324</sup>

An option has been given to an interrogated party to produce records for examination by the interrogating party if the answer to an interrogatory may be found in those records and the burden of answering the question is substantially the same for both parties.<sup>325</sup> Additionally, the form of the interrogatory has been changed in order to facilitate the finding of answers to interrogatories. Now the propounder must leave sufficient space after each question in order to reasonably accommodate the answer.<sup>326</sup>

## 2. DEPOSITIONS

Some of the rules governing the taking and use of depositions have been revised, rearranged, or renamed to conform more closely to the federal rules.<sup>327</sup> To conform with the similar federal rule,<sup>328</sup> rule 1.310, which deals with depositions upon oral examination, has been amended to require a plaintiff to obtain leave of court when seeking to take a

318. Compare FLA. R. CIV. P. 1.340 (1968) with FLA. R. CIV. P. 1.340 (1972). The texts of each appear in 30 FLA. STAT. ANN. 71-73 (Supp. 1973). Rule 1.340 was derived from the federal rule 33. Committee Note to FLA. R. CIV. P. 1.340, 30 FLA. STAT. ANN. 72 (Supp. 1973).

319. FLA. R. CIV. P. 1.340(a).

320. See FLA. R. CIV. P. 1.340(a) (1968). The pre-amendment rule 1.340(a) specified that: "Within ten days after service of interrogatories a party may serve *written objections* thereto *together with a notice of hearing the objections . . .*" *Id.* (emphasis added).

321. FLA. R. CIV. P. 1.340(a).

322. See, e.g., *Novack v. Novack*, 187 So. 2d 385 (Fla. 3d Dist. 1966); *Boucher v. Pure Oil Co.*, 101 So. 2d 408 (Fla. 1st Dist. 1958).

323. Committee Note to FLA. R. CIV. P. 1.340, 30 FLA. STAT. ANN. 72 (Supp. 1973).

324. FLA. R. CIV. P. 1.340(b).

325. FLA. R. CIV. P. 1.340(c).

326. FLA. R. CIV. P. 1.340(e).

327. See Committee Notes to FLA. R. CIV. P. 1.310, 1.320, 1.330, 30 FLA. STAT. ANN. 67-71 (Supp. 1973).

328. FED. R. CIV. P. 30.

deposition within 30 days after service of process upon any defendant.<sup>329</sup> However, leave of court is not required if the defendant has already sought discovery or if the plaintiff notifies the court that the person to be deposed is about to go out of the state and will be unavailable after expiration of the 30 day period.<sup>330</sup> Rule 1.320 "Depositions upon written interrogatories" has been renamed "depositions upon written questions" to avoid confusion with rule 1.340 interrogatories to parties,<sup>331</sup> and the time periods have been increased to correspond with federal rule 31.<sup>332</sup>

Present rule 1.330, prescribing the use of depositions of non-experts in court proceedings, has as its components subdivisions of former rule 1.280 and all of former rule 1.330.<sup>333</sup> Together they constitute the Florida version of federal rule 32. Two recent cases have considered different provisions of this rule. In one case,<sup>334</sup> the appellate court found that the trial court had not abused its discretion in refusing to allow a deposition into evidence when it appeared that the absence of the witness was procured by the party who sought the introduction of the deposition.<sup>335</sup> The other case<sup>336</sup> involved a trial court's order refusing to allow the co-defendants to introduce the remainder of an absent defendant's deposition after the plaintiff had read about 8 lines of the deposition into evidence. The trial court allowed in only the portion relating to the part read by the plaintiff. On appeal, the District Court of Appeal, Fourth District, in construing former rule 1.280(d)(4) (present rule 1.330(a)(4)),<sup>337</sup> reversed and held that the plaintiff, by placing into evidence a part of a deposition of an adverse party, opened the door for any other party, including the deponent who was voluntarily absent from trial, to offer into evidence any other part of the deposition so long as the part offered was admissible under evidentiary rules.<sup>338</sup> The court certified the question to the Supreme Court of Florida<sup>339</sup> which thereupon approved the district court's opinion.<sup>340</sup>

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

330. FLA. R. CIV. P. 1.310(a), (b)(2).

331. Committee Note to FLA. R. CIV. P. 1.320, 30 FLA. STAT. ANN. 68 (Supp. 1973).

332. Compare FLA. R. CIV. P. 1.320(a) with FED. R. CIV. P. 31(a).

333. Committee Note to FLA. R. CIV. P. 1.330, 30 FLA. STAT. ANN. 70 (Supp. 1973).

334. *Max Bauer Meat Packer, Inc. v. Gurrentz Int'l Corp.*, 280 So. 2d 508 (Fla. 3d Dist. 1973).

335. Rule 1.330(a)(3) provides that:

The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: . . . (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the State, unless it appears that the absence of the witness was procured by the party offering the deposition . . .

336. *Eggers v. Narron*, 254 So. 2d 382 (Fla. 4th Dist. 1971).

337. FLA. R. CIV. P. 1.330(a)(4) provides that: "If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part that in fairness ought to be considered with the part introduced, and any party may introduce any other parts."

338. *Eggers v. Narron*, 254 So. 2d 382 (Fla. 4th Dist. 1971).

339. *Eggers v. Narron*, 256 So. 2d 22 (Fla. 4th Dist. 1971).

340. *Narron v. Eggers*, 263 So. 2d 213 (Fla. 1972).

The "expert deposition" rule<sup>341</sup> has been changed to emphasize that the use of an expert's deposition is not dependent upon the unavailability of the expert for trial.<sup>342</sup> According to the rule, the deposition of an expert could be introduced at trial even if the expert were in the courthouse.<sup>343</sup>

### 3. PRODUCTION OF DOCUMENTS

Production of documents may be obtained by two methods. One method, used when production is requested of parties, is governed by rule 1.350. The other, the subpoena duces tecum specified in rule 1.410(b), is ordinarily used to obtain production from a non-party witness in conjunction with a deposition of the non-party.

Rule 1.350 has been amended to eliminate the good cause requirement<sup>344</sup> of the former rule, to change the time for the request and the response, and to obviate the necessity of a court order in the absence of an objection by the party from whom production was sought.<sup>345</sup> The elimination of the good cause requirement, however, should not be interpreted as a sanction of oppressive or unreasonable requests for production.<sup>346</sup>

A request for production was considered by the court to be oppressive and unreasonable in *Schering Corp. v. Thornton*.<sup>347</sup> The appellate court, in reversing the lower court's order denying the defendant's motion for a protective order, held that the defendant should not be forced to expend in excess of \$4,000 in locating and copying approximately 25,000 pages of documents. The court reasoned that the defendant should not be required to "undertake the financial burden of preparing the plaintiff's case even though some or all of such expense may ultimately be assessed and recovered as costs"<sup>348</sup> when the burden to be assumed would be substantial.<sup>349</sup>

The documents requested also must constitute or contain matters within the scope of rule 1.280(b).<sup>350</sup> Accordingly, "Mary Carter" agree-

341. FLA. R. CIV. P. 1.390. See section VI, A, 2 *infra*.

342. See Committee Note to FLA. R. CIV. P. 1.390, 30 FLA. STAT. ANN. 86 (Supp. 1973).

343. See FLA. R. CIV. P. 1.390(b), 1.350 (1972).

344. The good cause requirement was considered during the period surveyed in *Ernst & Ernst v. Reedus*, 260 So. 2d 258 (Fla. 3d Dist. 1972), and *Stanton Investment Co. v. Simon*, 255 So. 2d 557 (Fla. 2d Dist. 1971).

345. See Committee Note to FLA. R. CIV. P. 1.350, FLA. STAT. ANN. 76 (Supp. 1973); compare FLA. R. CIV. P. 1.350(b) (1973) with FLA. R. CIV. P. 1.350 (1972).

346. See Committee Note to FLA. R. CIV. P. 1.350, 30 FLA. STAT. ANN. 76 (Supp. 1973).

347. 280 So. 2d 493 (Fla. 4th Dist. 1973).

348. *Id.* at 494.

349. The case was remanded to the trial court with directions that "[i]f it is shown that even on a modified order [the defendant] will incur any *substantial* expense in order to comply, plaintiffs should be required to advance the reasonable costs thereof." *Id.* at 494-95 (emphasis added).

350. FLA. R. CIV. P. 1.350(a). See section VI, A *supra*.



ments,<sup>351</sup> intracorporate documents<sup>352</sup> and hospital records of prior similar accidents<sup>353</sup> may properly be requested. Tax returns, however, often have been held not to be proper documents for production.<sup>354</sup>

As mentioned previously, production of documents held by a non-party may be accomplished pursuant to rule 1.410; the 1972 amendments to this rule make it clear that a protective order or a court order quashing the subpoena may be sought by the person subpoenaed. Whether a party has standing to contest as oppressive a subpoena duces tecum served upon a non-party was only recently decided in *Sunrise Shopping Center, Inc. v. Allied Stores Corp.*<sup>355</sup> In concluding that a party did have the requisite standing, the court read *in pari materia* former rule 1.310(b) (present rule 1.280(c)), which permits a motion for a protective order to be made by any party as well as the person to be examined, and rule 1.410(b) (unchanged) which does not prohibit a party from seeking an order to quash a subpoena which is oppressive.

#### 4. REQUESTS FOR ADMISSIONS

Recent amendments to the rule governing requests for admissions<sup>356</sup> have effected a change<sup>357</sup> in that a party, instead of being restricted solely to request for admissions of fact, may now "request . . . the admission of the truth of any matters . . . that relate to . . . opinions of fact or of the application of law to fact . . . ."<sup>358</sup> The amendment also removed the requirement that a party denying a request do so by sworn statement. This requirement proved to be a pitfall for the inattentive attorney.<sup>359</sup>

The rule provides that if the matters contained in a request for admission are not denied in writing within the time provided, the matters

351. See *Ward v. Ochoa*, 271 So. 2d 173 (Fla. 4th Dist. 1972); *Maule Indus., Inc. v. Rountree*, 264 So. 2d 445 (Fla. 4th Dist. 1972).

352. *Kenleigh Assoc. v. Harris Intertype Corp.*, 279 So. 2d 373 (Fla. 3d Dist. 1973).

353. *Torrence v. Sacred Heart Hosp.*, 251 So. 2d 899 (Fla. 1st Dist. 1971) (dictum).

354. See *Tallahassee Democrat, Inc. v. Pogue*, 280 So. 2d 512 Fla. 1st Dist. 1973) (not proper for determination of financial worth for punitive damages purposes); *Greenwood v. First America Dev. Corp.*, 265 So. 2d 89 (Fla. 1st Dist. 1972) (action against county tax assessor seeking revaluation). See also *Ernst & Ernst v. Reedus*, 260 So. 2d 258 (Fla. 3d Dist. 1972).

355. 270 So. 2d 32 (Fla. 4th Dist. 1972).

356. FLA. R. CIV. P. 1.370.

357. Compare FLA. R. CIV. P. 1.370 (1972) with FLA. R. CIV. P. 1.370 (1970).

358. FLA. R. CIV. P. 1.370(a). Two cases decided during the survey period in which objections based on the distinction were sustained are *Old Equity Life Insurance Co. v. Suggs*, 263 So. 2d 280 (Fla. 2d Dist. 1972), and *City of Miami v. Bell*, 253 So. 2d 742 (Fla. 3d Dist. 1971).

359. See, e.g., *Farish v. Lum's, Inc.*, 267 So. 2d 325 (Fla. 1972), where the supreme court reversed the appellate court and affirmed the trial court's entry of summary judgment for the plaintiff based upon the failure of defendant's attorney to have answers to requests for admissions sworn to. See also *Old Equity Life Ins. Co. v. Suggs*, 263 So. 2d 280 (Fla. 2d Dist. 1972), and *Curry Ford Apartments, Inc. v. Blackton, Inc.*, 249 So. 2d 693 (Fla. 4th Dist. 1971), where summary judgment orders based upon failures to answer requests by sworn statements were reversed because the circumstances revealed abuse of discretion by the trial judges.

will be deemed admitted.<sup>360</sup> The otherwise disastrous effect of an inadvertent or mistaken admission may be averted since the rule now permits, upon motion, withdrawal or amendment of any matter previously admitted. The motion is well-founded when "the presentation of the merits of the action will be subserved by [the withdrawal or amendment] and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits."<sup>361</sup>

##### 5. PHYSICAL AND MENTAL EXAMINATIONS

A court may order a physical or mental examination of a party or a person in the custody or under the control of a party whenever that person or party's mental or physical condition is in controversy.<sup>362</sup> "The order may be made only on motion for good cause shown . . ."<sup>363</sup> The person or party examined has a right to obtain a complete report of the examination, but one who chooses to do so must upon request of the other party furnish a "similar report of any examination of the same condition previously or thereafter made . . ."<sup>364</sup>

A mental or physical examination pursuant to rule 1.360 is not limited to negligence actions, as asserted by the plaintiff in a slander action in *Gordon v. Davis*.<sup>365</sup> In *Gordon*, the plaintiff claimed that the defendant's slanderous utterances included "that man is sick—he is psychotic."<sup>366</sup> The defendant, after having asserted as an affirmative defense the truth of the statement, moved for and obtained an order compelling the plaintiff to submit to a mental examination. The plaintiff, by petition for writ of certiorari, sought review of the order, contending, *inter alia*, that the rule was limited in scope to negligence cases, that the mental condition of the plaintiff was not in controversy and that good cause for the order was not shown. The District Court of Appeal, Third District, in rejecting the first contention noted that

the wording of the rule is such as to preclude the limiting of its application to actions for personal injuries, since by its terms it is made applicable *in any action* in which the mental or physical condition of a party . . . is in controversy.<sup>367</sup>

In dispensing with the second objection, the court decided that the plaintiff's mental condition was in controversy since the verity of the de-

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360. FLA. R. CIV. P. 1.370(a).

361. FLA. R. CIV. P. 1.370(b). This rule states that the withdrawal or amendment is subject to rule 1.200, which deals with pretrial procedure.

362. FLA. R. CIV. P. 1.360(a). See also FED. R. CIV. P. 35.

363. FLA. R. CIV. P. 1.360(a).

364. FLA. R. CIV. P. 1.360(b)(1). See also *Smiles v. Young*, 271 So. 2d 798 (Fla. 3d Dist. 1973), as discussed in text accompanying note 621 *infra*.

365. 267 So. 2d 874 (Fla. 3d Dist. 1972) [hereinafter referred to as *Gordon*].

366. *Id.* at 874.

367. *Id.* at 875 (original emphasis).

defendant's statements along with a good motive in uttering them would be a complete defense. Finally, the good cause requirement was held to be satisfied by the fact that the mental examination was required to substantiate the truth defense.

### C. *Refusal to Make Discovery*

Rule 1.380, as amended in 1972, is patterned after federal rule 37.<sup>368</sup> This rule provides sanctions for failure to comply with any discovery rule or order of court relating to discovery.<sup>369</sup> Among the sanctions available are the following: an order that designated facts be taken as established in favor of the party obtaining the order;<sup>370</sup> an order that certain claims or defenses not be attacked or supported;<sup>371</sup> an order that pleadings or parts thereof be stricken or that the action be dismissed or that a default judgment be entered against the disobedient party;<sup>372</sup> and an order that a person be held in contempt of court for failure to obey any court order "except an order to submit to a physical or mental examination . . . ."<sup>373</sup>

Although the rule provides penalties for failure to make discovery, many courts have required a showing of willful or bad faith refusal to comply with discovery rules before an imposition of the more severe sanctions can be justified.<sup>374</sup> For example, in *Owens-Illinois, Inc. v. Lewis*,<sup>375</sup> the appellate court held that although the defendant had failed to comply with both an order requiring more complete answers to interrogatories and an order compelling compliance with the prior order, the trial court had abused its discretion in striking the defendant's defenses and ordering the entry of a default judgment at an *ex parte* hearing.<sup>376</sup> The court further noted that

even if notice had been given to defendant of the hearing for the purpose of imposing sanctions, the record is clear that such

368. See Committee Note to FLA. R. CIV. P. 1.380, 30 FLA. STAT. ANN. 84 (Supp. 1973).

369. *Id.*

370. FLA. R. CIV. P. 1.380(b)(2)(A).

371. FLA. R. CIV. P. 1.380(b)(2)(B). See *Ganem v. Ganem*, 269 So. 2d 740 (Fla. 3d Dist. 1972), where it was held that the trial court had not erred in refusing to allow the defendant to prove Colombian law after the defendant had refused to comply with discovery orders. Additionally, the court upheld the striking of the defendant's answer and the entry of final summary judgment in the approximate amount of \$1,800,000.

372. FLA. R. CIV. P. 1.380(b)(2)(C). See also *Synthetic Environ. Dev. Corp. v. Sussman*, 275 So. 2d 291 (Fla. 3d Dist. 1973) (pleadings struck for failure of party to appear at deposition); *Azar v. Azar*, 263 So. 2d 266 (Fla. 3d Dist. 1972) (divorce pleadings struck for failure to obey court order relating to discovery).

373. FLA. R. CIV. P. 1.380(b)(2)(D). See also *Buckley Dev. Co. v. Tagrin*, 270 So. 2d 433 (Fla. 3d Dist. 1972), where a contempt order for failure to produce items pursuant to court order was reversed because the items sought were not sufficiently described nor in the possession of the party held in contempt.

374. See, e.g., *Owens-Illinois, Inc. v. Lewis*, 260 So. 2d 221 (Fla. 1st Dist. 1972); *Herold v. Computer Components Int'l, Inc.*, 252 So. 2d 576 (Fla. 4th Dist. 1971).

375. 260 So. 2d 221 (Fla. 1st Dist. 1972).

376. *Id.*

severe action was not authorized. There is no evidence from which one could reasonably conclude that defendant's failure to comply with the court's order . . . was a result of willfulness or bad faith.<sup>377</sup>

## VII. DISMISSAL

### A. *Voluntary*

The plaintiff may obtain a voluntary dismissal of an action without the necessity of a court order by serving a notice of dismissal before submission of the case to the judge or retirement of the jury, or before a summary judgment hearing, if any.<sup>378</sup> An action may also be dismissed by filing a stipulation of dismissal signed by all parties who have appeared in the action,<sup>379</sup> or by court order upon timely motion.<sup>380</sup> On one occasion, the District Court of Appeal, Third District, interpreted the language "before submission of a nonjury case to the court for decision"<sup>381</sup> as permitting a plaintiff to take a voluntary dismissal before resting and reversed the trial court's ruling that the dismissal attempted before resting plaintiff's case was untimely.<sup>382</sup>

The time during which a notice of voluntary dismissal will be considered timely has been held to embrace the period granted plaintiff to amend pleadings.<sup>383</sup> Where the trial court had, upon plaintiffs' motion for rehearing, set aside the judgment and granted plaintiffs 30 days in which to file an amended complaint, and plaintiffs instead served notice of voluntary dismissal within the given period, the trial court was held to have erred by entering final judgment against plaintiffs for failure to amend their pleadings as ordered. In its reversal, the district court of appeals reasoned that the trial court's order on plaintiffs' motion for rehearing had the same effect as if it had dismissed the complaint entirely; thus, following an earlier ruling of the supreme court,<sup>384</sup> plaintiffs would be entitled to a voluntary dismissal within the time granted for filing an amended complaint.<sup>385</sup>

A voluntary dismissal does not operate as an adjudication upon the merits provided the plaintiff has not previously dismissed an action in any court based on or including the same claim, or unless otherwise stated

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377. *Id.* at 226. See also *Grahn v. Dade Home Services, Inc.*, 277 So. 2d 544 (Fla. 3d Dist. 1973); *Herold v. Computer Components Int'l, Inc.*, 252 So. 2d 576 (Fla. 4th Dist. 1971).

378. FLA. R. CIV. P. 1.420(a)(1)(i).

379. FLA. R. CIV. P. 1.420(a)(1)(ii).

380. FLA. R. CIV. P. 1.420(a)(2).

381. FLA. R. CIV. P. 1.420(a)(1)(i).

382. *Modular Constr., Inc. v. Owen*, 270 So. 2d 753 (Fla. 3d Dist. 1972).

383. *City of Sunrise v. Florida State Bd. of Pub. Instr.*, 273 So. 2d 10 (Fla. 4th Dist. 1973).

384. *Hibbard v. State Road Dept.*, 225 So. 2d 901 (Fla. 1969).

385. *City of Sunrise v. Florida State Bd. of Pub. Instr.*, 273 So. 2d 10 (Fla. 4th Dist. 1973). See section IV, A, 4 *supra*.

in the notice or stipulation of dismissal.<sup>386</sup> Thus, according to a case of first impression in Florida, stipulated dismissals with prejudice of counterclaims in two prior actions were held to be adjudications that those claims were without merit and thus barred reassertion of the same claims.<sup>387</sup> Although appellants argued that the two prior dismissals had no res judicata effect since they were based on stipulations, the court interpreted rule 1.420(a)(2) as contemplating the possibility that in some cases a voluntary dismissal could be with prejudice and operate as an adjudication on the merits.<sup>388</sup>

A voluntary dismissal is not available to a plaintiff as a matter of right if a counterclaim has been served upon the plaintiff prior to the service of the notice of dismissal.<sup>389</sup> In such a situation, the action can be dismissed only by obtaining a court order, and the order will not be granted over the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court.<sup>390</sup> The rationale of this prohibition has been extended to include a pending motion for leave to file a counterclaim. Thus, where a defendant moved for leave to amend its answer to a cross-claim by including a counterclaim, serving its motion by mail, and cross-claimants served notice of voluntary dismissal the following day, the trial court's denial of defendant's motion for leave to amend was held error.<sup>391</sup> The court observed that the proper and timely taking of any action permitted by the rules tolls the progress of the cause until the completion of such action.<sup>392</sup>

The decision to take a voluntary dismissal has not always, with the benefit of hindsight, proved to be a prudent one. In a lessee's action for return of its rental deposit, the lessors counterclaimed for rent allegedly due. At the close of plaintiff-lessee's case in chief, defendant-lessors moved for a directed verdict, and the plaintiff then voluntarily dismissed its action. The trial court then scheduled the counterclaim for trial, and when plaintiff refiled its complaint and moved to consolidate the causes, the motion was denied. Defendant-lessors prevailed on their counterclaim for rent; subsequently, judgment for the lessors was also entered on the refiled complaint, the trial court holding that lessee was bound by its determination of the issues in the counterclaim since the same issues were raised. In affirming, the District Court of Appeal, Third District, observed that a trial court may consider evidence received at the trial of the com-

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

387. *Lomelo v. American Oil Co.*, 256 So. 2d 9 (Fla. 4th Dist. 1971).

388. The court based its interpretation on the language of the rule: "*Unless otherwise specified* in the order, a dismissal under this paragraph is without prejudice." FLA. R. CIV. P. 1.420(a)(2) (emphasis added).

389. *Id.*

390. *Id.*

391. *Gull Constr. Co. v. Hendrie*, 271 So. 2d 775 (Fla. 2d Dist. 1973).

392. *Id.*

plaint in deciding the sufficiency of the evidence for a counterclaim, even if the plaintiff takes a voluntary dismissal after plaintiff's case in chief.<sup>393</sup>

In another case, a plaintiff's attempt to take a voluntary dismissal resulted in a dismissal with prejudice and a summary judgment for defendant on the counterclaim. Although few facts are stated in the affirming opinion, apparently the trial court granted the plaintiff "every effort to state a cause of action and to refute the contention of the appellee . . . . This coupled with appellant's motion for a voluntary dismissal of his complaint, we think and so hold, was sufficient . . . ." <sup>394</sup>

### B. *Involuntary*

Rule 1.420(b) provides that any party may move for dismissal of any claim by an opponent who fails to comply with a procedural rule or an order of court. Thus, where a plaintiff was granted leave to file an amended pleading within ten days but failed to do so, the trial court granted defendant's motion to dismiss with prejudice which was filed 65 days after the plaintiff's deadline. Although plaintiff then filed the amended complaint later on that same day, the appellate court found no abuse of discretion and affirmed the dismissal.<sup>395</sup>

The rule<sup>396</sup> further provides that in a non-jury action, a defendant<sup>397</sup> may, after presentation of the plaintiff's case, move for a dismissal for failure of the plaintiff to show a right to relief; the court may then determine the facts and render judgment.<sup>398</sup> It has recently been definitively declared by the supreme court, however, that a trial court is *not* empowered to weight the evidence in such a situation if the plaintiff has presented a prima facie case.<sup>399</sup> The court noted that the federal courts have permitted the trial judge to weigh the evidence at that juncture,<sup>400</sup> as had the District Court of Appeal, Fourth District, in the case before it.<sup>401</sup> However, the Supreme Court of Florida quoted with approval the

393. *Orange Julius Realty Corp. v. Sunshine Toy Center, Inc.*, 251 So. 2d 681 (Fla. 3d Dist. 1971).

394. *Bridger v. Carter*, 281 So. 2d 229, 229-30 (Fla. 1st Dist. 1973).

395. *Miami Auto Auction, Inc. v. Friendly Enterprises, Inc.*, 257 So. 2d 69 (Fla. 3d Dist. 1972).

396. *FLA. R. CIV. P. 1.420(b)*.

397. Or any party other than the one seeking affirmative relief, *FLA. R. CIV. P. 1.420(b)*.

398. After a party seeking affirmative relief in an action tried by the court without a jury has completed the presentation of his evidence, any other party may move for a dismissal on the ground that upon the facts and the law the party seeking affirmative relief has shown no right to relief, without waiving his right to offer evidence in the event the motion is not granted.

*FLA. R. CIV. P. 1.420(b)*.

399. *Tillman v. Baskin*, 260 So. 2d 509 (Fla. 1972).

400. *E.g.*, *Bach v. Friden Calculating Mach. Co.*, 148 F.2d 407 (6th Cir. 1945), (under *FED. R. CIV. P. 41(b)*), which is virtually identical to *FLA. R. CIV. P. 1.420(b)*).

401. The case was before the supreme court on certiorari, because of the apparent conflict between the District Court of Appeal, Fourth District's holding in *Tillman v. Baskin*, 242 So. 2d 748 (Fla. 4th Dist. 1971), and two other cases: *Hartnett v. Fowler*, 94 So. 2d 724

rationale of the Supreme Court of Alaska, in preference to the federal interpretation,<sup>402</sup> and concluded:

It is inconceivable that a trial judge can fairly find for a defendant after hearing nothing more than testimony from a plaintiff establishing a prima facie case in that plaintiff's favor. When a prima facie case is made by plaintiff, fairness would appear to require that the trial judge weigh it in the light of the strength or weakness of the defendant's defense evidence, if any, as in the case of a jury trial.<sup>403</sup>

In holding that a trial judge cannot weigh evidence when ruling on a defendant's rule 1.420(b) motion, the court noted that to hold otherwise would create an important (and presumably undesirable) difference between involuntary dismissals and their jury trial counterparts, directed verdicts.<sup>404</sup>

### C. *Failure to Prosecute*

Rule 1.420(e) provides that an action may be dismissed by the court on its own motion or on the motion of any interested person (party or non-party) if no action has been taken during the previous year.<sup>405</sup> Such dismissal is conditioned upon reasonable notice to the parties, and shall not be granted if at least five days before the hearing on the motion, a party shows good cause in writing why the action should remain pending.<sup>406</sup> If granted, however, the dismissal is without prejudice and does not act as a bar to a subsequent suit.<sup>407</sup>

A number of cases decided during the survey period have attempted

(Fla. 1957), and *Wajay Bakery, Inc. v. Carolina Freight Carriers Corp.*, 177 So. 2d 544 (Fla. 3d Dist. 1965). Since the supreme court quashed its decision in *Tillman*, however, the District Court of Appeal, Fourth District, has obediently followed the supreme court's lead and reversed a trial court judge who weighed the evidence and granted defendant's motion for involuntary dismissal after plaintiff presented a prima facie case of fraud. *Preisner v. Cropf*, 278 So. 2d 295 (Fla. 4th Dist. 1973).

402. Where plaintiff's proof has failed in some aspect the motion should, of course, be granted. . . . But where plaintiff has presented a prima facie case based on unimpeached evidence we are of the opinion that the trial judge should not grant the motion even though he is the trier of the facts and may not himself feel at that point in the trial that the plaintiff has sustained his burden of proof. . . . If, after denial of the motion, the defendant declines to present any evidence, the judge must, of course, then exercise his own judgment in applying the law to the facts presented and rule on the motion and decide the case.

*Tillman v. Baskin*, 260 So. 2d 509, 511 (Fla. 1972), quoting *Rogge v. Weaver*, 368 P.2d 810, 813 (Alas. 1962).

403. *Id.* at 511-12.

404. *Id.*

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

406. *Id.*

407. *Spolter Elec. Supplies, Inc. v. Kalb*, 275 So. 2d 594 (Fla. 4th Dist. 1973). In a special concurring opinion, however, Judge Wilden called for a procedural change so that plaintiffs who are dismissed under Rule 1.420(e) and cannot show good cause would not be permitted to refile their complaints, in order to avoid overcrowding the docket and causing unnecessary aggravation for defendants.

to state what constitutes the "action" which rule 1.420(e) contemplates. Courts have found such affirmative action to exist where a plaintiff filed a notice of hearing<sup>408</sup> or filed a notice of taking deposition.<sup>409</sup> Activity by the defendant within a year was also held sufficient to preclude dismissal under Rule 1.420(e), whether "record"<sup>410</sup> or "nonrecord" activity.<sup>411</sup>

The Supreme Court of Florida heard two cases<sup>412</sup> dealing with activity by a defendant, which allegedly conflicted with three prior supreme court decisions.<sup>413</sup> In *Musselman Steel Fabricators, Inc. v. Radziwon*,<sup>414</sup> the court found that nonrecord activity by the defendant, such as mailing photographs to plaintiff's counsel, was sufficient "action" since it was intended to hasten the suit to judgment. In the companion case,<sup>415</sup> the court affirmed the District Court of Appeal, Fourth District's ruling that prosecution of an action could be manifested by a defendant's activities, such as filing written interrogatories.<sup>416</sup>

Florida courts will not, however, infinitely expand the concept of

408. *Milu, Inc. v. Duke*, 256 So. 2d 83 (Fla. 3d Dist. 1971).

409. *Flack v. Kuhn*, 277 So. 2d 593 (Fla. 4th Dist. 1973).

410. *Manteiga v. City of Miami*, 268 So. 2d 537 (Fla. 3d Dist. 1972); *Eastern Elevator, Inc. v. Page*, 250 So. 2d 326 (Fla. 4th Dist. 1971), *cert. discharged*, 263 So. 2d 218 (Fla. 1972).

411. *Musselman Steel Fabricators, Inc. v. Radziwon*, 250 So. 2d 327 (Fla. 4th Dist. 1971), *cert. discharged*, 263 So. 2d 221 (Fla. 1972).

Two cases from the District Court of Appeal, Second District, illustrate how broadly the courts are willing to interpret nonrecord activity. In *Fleming v. Florida Power Corp.*, 254 So. 2d 546 (Fla. 2d Dist. 1971), the parties waived filing of a deposition which was taken on September 19, 1969, and defendant moved to dismiss for failure to prosecute on September 21, 1970. In reversing the trial court's dismissal judgment, the district court of appeals noted that the court reporter's certificate was dated October 15, 1969, and thus the deposition, if filed, would have appeared of record subsequent to that date and within the one-year period; therefore, such nonrecord activity satisfied the "or otherwise" provision of rule 1.420(e): "All actions in which it affirmatively appears that no action has been taken by filing of pleadings, order of court or otherwise for a period of one year . . ." (emphasis added). The court cautioned, however, that only such nonrecord activity "of which the defendant's counsel has notice and which would appear of record but for their amicable progress in the cause" would meet the "or otherwise" test. *Id.* at 547.

In *Dukes v. Chemicals, Inc.*, 277 So. 2d 298 (Fla. 2d Dist. 1973), the court found that the "or otherwise" provision was not met where, as defendant's counsel conceded, plaintiff's counsel had asked him for certain records which he had been unable to produce, although no formal motion to produce had been filed.

412. *Musselman Steel Fabricators, Inc. v. Radziwon*, 250 So. 2d 327 (Fla. 4th Dist. 1971), *cert. discharged*, 263 So. 2d 221 (Fla. 1972) [hereinafter referred to as *Musselman*]; *Eastern Elevator, Inc. v. Page*, 250 So. 2d 326 (Fla. 4th Dist. 1971), *cert. discharged*, 263 So. 2d 218 (Fla. 1972) [hereinafter referred to as *Eastern Elevator*].

413. *Sroczyk v. Fritz*, 220 So. 2d 908 (Fla. 1969); *Adams Eng'r Co. v. Construction Prod. Corp.*, 156 So. 2d 497 (Fla. 1963); *Gulf Appliance Distrib., Inc. v. Long*, 53 So. 2d 706 (Fla. 1951).

414. 250 So. 2d 327 (Fla. 4th Dist. 1971), *cert. discharged*, 263 So. 2d 221 (Fla. 1972). Also, although defendants had taken plaintiff's deposition more than one year before filing his motion to dismiss, the clerk had filed the depositions within the one-year period. *Id.*

415. *Eastern Elevator, Inc. v. Page*, 250 So. 2d 326 (Fla. 4th Dist. 1971), *cert. discharged*, 263 So. 2d 218 (Fla. 1972).

416. Both *Musselman* and *Eastern Elevator* were cited by the District Court of Appeal, Third District, in its holding that a notice of trial filed by the defendant was sufficient activity, and that the trial court erred in dismissing the action on its own motion. *Manteiga v. City of Miami*, 268 So. 2d 537 (Fla. 3d Dist. 1972).



prosecution of a case; where no contact is made with the other party or with the court, the fact that the plaintiff has been researching, planning, and contacting witnesses will not prevent the court from dismissing the case for lack of prosecution.<sup>417</sup>

The Supreme Court of Florida has also refused to allow a party to defeat the purpose of the rule by taking action solely to avoid dismissal for want of prosecution. In *Chrysler Leasing Corp. v. Passacantilli*,<sup>418</sup> the trial court had dismissed the case sua sponte for lack of prosecution. The District Court of Appeal, Third District, reversed on the basis of plaintiff's tender of trial after receiving notice of hearing on the court's motion; the court was of the opinion that plaintiff's affidavit constituted a "pleading" under rule 1.420(e).<sup>419</sup> The supreme court disagreed, noting that the substantive requirements for avoiding dismissal were not met by an affidavit submitted subsequent to the court's motion to dismiss.<sup>420</sup>

Although not provided in rule 1.420(e), under some conditions courts have dismissed a cause for failure to prosecute even though one year has not elapsed.<sup>421</sup> However, "proper circumstances" must exist. In *R.J. Paquette Aviation Enterprise, Inc. v. C.B. Phillips, Inc.*,<sup>422</sup> the trial court dismissed defendant's counterclaim within the one-year period. The District Court of Appeal, Fourth District, reversed, stating that "proper circumstances" were not presented by the record. It should be noted, however, that the court failed to disclose what it would consider "proper circumstances" to be in such a case.<sup>423</sup>

Perhaps the circumstances which motivated the District Court of Appeal, Third District, to affirm dismissal in *McIlveen v. Metropolitan Dade County*<sup>424</sup> would qualify as "proper circumstances." In that case, the plaintiff had been granted three continuances and nevertheless failed

417. *Wells v. Van Arnam*, 271 So. 2d 186 (Fla. 1st Dist. 1973).

418. 259 So. 2d 1 (Fla. 1972).

419. The affidavit indicated that the plaintiff had suffered a severe heart attack and stroke but was not ready to proceed to trial. Correctly speaking, of course, this affidavit cannot be considered a "pleading." FLA. R. Civ. P. 1.100(a).

420. Although it disapproved the district court's rationale, the supreme court did not reverse because it found that there was a pleading which had not been considered and did not appear in the district court's opinion although it was a part of the record. *Chrysler Leasing Corp. v. Passacantilli*, 259 So. 2d 1 (Fla. 1972).

On similar facts, the District Court of Appeal, Second District, found that the plaintiff's action in filing a motion to set the case for jury trial one day after defendant's motion for dismissal also did not constitute "good cause" to avoid dismissal under rule 1.420(e). *Lindquist v. Williams*, 262 So. 2d 899 (Fla. 2d Dist. 1972).

421. The rule [FLA. R. Civ. P. 1.420(e)] does not mean, nor has it been construed to hold, that the trial court in the exercise of a sound discretion is without power or jurisdiction to dismiss an action under proper circumstances because of the failure of plaintiff to prosecute it with due diligence, even though affirmative action has been taken in the case within a period of one year prior to its dismissal.

*Popkin v. Crispen*, 213 So. 2d 445, 448 (Fla. 4th Dist. 1968). See also *Reddish v. Forlines*, 207 So. 2d 703 (Fla. 1st Dist. 1968).

422. 262 So. 2d 229 (Fla. 4th Dist. 1972).

423. *Id.*

424. 276 So. 2d 844 (Fla. 3d Dist. 1973).

to appear for trial; the court held that no abuse of discretion was shown where the trial judge dismissed the action for failure to prosecute.<sup>425</sup>

Rule 1.420(e) refers to the "filing of pleadings," and several cases have arisen concerning the interpretation of those words. The courts have consistently refused to depart from the language of the rule, and thus have held that the date of filing a deposition controls, rather than the date it was taken;<sup>426</sup> that the date of filing of interrogatories controls, rather than the date of service;<sup>427</sup> and finally, even that the date of filing the court's sua sponte motion to dismiss measured the one-year period, rather than the date of its entry.<sup>428</sup>

The requirement that a party show "good cause in writing why the action should remain pending"<sup>429</sup> in order to avoid dismissal has provided fertile ground for litigation. For example, neither "[a] change of attorneys, even when made necessary by misfortune,"<sup>430</sup> nor inadvertent office error by plaintiff's attorney,<sup>431</sup> was sufficient good cause for failure to prosecute for one year; nor would temporary illness of plaintiff's counsel suffice.<sup>432</sup>

On the other hand, where the court's own action has played a part in the delay of the cause, courts are more reluctant to dismiss. Thus, where the trial judge entered an order continuing the case "until such time as is mutually agreeable to the court and respective counsel for the parties,"<sup>433</sup> that order was itself adequate protection for the plaintiff as a record showing of "good cause." Also, an order of the court that it would set a future date for trial after counsel's illness was held to be good cause for plaintiff's failure to take further action.<sup>434</sup>

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425. Evidently the plaintiff in this negligence action had no fixed place of abode, and his attorney was unable to contact him. *Id.*

426. *Licausi v. Airport Transp. Serv., Inc.*, 252 So. 2d 835 (Fla. 4th Dist. 1971).

427. *Ace Delivery Serv., Inc. v. Pickett*, 274 So. 2d 15 (Fla. 2d Dist. 1973).

428. In *Shalabey v. Memorial Hosp.*, 253 So. 2d 712 (Fla. 4th Dist. 1971), plaintiff had argued that the trial court's action was premature where it entered its motion to dismiss one day before the one-year period elapsed. The district court affirmed, however, stating that the date the court *filed* its motion should control: "The determinative factor in regard to the computation of the one year period is the date of *filing*, i.e., the date the last pleading was filed and the date of filing of the action seeking to abate the proceedings." *Id.* at 714 (original emphasis). The court further observed that even if the one year had not fully elapsed, the trial court has discretion to dismiss even within that period. See notes 420-25 *supra* and accompanying text.

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

430. *Florida Power & Light Co. v. Gilman*, 280 So. 2d 15, 16 (Fla. 3d Dist. 1973).

431. *Id.*

432. *Grossman v. Segal*, 270 So. 2d 746 (Fla. 3d Dist. 1972). The court observed in dictum:

The one year period established in RCP 1.420(e) is liberal enough to contemplate a misfortune such as illness because the litigants have sufficient time to readjust themselves to this type of calamity, . . . and a temporary illness will not work an extreme hardship that would satisfy the good cause requirement of RCP 1.420(e).

*Id.* at 747.

433. *City of West Palm Beach v. Widell Assoc., Inc.*, 266 So. 2d 176, 176 (Fla. 4th Dist. 1972) (emphasis omitted).

434. *Neff Mach., Inc. v. Allied Elec. Co., Inc.*, 258 So. 2d 314 (Fla. 3d Dist. 1972).

A trial judge possesses a wide degree of discretion in determining whether an action should be dismissed under this rule; for example, in *Grossman v. Segal*,<sup>435</sup> the court denied defendant's motion to dismiss where it determined that the defendant had engaged in delaying tactics and was not free from criticism. If, however, no good cause has been shown by plaintiff, an order of dismissal must be entered without delay.<sup>436</sup>

### VIII. CONTINUANCES

A party may move for a continuance only before or at the time the case is set for trial, unless the grounds for the continuance arose at a later date or the party can show good cause for his failure to file a timely motion.<sup>437</sup> A trial judge has broad discretion in granting or refusing to grant continuances in any matter before him.<sup>438</sup> However, as in many other areas of procedure, the trial judge's discretion is not unlimited. In *Diaz v. Diaz*,<sup>439</sup> a suit for dissolution of marriage, the wife's attorney became ill, notified the judge's office accordingly, and dictated a motion for a continuance. The next day, however, the judge denied the motion, awarded the husband a "divorce," and decided the question of alimony without the wife, her attorney, or her witnesses being present. The District Court of Appeal, Third District, held that the trial court had abused its discretion in not granting the requested continuance.<sup>440</sup>

An appellate court should not, however, undertake to substitute its judgment for that of the trial court unless a gross or flagrant abuse of discretion is shown.<sup>441</sup> Also, the courts will take into account a plaintiff's repeated requests for continuances in exercising their discretion on a motion to dismiss for failure to prosecute.<sup>442</sup>

### IX. DIRECTED VERDICTS

Upon proper motion,<sup>443</sup> the trial court may direct the jury's verdict where it appears that the evidence presented is insufficient to raise a question of fact for the jury. Although the appellate courts have held more often than not<sup>444</sup> that a directed verdict was improper, they have approved such action where clearly indicated.<sup>445</sup>

435. 270 So. 2d 746 (Fla. 3d Dist. 1972).

436. *Karkeet v. Snyder*, 275 So. 2d 302 (Fla. 3d Dist. 1973).

437. FLA. R. CIV. P. 1.460(a).

438. *Sapp v. Hillsborough County*, 262 So. 2d 256 (Fla. 2d Dist. 1972).

439. 258 So. 2d 37 (Fla. 3d Dist. 1972).

440. *Id.*

441. *Williams v. Gunn*, 279 So. 2d 69 (Fla. 1st Dist. 1973).

442. *McIlveen v. Metropolitan Dade County*, 276 So. 2d 844 (Fla. 3d Dist. 1973).

443. FLA. R. CIV. P. 1.480.

444. Of the twenty-eight cases reported during the survey period which considered the propriety of a directed verdict, only ten indicated that the motion should have been granted.

445. In *First Nat'l Bank v. Jackson*, 267 So. 2d 697 (Fla. 4th Dist. 1972), a misrepresentation action, the defendant died after denying plaintiff's allegations in her answer. At trial, after all evidence had been presented, defendant's personal representative moved for a

Other situations where a directed verdict has been held proper include lack of evidence to justify application of the *res ipsa loquitur* doctrine;<sup>446</sup> failure to show breach of duty in a negligence action;<sup>447</sup> and, in a "slip and fall" case, failure to show how a foreign substance got on a restaurant floor, how long it remained there, and whether defendants had actual or constructive knowledge of its presence.<sup>448</sup>

The reluctance of the appellate courts to uphold directed verdicts usually results from the conclusion that an issue of fact exists wherein reasonable persons could be expected to differ, and which, in fairness to the parties, could be resolved only by the jury.<sup>449</sup> Thus, among others, questions of contributory negligence,<sup>450</sup> undue influence,<sup>451</sup> insurance coverage,<sup>452</sup> and failure to inspect<sup>453</sup> have been reserved for the jury's determination, and a showing of a prima facie case in a malpractice action has precluded the entry of a directed verdict for the defendant.<sup>454</sup>

Where a question of punitive damages is involved, a directed verdict is inappropriate; and where sufficient proof existed as to one defendant's involvement in an automobile conversion case, the trial court erred in directing a verdict for that defendant and striking plaintiff's claim for punitive damages.<sup>455</sup> In another punitive damages case, the court once

directed verdict; upon denial of the motion, judgment for plaintiff resulted. No evidence had been presented by defendant, and plaintiff was prevented from introducing testimony as to defendant's alleged misrepresentations because of the Dead Man's Statute. The appellate court held that since no evidence was presented on which the jury could lawfully have returned its verdict, defendant's motion for a directed verdict should have been granted. In reversing, the court observed: "This is an unfortunate case all the way around. Nevertheless, it is our opinion that there is no evidence to sustain a cause of action at law for damages based on fraud." *Id.* at 699.

446. *Waite v. Jackson's Byrons Enterprises, Inc.*, 254 So. 2d 28 (Fla. 3d Dist. 1971).

447. *McGriff v. Associated Grocers, Inc.*, 258 So. 2d 468 (Fla. 3d Dist. 1972).

448. *Friedman v. Biscayne Restaurant, Inc.*, 254 So. 2d 831 (Fla. 3d Dist. 1971). Other cases approving directed verdicts include *Britz v. LeBase*, 258 So. 2d 811 (Fla. 1972); *Farmer v. Brotherhood of R.R. Trainmen*, 258 So. 2d 503 (Fla. 3d Dist. 1972); *Solomon v. City of North Miami Beach*, 256 So. 2d 399 (Fla. 3d Dist. 1972); and *Knabb v. Tompkins*, 254 So. 2d 858 (Fla. 1st Dist. 1971).

449. The general rule for weighing a motion for a directed verdict is that such motions "should not be granted unless it can be said that under no view that the jury might lawfully take of the evidence could a verdict for the party moved against be sustained." *Cleaver v. Dade County*, 272 So. 2d 559, 561 (Fla. 3d Dist. 1973) (patient's arm pinched by operation of wheelchair by hospital attendant).

In affirming a county judge's "directed verdict" in a will contest case (non-jury), the court briefly "remind[ed] the trial bench that directed verdicts in nonjury trials are governed by the same rules and principles as in jury trials." *In re Estate of Merz*, 273 So. 2d 795, 796 (Fla. 2d Dist. 1973). Presumably the appellate court was referring to a motion to dismiss in the non-jury context.

450. *Blair Contracting Co. v. William E. Arnold Co.*, 281 So. 2d 66 (Fla. 1st Dist. 1973); *Brown v. City of Vero Beach*, 271 So. 2d 222 (Fla. 4th Dist. 1972); *1661 Corp. v. Snyder*, 267 So. 2d 362 (Fla. 1st Dist. 1972); *Seigel v. Mt. Sinai Hosp., Inc.*, 250 So. 2d 332 (Fla. 3d Dist. 1971).

451. *National Bank & Trust Co. v. Batchelor*, 266 So. 2d 185 (Fla. 4th Dist. 1972).

452. *Lasby v. Wood*, 274 So. 2d 894 (Fla. 4th Dist. 1973).

453. *Johnson v. Oliver*, 249 So. 2d 65 (Fla. 1st Dist. 1971).

454. *Wale v. Barnes*, 278 So. 2d 601 (Fla. 1973).

455. *Andrews v. Mother's Auto Sales, Inc.*, 281 So. 2d 217 (Fla. 3d Dist. 1973).

again held that a jury question was presented: "If there is any evidence tending to show that punitive damages could be properly inflicted, even if the court be of the opinion that the preponderance of the evidence is the other way, the court should leave the question to the jury."<sup>456</sup>

Rule 1.480 states that a party may move for a directed verdict at the close of the evidence offered by the adverse party; if the court denies a defendant's motion at the close of plaintiff's evidence, defendant must renew the motion at the conclusion of all the testimony to preserve the question for review.<sup>457</sup> The question of the motion's timeliness was raised in *Madden v. Gorum*,<sup>458</sup> where, after plaintiffs rested their case, defendants also rested without adducing any evidence; defendants then moved for a directed verdict, which was denied, and judgment was entered on a jury verdict for plaintiffs. On appeal, the failure to grant defendants' motion was held reversible error. The court dismissed plaintiff's argument that the motion had been untimely because of defendants' alleged failure to move for a directed verdict at the close of plaintiffs' case:

[T]he trial court should be afforded an opportunity to make a ruling on the sufficiency of all of the evidence to take the case to the jury before that question is permitted to be raised in the appellate court. We think that appellants' motion, made as it was immediately on the heels of plaintiffs' case, was sufficient for that purpose.<sup>459</sup>

When the trial court reserves its ruling on a motion for a directed verdict, it is deemed to have submitted the case to the jury subject to a later determination of that motion; if an adverse verdict is returned, the movant may within ten days move to have the verdict set aside and judgment entered in accordance with the earlier motion. Such a motion is referred to as one for a judgment notwithstanding the verdict.<sup>460</sup>

As with motions for directed verdict, rule 1.480(b) motions will also be denied where a fact issue exists:

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456. *Richards Co. v. Harrison*, 262 So. 2d 258, 263 (Fla. 1st Dist. 1972), quoting *Doral Country Club, Inc. v. Lindgren Plumbing Co.*, 175 So. 2d 570, 571 (Fla. 3d Dist. 1965). In *Richards*, the plaintiff, age 18, was given an intensive three day training course in the art of encyclopedia selling and a free ride to Valdosta, Georgia, where he was to begin reaping the benefits of his new-found art. The employer's agent let the plaintiff out within the city limits, where he was arrested for soliciting without a permit and jailed overnight. He sued his employers for failure to provide a reasonably safe place to work and for knowingly exposing him to arrest and incarceration. The jury's award of \$5,000 compensatory and \$35,000 punitive damages was upheld on appeal.

457. *Barnett First Nat'l Bank v. Shelton*, 253 So. 2d 480 (Fla. 4th Dist. 1971).

458. 250 So. 2d 342 (Fla. 1st Dist. 1971).

459. *Id.* at 344.

460. FLA. R. CIV. P. 1.480(b). Technically, the motion is a post-trial motion for judgment in accordance with a motion for directed verdict. See *Mendoza v. Board of County Comm'rs*, 221 So. 2d 797 (Fla. 3d Dist. 1969). However, the drafters of the federal rules have eliminated this technical distinction. FED. R. CIV. P. 50. See WRIGHT & MILLER, *supra* note 288, at § 2537.

[A] motion for judgment notwithstanding the verdict should be granted only if there is no evidence or reasonable inference to support the opposing position; . . . a jury must determine what is or is not negligence in a particular case if there are conflicts in the testimony or if the facts are such that reasonable persons may fairly arrive at different conclusions.<sup>461</sup>

A trial judge mistakenly granted a judgment notwithstanding the verdict in attempting to correct his error in allowing the defendant to assert its unpleaded affirmative defense during the trial; when the jury returned its verdict for defendant, the judge ordered judgment for the plaintiff. The case was reversed on that point, since another factual issue existed upon which the jury verdict could properly have been based.<sup>462</sup>

Where, however, the facts are not in conflict and only an issue of law remains, a judgment notwithstanding the verdict may properly be entered.<sup>463</sup> For example, a jury verdict for plaintiff railroad employee was returned in a FELA action.<sup>464</sup> The trial court properly granted defendant railroad's motion for judgment notwithstanding the verdict, on the grounds that the evidence and justifiable inferences most favorable to the plaintiff afforded no rational basis for the jury's verdict.<sup>465</sup>

The question of timeliness of a rule 1.480(b) motion was presented in a case of first impression in Florida.<sup>466</sup> A motion for judgment notwithstanding the verdict was filed more than ten days after judgment had been entered but had been served on opposing counsel within the allowable ten day period. The court found that to be timely, a post-trial motion under 1.480(b) must be *filed* with the clerk within ten days.<sup>467</sup>

## X. DEFAULT JUDGMENTS

Rule 1.500(b) provides that the court<sup>468</sup> may enter a default against any party against whom affirmative relief is sought, and who has failed to plead or otherwise defend the action; notice is required if that party has previously filed or served any paper. As amended effective January

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461. *Tynan v. Seaboard Coast Line R.R.*, 254 So. 2d 209, 212 (Fla. 1971).

462. *Peninsular Life Ins. Co. v. Hanratty*, 281 So. 2d 609 (Fla. 3d Dist. 1973). The judge's order granting a new trial (evidently anticipating reversal) was affirmed.

463. *See, e.g., Whetzel v. Metropolitan Life Ins. Co.*, 266 So. 2d 89 (Fla. 4th Dist. 1972); *Burger v. Hector*, 278 So. 2d 636 (Fla. 1st Dist. 1973).

464. *Adams v. Seaboard Coast Line R.R.*, 277 So. 2d 578 (Fla. 1st Dist. 1973).

465. *Id.* Apparently the plaintiff was totally at fault, and not even the slightest evidence of negligence was presented to support the verdict.

466. *Behm v. Department of Transp.*, 275 So. 2d 545 (Fla. 4th Dist. 1973).

467. *Id.* The court based its decision on federal practice, noting that no cases had been decided in Florida on this point, and certified the following question to the supreme court: "IN ORDER FOR SAME TO BE TIMELY, MUST A POST TRIAL MOTION UNDER RULE 1.480(B), R.C.P. (WHICH PROVIDES THAT A PARTY *may move* THEREUNDER WITHIN 10 DAYS) BE FILED WITH THE CLERK WITHIN SUCH PERIOD?" *Id.* at 551.

468. If the party against whom the default is sought has failed to file or serve any paper in the action, the clerk may enter the default. FLA. R. Civ. P. 1.500(a).

1, 1973,<sup>469</sup> rule 1.500(c) allows a party to plead or otherwise defend up until the default is entered, but if the defendant attempts to file any paper after that date, it will be returned by the clerk with notification that a default has been entered. After a default has been entered against a defendant for failure to file pleadings, final judgment may be entered at any time without notice to the defendant.<sup>470</sup>

The question of whether a party in default is entitled to notice of trial on the issue of damages was certified to the supreme court by the District Court of Appeal, Fourth District, as a question of great public interest.<sup>471</sup> In answering this question in the negative, the court pointed out that rule 1.080(a)<sup>472</sup> renders unnecessary the notice for trial normally required by rule 1.440(b).<sup>473</sup> The court was careful to point out that its ruling would not preclude a defendant from being allowed to participate in the trial on damages if timely requested or if the trial court deems it necessary.<sup>474</sup> The same result was reached by the District Court of Appeal, Third District, in an analogous situation. Plaintiff failed to appear on the day set for jury trial; a default was entered on the claim and against plaintiff as to liability on defendant's counterclaim. The trial court's action in holding an ex parte trial on the amount of damages to be awarded to counterclaimant, with no notice to plaintiff, was affirmed.<sup>475</sup>

A trial judge has the discretionary power to set aside a default where defendant shows a meritorious defense and is chargeable with mere excusable mistake or neglect.<sup>476</sup> The policy in ruling on motions to vacate should be to allow trial on the merits where the defendant has not been guilty of gross neglect.<sup>477</sup> Although the trial judge's discretion does have

469. *In re The Florida Bar: Rules of Civil Procedure*, 265 So. 2d 21, 41 (Fla. 1972).

470. *Al Wilson's Power-Ful Displays, Inc. v. Morgan Adhesive, Inc.*, 259 So. 2d 166 (Fla. 3d Dist. 1972).

471. "Whether in a suit seeking a money judgment for unliquidated damages, a defendant against whom a default judgment has been duly and regularly entered, is entitled to notice of trial on the issue of damages notwithstanding Rule 1.080(a), R.C.P." *Stevenson v. Arnold*, 250 So. 2d 270, 271 (Fla. 1971) [hereinafter referred to as *Stevenson*].

472. "No service need be made on parties against whom a default has been entered, except that pleadings asserting new or additional claims against them shall be served in the manner provided for service of summons." FLA. R. CIV. P. 1.080(a).

473. FLA. R. CIV. P. 1.440(b).

474. FLA. R. CIV. P. 1.500(e). The holding in *Stevenson* was duly followed in *Jeffcoat Equipment, Inc. v. John Deere Indus. Equip. Co.*, 281 So. 2d 233 (Fla. 1st Dist. 1973), and *Synthetic Environmental Dev. Corp., v. Sussman*, 275 So. 2d 291 (Fla. 3d Dist. 1973).

475. *Stern v. Commercial Constr. Corp.*, 268 So. 2d 549 (Fla. 3d Dist. 1972).

476. *Hamilton v. Bogorad, Klein, Schulwolf, Masciovecchio, Inc.*, 275 So. 2d 41 (Fla. 3d Dist. 1973) (service of notice on plaintiff's attorney at his Miami address was returned "unknown," but defendant's attorney knew his New York address and that he was in the process of moving from New York to Miami).

477. *Cowen v. Knott*, 252 So. 2d 400 (Fla. 2d Dist. 1971). A further example is shown by *Grahn v. Dade Home Services, Inc.*, 277 So. 2d 544 (Fla. 3d Dist. 1973), where the record showed a handwritten note from the plaintiff to the trial judge stating that her attorney had withdrawn from the case after unsuccessfully attempting to negotiate a settlement. The appellate court found that since the plaintiff had been without counsel during the period of extension that she had been granted to appear for a deposition and answer interrogatories,

its limits,<sup>478</sup> the District Court of Appeal, Third District, found no gross abuse of discretion in setting aside a default where the motion alleged no reasonable basis for showing mere excusable neglect:

It is our opinion that although this definition of excusable neglect amounts to no more than an assertion of corporate inefficiency, nevertheless it cannot be logically distinguished from the corporate neglect held to be excusable neglect in *North Shore Hospital, Inc. v. Barber*.<sup>479</sup>

Where, however, the defendant showed lack of due diligence in failing to contact an attorney after being served,<sup>480</sup> or merely claimed failure to receive notice of hearing,<sup>481</sup> the courts affirmed the default judgments.

## XI. SUMMARY JUDGMENTS

### A. *In General*

Upon proper motion, a summary judgment may be granted in favor of either party if there is no genuine issue as to any material fact and if the moving party is entitled to a judgment as a matter of law.<sup>482</sup> The bulk of cases arising under this rule necessarily turn on the individual fact pattern of each case in determining whether a summary judgment would be justified. Some general principles may be determined, however: for example, all doubts and inferences are to be resolved against the movant, and if the slightest doubt remains, a summary judgment cannot be granted.<sup>483</sup> Also, if proofs supporting the motion for summary judgment fail to overcome every theory on which the adversary's position might be sustained under the pleadings, the motion should not be granted.<sup>484</sup> A summary judgment is justified only where the controversy is purely one of law to be decided upon undisputed facts; and even if the facts are undisputed, the motion should not be granted if conflicting inferences may reasonably be made from the evidence.<sup>485</sup>

A summary judgment is normally in order where "a determination of a lawsuit depends upon the written instrument of the parties and the

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the interests of justice would best be served by allowing the plaintiff a further reasonable time to comply. *Id.* at 546.

478. *Plotkin v. Deatrick Leasing Co.*, 267 So. 2d 368 (Fla. 3d Dist. 1972).

479. *Id.* at 369-70.

480. *Jeffcoat Equipment, Inc. v. John Deere Indus. Equip. Co.*, 281 So. 2d 233 (Fla. 1st Dist. 1973).

481. *Hurst Ins. Agency, Inc. v. O'Malley*, 262 So. 2d 224 (Fla. 3d Dist. 1972). See text accompanying note 218 *supra* for a situation where such an excuse was accepted.

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

483. *Torrence v. Sacred Heart Hosp.*, 251 So. 2d 899 (Fla. 1st Dist. 1971).

484. *Campbell v. Anheuser-Busch, Inc.*, 265 So. 2d 557 (Fla. 1st Dist. 1972).

485. *Ham v. Heintzelman's Ford, Inc.*, 256 So. 2d 264 (Fla. 4th Dist. 1971); *Herold v. Computer Components Int'l, Inc.*, 252 So. 2d 576 (Fla. 4th Dist. 1971).



legal effect to be drawn therefrom,<sup>486</sup> since the issue in such a case is one of law only; as, for example, where a lease clause relieved a landlord of liability for his own negligence,<sup>487</sup> where the parties by contract waived the bank's duty to check identification on checks,<sup>488</sup> where an insurance policy's exclusion clause effectively removed the insurer's liability,<sup>489</sup> and where a provision in an airline tariff precluded action against the airline.<sup>490</sup> However, where the terms of the instrument are ambiguous and cast doubt upon the parties' intent, a summary judgment would be improper.<sup>491</sup>

Even where no written instrument is involved, a summary judgment should be granted if it is clear that only a question of law is involved. For example, where a plaintiff sued for emotional distress but it was clear that she was not actually struck by the falling ceiling, the "impact rule" was applied as a question of law in granting summary judgment for the defendant;<sup>492</sup> and in a slander action, the defendant was held to have an absolute privilege as a matter of law,<sup>493</sup> and summary judgment for the defendant was affirmed despite conflicting evidence as to what actually occurred.<sup>494</sup> Similarly, only a question of law existed where a car owner who left keys in the car on an unguarded street was found not liable to a plaintiff injured when a passerby stole the car.<sup>495</sup>

A defendant who moves for a summary judgment bears a heavy burden, for the movant must make an affirmative showing of non-liability in order to succeed.<sup>496</sup> "When a defendant moves for summary judgment, the trial court does not determine whether the plaintiff can prove her case but only whether the pleadings, depositions and affidavits *conclusively show that she cannot prove her case.*"<sup>497</sup> Thus, even if the non-moving party chooses not to oppose the motion by filing affidavits, the court may nevertheless, if the record is clear, find that fact issues exist and deny the motion.<sup>498</sup>

486. *Duprey v. United Serv. Auto. Ass'n*, 254 So. 2d 57, 58 (Fla. 1st Dist. 1971).

487. *Middleton v. Lomaskin*, 266 So. 2d 678 (Fla. 3d Dist. 1972).

488. *Wall v. Hamilton County Bank*, 276 So. 2d 182 (Fla. 1st Dist. 1973).

489. *Lamos v. Consolidated Mutual Ins. Co.*, 274 So. 2d 552 (Fla. 3d Dist. 1973). *See also* *Swift v. Century Ins. Co.*, 264 So. 2d 88 (Fla. 3d Dist. 1972). Note, however, that the exclusionary clause may itself raise a question of fact. *Balboa Ins. Co. v. Floyd*, 262 So. 2d 202 (Fla. 3d Dist. 1972).

490. *Furmanik v. Northeast Airlines, Inc.*, 266 So. 2d 352 (Fla. 3d Dist. 1972).

491. *Westchester Fire Ins. Co. v. In-Sink-Erator*, 252 So. 2d 856 (Fla. 4th Dist. 1971).

492. *Arcia v. Altagracia Corp.*, 264 So. 2d 865 (Fla. 3d Dist. 1972). *See also* *Johnson v. Herlong Aviation, Inc.*, No. 43,431 (Fla. Jan. 10, 1974), *quashing and remanding* 271 So. 2d 226 (Fla. 2d Dist. 1972).

493. *Roberts v. Lenfestey*, 264 So. 2d 449 (Fla. 2d Dist. 1972) (president of junior college had absolute privilege concerning statements uttered during faculty meeting).

494. *Id.*

495. *Clements v. Barber*, 258 So. 2d 465 (Fla. 3d Dist. 1971).

496. *Smith v. Continental Ins. Co.*, 281 So. 2d 393 (Fla. 2d Dist. 1973). *Cf.* *Kemper v. First Nat'l Bank*, 277 So. 2d 804 (Fla. 3d Dist. 1973).

497. *Williams v. Florida Realty & Mgt. Co.*, 272 So. 2d 176, 178 (Fla. 3d Dist. 1973) (emphasis added).

498. *Taylor v. Liberty Mutual Ins. Co.*, 281 So. 2d 920 (Fla. 2d Dist. 1973). Where,

Because the ends of justice are most often served by a trial of the cause on its merits unless it is "clearly disposable by summary judgment,"<sup>499</sup> the great majority of cases ruling on the point during the survey period have found a fact issue to exist, precluding summary judgments. For example, where there was prima facie evidence of culpable negligence, it was error to grant a summary judgment and eliminate the consideration of punitive damages by the jury;<sup>500</sup> a trial court erred in deciding the defendant's actions constituted "assault and battery," not negligence, as a matter of law;<sup>501</sup> and a summary judgment should not have been granted where fraud was alleged.<sup>502</sup>

Despite the courts' reluctance to take a case from the jury, however, mere contrary allegations by the non-moving party, or an affidavit denying liability as a conclusion of law, have been held insufficient to preclude a summary judgment.<sup>503</sup> This is, of course, justifiable where no genuine issue of material fact appears upon the record. However, on several occasions<sup>504</sup> the appellate courts have affirmed summary judgments where it appears from the reported opinions that fact issues were present and were decided by the trial judge in violation of the approved rule.<sup>505</sup> For example, where the plaintiff's husband was killed by the defendant's train at a railroad crossing, summary judgment for the defendant was affirmed despite the plaintiff's contention that issues of fact existed because of conflicting testimony as to the defendant's failure to keep a lookout, give warnings, maintain a proper crossing, and apply the emergency brakes. Nevertheless, the trial court found contributory negligence as a matter of law.<sup>506</sup> In another District Court of Appeal, First District, case, where a

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however, the defendant failed to offer any proof to dispute the plaintiff's arguments that the defendant had given no consideration for the option he claimed, the trial court properly granted a summary judgment for the plaintiff. *Ross v. Nelson*, 273 So. 2d 790 (Fla. 1st Dist. 1973).

499. *Ham v. Heintzelman's Ford, Inc.*, 256 So. 2d 264, 268 (Fla. 4th Dist. 1971). The court also remarked, however, that: "*Our own experience attests an occasional impulse to amputate at once rather than face the prospect of surgery by painful stages, but herein lies the occasional margin of error.*" *Id.* at 268 (court's emphasis), quoting *Nance v. Ball*, 134 So. 2d 35, 37 (Fla. 2d Dist. 1961).

500. *Mills v. Cone Bros. Contracting Co.*, 265 So. 2d 739 (Fla. 2d Dist. 1972).

501. *Spivey v. Battaglia*, 258 So. 2d 815 (Fla. 1972). The trial court had accordingly granted a summary judgment for the defendant since the two-year statute of limitations for "assault and battery" had run.

502. *Pentecostal Holiness Church, Inc. v. Mauney*, 270 So. 2d 762 (Fla. 4th Dist. 1972). See also *Automobile Sales, Inc. v. Federated Mut. Implement & Hardware Ins. Co.*, 256 So. 2d 386 (Fla. 3d Dist. 1972), where the court observed that the issue of fraud is not ordinarily a proper subject for summary judgment.

503. *Beverage Canners, Inc. v. E.D. Green Corp.*, 276 So. 2d 239 (Fla. 3d Dist. 1973).

504. *Poche v. Leon Motor Lodge, Inc.*, 275 So. 2d 55 (Fla. 1st Dist. 1973); *Lindsey v. Seaboard Coastline R.R.*, 248 So. 2d 518 (Fla. 1st Dist. 1971).

505. The law in Florida is clear that the trial judge may not sit in judgment of material issues of fact when passing upon a Motion for Summary Judgment. In such proceeding the trial judge may not weigh material conflicting evidence or pass upon the credibility of the witnesses.

*Rice v. Mercy Hosp. Corp.*, 275 So. 2d 566, 567 (Fla. 3d Dist. 1973).

506. *Lindsey v. Seaboard Coastline R.R.*, 248 So. 2d 518 (Fla. 1st Dist. 1971). In affirm-

tenant sued his landlord when the tenant's four-year-old son ran into the glass door of a clubhouse in the swimming pool area of the apartment complex, a summary judgment for the defendant was affirmed per curiam without opinion, although apparently fact questions had been raised.<sup>507</sup>

As noted above,<sup>508</sup> a trial judge may not determine questions of fact when deciding a motion for summary judgment.<sup>509</sup> This is equally true in a non-jury case, where the same judge would determine the factual issues if a full hearing on the merits were held,<sup>510</sup> because the judicial function in deciding the motion differs from that as trier of fact. In the former instance, the judge is to determine whether a factual issue exists; however, when considering the entry of a final judgment after a full hearing on the merits, the trial court "determines controverted factual issues, and draws inferences of fact from the substantial, competent evidence adduced by the parties."<sup>511</sup> Furthermore, even where both attorneys agree that a summary judgment is proper, the trial court must still determine that no genuine issue of material fact exists;<sup>512</sup> a stipulation by counsel does not bind the court "where the threshold requirements of Rule 1.510(c), F.R.C.P., are not fully met."<sup>513</sup>

It has been said that "the fundamental purpose of a summary [judgment] is to relieve the litigants and the courts from the trial of unnecessary lawsuits . . .";<sup>514</sup> it should not be used as a punitive device.<sup>515</sup> Thus, where the defendant failed to verify his answers to the plaintiff's request for admissions, the trial court's entry of a summary judgment was re-

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ing, the court conceded that "the existence of contributory negligence is a question for the jury when the facts upon which it rests are such that they might lead reasonable men to draw different conclusions." *Id.* at 520. After reviewing the record, however, the appellate court determined that "the negligence of the deceased was the sole proximate cause of the accident." *Id.* at 521. Surely, however, the issue of proximate cause is itself an issue of fact which should have been determined by the jury, rather than disposed of by summary judgment.

507. *Poche v. Leon Motor Lodge, Inc.*, 275 So. 2d 55 (Fla. 1st Dist. 1973). It was pointed out in the dissenting opinion that the trial court did not state its basis for granting the defendant's motion. However, the defendant raised only three arguments in the pleadings on which the judge could have based his decision, namely that an exculpatory clause in the lease eliminated the landlord's liability, that the parents' failure to supervise the child was the proximate cause of his injury, and that the defendants had not constructed or maintained the door in a negligent manner. As the dissenting judge observed, the trial court could not have relied on the defendant's first argument since ample case law exists disfavoring such clauses; and the other two arguments raised questions of fact which should have been determined only by the jury.

508. See note 505 *supra*.

509. See, e.g., *Gentile v. Abadessa*, 267 So. 2d 344 (Fla. 4th Dist. 1972), where a summary judgment was reversed because the trial court made a factual finding on a disputed material issue, namely whether the defendants agreed to an alteration in a purchase contract.

510. *Coquina Ridge Properties v. East West Co.*, 255 So. 2d 279 (Fla. 4th Dist. 1971).

511. *Id.* at 280, quoting *Baskin v. Griffith*, 127 So. 2d 467, 474 (Fla. 1st Dist. 1961).

512. *Van Arsdale v. DiMil Land Co.*, 264 So. 2d 85 (Fla. 4th Dist. 1972).

513. *Id.* at 86 n.1.

514. *Ham v. Heintzelman's Ford, Inc.*, 256 So. 2d 264, 267 (Fla. 4th Dist. 1971).

515. *Clark v. Suncoast Peach Corp.*, 263 So. 2d 247 (Fla. 2d Dist. 1972). But see *Bridger v. Carter*, 281 So. 2d 229 (Fla. 1st Dist. 1973).

versed. The court held that under the *circumstances* presented, such action ran counter to the purpose of the rules—namely, the efficient and methodical trial of the material issues.<sup>516</sup> Also, where a defendant twice failed to show up at scheduled pretrial conferences, the trial court should not have granted a summary judgment, but rather should have cited her for contempt or assessed the costs of the conference against her.<sup>517</sup>

Perhaps the outer limit of judicial patience was reached when the District Court of Appeal, Fourth District, reversed a summary judgment which the trial court had granted to the defendant after the plaintiff's fourth attempt to state a cause of action was unsuccessful.<sup>518</sup> After observing that a motion to dismiss for failure to state a cause of action would have been more appropriate, the court construed the summary judgment as essentially a rule 1.140(b) dismissal and concluded:

We are not satisfied at this point that once plaintiff's counsel has been pointed in that direction and afforded a further opportunity to do so, he could not allege sufficient ultimate facts to get by a motion to dismiss. We feel that justice requires that appellant be afforded that further opportunity.<sup>519</sup>

The matters which may properly be considered by the trial judge are enumerated in the rule as including pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any.<sup>520</sup> It has been held, therefore, that it was improper for the judge to consider matters of which it did not make a record in granting a summary judgment for the defendants.<sup>521</sup> In contrast, however, the principle of liberality to the non-moving party on a motion for summary judgment has been held to apply also to a motion to receive new affidavit evidence<sup>522</sup> and to consider an untranscribed deposition.<sup>523</sup>

The rules provide for a partial summary judgment, interlocutory in character, which may be rendered on the liability issue alone, with damages to be determined at trial.<sup>524</sup> Where, however, a summary *final*

516. *Old Equity Life Ins. Co. v. Suggs*, 263 So. 2d 280 (Fla. 2d Dist. 1972); *accord*, *Curry Ford Apartments, Inc. v. Blackton, Inc.*, 249 So. 2d 693 (Fla. 4th Dist. 1971). *See* *Farish v. Lum's, Inc.*, 267 So. 2d 325 (Fla. 1972), requiring a showing of abuse of discretion before such reversal is proper. Where, however, a refusal to answer a request for admissions results in its being deemed admitted under rule 1.370, summary judgment may be proper. *Stockett v. Beneficial Fin. Co.*, 269 So. 2d 735 (Fla. 3d Dist. 1972).

517. *Clark v. Suncoast Peach Corp.*, 263 So. 2d 247 (Fla. 2d Dist. 1972). The court noted that the defendant did not arbitrarily disobey, and that the use of this procedure by the court serves only to penalize litigants by denying their right to trial.

518. *Duncombe v. Coutant*, 267 So. 2d 681 (Fla. 4th Dist. 1972).

519. *Id.* at 683.

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

521. *Winston v. Dura-Tred Corp.*, 268 So. 2d 426 (Fla. 3d Dist. 1972). The trial court had considered the record of the prior hearings in the case and had received and considered the testimony of a witness at one of the four hearings on the motion; however, that testimony was apparently never made a part of the record.

522. *National Properties, Inc. v. Ballenger Corp.*, 277 So. 2d 29 (Fla. 3d Dist. 1973).

523. *Fernandez v. Cunningham*, 268 So. 2d 166 (Fla. 3d Dist. 1972).

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

judgment has been entered, it should not be treated as an interlocutory order; a party to the action dismissed in a summary judgment may be brought back in only upon a new process.<sup>525</sup> Also, a summary judgment, once entered, should not be reversed solely because the court erroneously failed to afford the plaintiff leave to amend. According to the Supreme Court of Florida the correct procedure would be to affirm the summary judgment, but "without prejudice to the plaintiff filing an amendment to the complaint within the facts appearing of record."<sup>526</sup>

Rule 1.510 provides that a claimant may move for a summary judgment at any time after the expiration of 20 days from the commencement of the action, or after the adverse party has served a motion for summary judgment;<sup>527</sup> the defending party, however, may so move at any time.<sup>528</sup> Although the rule allows a claimant to *move* for a summary judgment after the defending party has so moved, the courts hold that a motion made prior to the filing of an answer should be *denied* unless it is clear that an issue of material fact cannot be presented.<sup>529</sup>

Rule 1.510(c) provides that the motion shall be served at least 20 days before the time fixed for the hearing and that the adverse party may serve opposing affidavits prior to the day of hearing.<sup>530</sup> If affidavits are presented at the hearing, they are considered untimely,<sup>531</sup> and are a fortiori untimely if presented two days after the hearing was held.<sup>532</sup> If the nonmoving party cannot support its position by submitting essential affidavits, the court may for reasons shown order a continuance.<sup>533</sup> Where a party failed to file an affidavit seeking such relief under rule 1.510(f), however, the trial court acted correctly in denying the motion for continuance.<sup>534</sup> And, finally, although rule 1.510(c) states that "the judgment sought shall be rendered forthwith"<sup>535</sup> if justified, it has been held that an eight month delay between the hearing and the entry of judgment

525. *Seijo v. Futura Realty, Inc.*, 269 So. 2d 738 (Fla. 3d Dist. 1972). In an action for a broker's commission against the sellers (husband and wife), the wife was granted a summary judgment. At trial six months later, the trial court, pursuant to the plaintiff's oral motion, committed reversible error by reversing the summary judgment for Mrs. Seijo and entering a summary judgment *against* both defendants.

526. *Gold Coast Crane Serv., Inc. v. Watier*, 257 So. 2d 249, 251 (Fla. 1971). The court noted that although the district court's reversal of the summary judgment was within the spirit of the rules allowing for liberal amendments of pleadings (see section IV, A, 4 *supra*), it was procedurally erroneous.

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

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

529. *Balzebre v. 2600 Douglas, Inc.*, 273 So. 2d 445 (Fla. 3d Dist. 1973). Here, both parties filed for summary judgment prior to plaintiff-counterdefendant answering the counterclaim, and the trial court was held to have committed reversible error by entering a partial summary judgment for the counterplaintiffs at that juncture.

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

531. *Auerbach v. Alto*, 281 So. 2d 567 (Fla. 3d Dist. 1973).

532. *Kendel v. City of Miami*, 281 So. 2d 566 (Fla. 3d Dist. 1973).

533. FLA. R. CIV. P. 1.510(f).

534. *Rosen v. Parkway Gen. Hosp., Inc.*, 265 So. 2d 93 (Fla. 3d Dist. 1972).

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

was not a violation of rule 1.510(c), since the complaining party was not adversely affected by the delay.<sup>536</sup>

### B. Sufficiency of Affidavits

Affidavits in support of, or in opposition to, a motion for summary judgment must be based on personal knowledge and contain facts which would be admissible in evidence.<sup>537</sup> Furthermore, if any of the affidavits appear to the court to be made in bad faith, the offending party must pay any reasonable expenses or attorney's fees incurred thereby.<sup>538</sup>

Because of the requirement that the facts set forth in the affidavit must be such as would be admissible in evidence, an affidavit predicated upon hearsay could not be utilized.<sup>539</sup> For example, in an action for account stated where the plaintiff's attorney filed an affidavit alleging that he was familiar with the books and records and that they showed the existence of the account sued upon, such hearsay evidence was not competent to support a summary judgment.<sup>540</sup>

## XII. JURY TRIAL

The right of a litigant to demand trial by jury of all issues so triable is assured by the Florida Constitution<sup>541</sup> and rules.<sup>542</sup> An amendment to rule 1.430(d), effective January 1, 1973, liberalized the procedural aspects of this right. Now the court may, despite the initial waiver of jury trial, allow, with the parties' consent, an amendment in the proceedings to demand a trial by jury or order a trial by jury on its own motion.<sup>543</sup>

However, under the pre-amendment rule, where both parties waived jury trial, the fact that plaintiff added a new party defendant by amending his complaint was held not to entitle the original defendants to request a jury trial as a matter of right.<sup>544</sup>

The time limit for a demand for jury trial<sup>545</sup> was at issue in *Moretto*

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536. *First Nat'l Bank v. Morse*, 248 So. 2d 658 (Fla. 2d Dist. 1971).

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

538. FLA. R. CIV. P. 1.510(g).

539. *Ham v. Heintzelman's Ford, Inc.*, 256 So. 2d 264 (Fla. 4th Dist. 1971).

540. *Topping v. Hotel George V*, 268 So. 2d 388 (Fla. 2d Dist. 1972). The court noted that the attorney was not an agent or employee of the plaintiff with personal knowledge, nor was he in charge of the business records within the contemplation of the "shop book" rule.

541. FLA. CONST. art. I, § 22.

542. FLA. R. CIV. P. 1.430.

543. FLA. R. CIV. P. 1.430(d). The purpose of the amendment is to conform the subdivision to the decisions construing it. Committee Note to FLA. R. CIV. P. 1.430, 30 FLA. STAT. ANN. 99 (Supp. 1973), citing *Shores v. Murphy*, 88 So. 2d 294 (Fla. 1956); *Wood v. Wariner*, 62 So. 2d 728 (Fla. 1953); and *Bittner v. Walsh*, 132 So. 2d 799 (Fla. 1st Dist. 1961).

544. *Leopold v. Richard Bertram & Co.*, 276 So. 2d 225 (Fla. 3d Dist. 1973). The plaintiff's amended complaint added no new issues as to the original defendant (the right of the newly added defendant to request jury trial was not at issue here).

545. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other party a demand therefor in writing at any time after commencement of the action and not later than ten days after the service of the last pleading directed to such issue.

FLA. R. CIV. P. 1.430(b).

*v. Sussman*,<sup>546</sup> where neither party timely requested a jury trial; defendants later amended their pleading to add a count for punitive damages to their counterclaim for usury, with a demand for jury trial. The trial judge denied the jury trial request and dismissed the amendment. In affirming, the District Court of Appeal, Fourth District, found the new pleading legally inadequate,<sup>547</sup> and thus defendants were not entitled to reopen the closed period for demanding a jury trial; but "had the defendants been able to plead a new and valid cause of action, they would newly be entitled to request and receive jury trial for the whole case or such part of it as would be appropriate."<sup>548</sup> However, allowing the period to be reopened where the new pleading was inadequate, according to the court, would render the time limit "impotent and meaningless," as a party could then use a "worthless pleading as a vehicle to remedy his earlier default in failing to timely request jury trial."<sup>549</sup>

Many of the jury trial cases arising during the survey period have dealt with the distinction between legal and equitable issues and its effect upon the right to trial by jury. For example, the denial of a jury trial in an action to set aside a conveyance was upheld on the ground that such an action was one previously cognizable in equity;<sup>550</sup> and where defendants sought reversal of a permanent injunction obtained under an obscenity statute on the ground, *inter alia*, that jury trial had been denied on the issue of obscenity, the court characterized the action as equitable and thus not triable by jury.<sup>551</sup>

Once an action is begun in equity and a non-jury trial has been set, a party may not obtain a jury trial by amending the complaint to include legal claims and a demand for trial by jury.<sup>552</sup> In so ruling, the trial court had ordered plaintiffs to list the issues they considered triable of right by a jury, but concluded after a hearing that the issues were so intertwined as to render a jury trial improper.<sup>553</sup>

Where the complaint raises equitable issues and the compulsory counterclaim raises legal issues which would be triable of right by a jury, the decision whether to sever the legal and equitable claims, trying the latter without a jury and the former with a jury, or to try the entire action

546. 274 So. 2d 259 (Fla. 4th Dist. 1973).

547. Punitive damages were not allowed under the usury statute. *Id.* at 260.

548. *Id.*

549. *Id.*

550. *Bryant v. Small*, 271 So. 2d 808 (Fla. 3d Dist. 1973).

551. *For Adults Only, Inc. v. State ex rel. Gerstein*, 257 So. 2d 912 (Fla. 3d Dist. 1972).

The court noted:

[A] defendant is ordinarily not entitled to a jury trial in an action in equity which seeks an injunction to abate a nuisance, and the statute under which this action was brought specifically authorizes the Circuit Court Judge to grant such an order.

*Id.* at 913.

552. *Davis v. McGahee*, 257 So. 2d 62 (Fla. 1st Dist. 1972).

553. The initial complaint sought an accounting, rescission, inspection of corporate books and dissolution of a corporation; the amendment added a count for conspiracy to defraud, seeking compensatory and punitive damages. *Id.*

with a jury, depends in turn upon whether the issues are sufficiently similar so that determination of the equitable issues would conclude the case.<sup>554</sup> Thus, if the determination of the factfinder in the non-jury trial of the equitable issues would necessarily bind a jury in determining the legal issues, the litigant would be deprived of his constitutional right to a jury trial of the legal issues. In such a case, the entire controversy should be submitted to a jury; but where the issues raised by the legal counterclaim are not common to the equitable issues raised by the complaint, the trial judge should proceed to try the equitable issues, with provision for a jury trial of the legal issues.<sup>555</sup>

Where only equitable relief is sought, the trial court nevertheless has discretion to submit questions of fact to a jury;<sup>556</sup> however, where the case is heard without a jury, "[a]n award solely of legal relief under such circumstances is inconsistent with Rule 1.430(a), FRCP, and the right of the opposing party to have claims for legal relief tried by a jury."<sup>557</sup>

The procedure for impaneling a jury is outlined in newly-adopted Rule 1.431,<sup>558</sup> which provides for a questionnaire to assist in selection of jurors, and also provides for peremptory challenges (three to each party) and challenges for cause. Under the latter provision, a prospective juror will be excused if, *inter alia*, "it appears that the juror does not stand indifferent to the action . . . ."<sup>559</sup>

Failure of a prospective juror to give truthful answers during the voir dire process may result in a new trial; concealment of material information sought in voir dire, whether intentional or not, deprives the parties of the opportunity to exercise challenges either peremptory or for cause.<sup>560</sup>

A new trial was granted, for example, where a prospective juror in a personal injury action replied in the negative when asked if he or any family member had ever been in an automobile accident, when in fact his daughter had been killed in one; in addition, he failed to disclose to the court his heart condition, although he made it clear to his fellow jurors,

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554. *Adams v. Citizens Bank*, 248 So. 2d 682 (Fla. 4th Dist. 1971). Here, the complaint sought foreclosure and the compulsory counterclaim sought monetary damages and demanded a jury. The trial court denied defendant's oral motions to submit the legal counterclaim to a jury before holding a non-jury trial on the mortgage foreclosure suit. On appeal the foreclosure was set aside since the issues were common to both claims and a jury trial should have been granted.

555. *Id.*

556. *Sanitary Linen Serv. Co. v. Executive Uniform Rental, Inc.*, 270 So. 2d 432 (Fla. 3d Dist. 1972), affirming denial of plaintiff's motion to strike defendant's demand for jury trial.

557. *M & M Inv., Inc. v. Bethlehem Steel Corp.*, 250 So. 2d 324, 325 (Fla. 4th Dist. 1971) (cross-claimant sought only equitable relief—enforcement of mechanic's lien or declaration of an equitable lien—but trial court erroneously awarded money damages).

558. Added effective December 13, 1971. *In re Florida Rules of Civil Procedure*, 253 So. 2d 404 (1971). Subdivisions (b) to (e) are taken from FLA. STAT. §§ 53.031, .021, .011 and .051 respectively, without substantial change; subdivision (a) replaces FLA. STAT. § 40.101. Committee Note to FLA. R. CIV. P. 1.431, 30 FLA. STAT. ANN. 102 (Supp. 1973).

559. FLA. R. CIV. P. 1.431(c)(1).

560. *Skiles v. Ryder Truck Lines, Inc.*, 267 So. 2d 379 (Fla. 2d Dist. 1972).



who later testified that they were reluctant to engage in any heated argument with him as a result of the condition.<sup>561</sup>

The possibility of an attorney's abusing the voir dire process was argued by the defendant in a wrongful death action;<sup>562</sup> there, plaintiff's attorney, after an unsuccessful attempt to join defendant's insurer, questioned the jurors on voir dire as to their possible connections with the insurance company. The District Court of Appeal, First District, however, affirmed the trial court's refusal to grant a mistrial, holding that *Shingleton v. Bussey*<sup>563</sup> was broad enough in scope to allow such questions. However, the trial court had denied plaintiff's motion to join the insurance company solely because it would have delayed the trial to grant the motion at such a late date.

### XIII. JURY INSTRUCTIONS

Rule 1.470 provides that parties must file their written requests for jury instructions not later than at the close of the evidence, and that all objections to any proposed instructions must be made at the charge conference.<sup>564</sup> If a party fails to file such requests<sup>565</sup> in writing,<sup>566</sup> or to timely object to those proposed,<sup>567</sup> he cannot assign as error any failure of the trial judge to charge the jury on any particular matter.

A number of cases arose during the survey period involving the Florida Standard Jury Instructions. For example, where the trial judge granted plaintiff's request to give instruction 6.2(c),<sup>568</sup> regarding past and future medical treatment, but in giving the instruction omitted reference to future treatment, the supreme court remanded the cause for a new trial as to damages;<sup>569</sup> and, where the judge failed to instruct jurors to reduce future damages to their present value per instruction 6.10,<sup>570</sup> it was held reversible error.<sup>571</sup> However, even where the trial judge has given a standard instruction in an inaccurate or incomplete manner, a timely objection is absolutely essential.<sup>572</sup>

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561. *Ellison v. Cribb*, 271 So. 2d 174 (Fla. 1st Dist. 1972).

562. *Signaigo v. Hennings*, 249 So. 2d 60 (Fla. 1st Dist. 1971).

563. 223 So. 2d 713 (Fla. 1969). See section V, B *supra*.

564. FLA. R. Civ. P. 1.470(b).

565. *Fleitas v. Robinson*, 273 So. 2d 419 (Fla. 3d Dist. 1973).

566. *Sun Ins. Office, Ltd. v. Noel*, 254 So. 2d 7 (Fla. 3d Dist. 1971) (no error in not giving charges orally requested since rule 1.470(b) requires a written request). *But cf.* *Rittenbery v. Eddins*, 272 So. 2d 840 (Fla. 1st Dist. 1973), affirming the trial court's order granting a new trial on the sole assigned ground that it had erred in refusing to give an instruction orally requested during the charge conference.

567. *Frankowitz v. Beck*, 257 So. 2d 918 (Fla. 3d Dist. 1972); *Zutell v. Sunrise Oldsmobile, Inc.*, 252 So. 2d 822 (Fla. 1st Dist. 1971); *Walton v. Robert E. Haas Constr. Corp.*, 259 So. 2d 731 (Fla. 3d Dist. 1972) (dictum).

568. Florida Standard Jury Instruction 6.2(c), 31 FLA. STAT. ANN. 485 (1967).

569. *LaRussa v. Vetro*, 254 So. 2d 537 (Fla. 1971).

570. Florida Standard Jury Instruction 6.10, 31 FLA. STAT. ANN. 488 (1967).

571. *Norman v. Mullin*, 249 So. 2d 733 (Fla. 2d Dist. 1971).

572. *Fleitas v. Robinson*, 273 So. 2d 419 (Fla. 3d Dist. 1973). Here, the court omitted the word "disfigurement" from instruction 6.2(a) in a case where the plaintiff had been permanently disfigured, and a jury verdict of only \$2,000 was returned. However, since

The trial judge, of course, has discretion in deciding whether to give the jury instructions requested. If they do not fully or fairly cover the issues, or are too argumentative, the court will be correct in refusing to give them;<sup>573</sup> but error was found where the court refused to instruct the jury that a defect must be shown in a product before recovery may be had from a drug manufacturer under an implied warranty theory.<sup>574</sup> The instructions given must also be consistent with the theory of recovery advanced; in a medical malpractice case where plaintiff claimed breach of express warranty, the trial judge first instructed the jury concerning that claim, but then instructed that the defendant would be exonerated if he had followed acceptable medical practice, regardless of whether he warranted a different result. This inconsistency constituted reversible error.<sup>575</sup> It is also error if a judge agrees to give an instruction but fails to do so.<sup>576</sup> Generally speaking, "jury instructions must be viewed in light of the evidence before reversible error can be ascertained; and, if it appears that the jury has not been confused or deceived, the judgment must be affirmed."<sup>577</sup>

An interesting question is raised where the jury requests additional instruction after it has retired. In a case where plaintiff's car stalled on defendant railroad's tracks, the jury was initially charged on proximate cause and contributory negligence.<sup>578</sup> In the course of their deliberations, however, the jurors sent a question to the court as to their duty if they found both parties negligent. The judge replied that their verdict should be for defendant, which they then duly returned. Although plaintiff argued on appeal that the trial judge erred in failing to explain in his reply the dependence of both negligence and contributory negligence on proximate cause, the District Court of Appeal, Third District, affirmed, explaining that the judge was entitled to assume that when the jury found both parties negligent, it had done so with reference to the initial charges.<sup>579</sup>

#### XIV. MOTIONS FOR NEW TRIAL AND REHEARING

Rule 1.530 provides the procedural basis whereby a dissatisfied litigant may obtain a new trial or rehearing on all or a part of the issues.<sup>580</sup> The use of this procedure has been held inappropriate where the order to

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plaintiff's attorney had made no specific request for charges and had failed to timely object to the instruction given, denial of a motion for new trial was affirmed.

573. *Ashland Oil, Inc. v. Pickard*, 269 So. 2d 714 (Fla. 3d Dist. 1972).

574. *E.R. Squibb & Sons, Inc. v. Jordan*, 254 So. 2d 17 (Fla. 1st Dist. 1971) (plaintiff allegedly suffered adverse reaction to a transplant of bovine bone supplied by defendant).

575. *Buga v. Wiener*, 277 So. 2d 296 (Fla. 4th Dist. 1973).

576. *Lawn v. Wasserman*, 248 So. 2d 548 (Fla. 3d Dist. 1971).

577. *Stewart v. Drawdy*, 277 So. 2d 803 (Fla. 2d Dist. 1973). In *Marley v. Saunders*, 249 So. 2d 30 (Fla. 1971), the supreme court used as the test of an instruction's correctness "whether the jury might have reasonably been misled . . ." *Id.* at 35.

578. *Perez v. Seaboard Coast Line R.R.*, 277 So. 2d 825 (Fla. 3d Dist. 1973).

579. *Id.* Note that Florida has now adopted the doctrine of comparative negligence. *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973).

580. FLA. R. CIV. P. 1.530(a).

which the motion was directed was a denial of a motion for a summary judgment.<sup>581</sup> Although the rule refers to "matters heard without a jury, including summary judgments,"<sup>582</sup> the supreme court interprets that language as permitting petitions for rehearing directed only to orders *granting* a summary judgment, observing that the "rules as currently amended do not permit motions for rehearing directed to interlocutory orders, such as orders denying summary judgment . . ."<sup>583</sup> Although contested, the use of a motion for rehearing has, however, been approved where the motion was directed to the granting of a partial summary judgment,<sup>584</sup> and to a dismissal of a complaint with prejudice.<sup>585</sup>

In ruling upon a new trial motion, the trial judge has wide discretion;<sup>586</sup> however, if it is concluded that the jury's verdict is against the manifest weight of the evidence, the judge has the duty to grant a new trial and "should always do so if the jury has been deceived as to the force and credibility of the evidence or it has been influenced by considerations outside the record."<sup>587</sup> Where the movant contends that the verdict was either grossly inadequate or excessive, the trial judge must determine whether reasonable persons could reach the verdict given,<sup>588</sup> and an appellate court should not disturb the verdict unless it "shocks the conscience of the court."<sup>589</sup> The fact that a trial judge grants the motion for a new trial does not, however, mean that the movant is entitled to a verdict as a matter of law because there is insufficient evidence to support his opponent's case;<sup>590</sup> granting such a motion should mean only that the trial judge is convinced that "the verdict is wholly unsupported by the evidence or that it was the result of passion, prejudice, or other improper motive."<sup>591</sup> Furthermore, unless an appellant can show either that a jury considered an inappropriate item of damages, or that it was influenced by passion and sympathy, the jury's verdict should stand: "Neither an appellate court nor a trial court is to act as a seventh juror with veto power."<sup>592</sup>

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581. *Wagner v. Bieley, Wagner & Assoc., Inc.*, 263 So. 2d 1 (Fla. 1972).

582. FLA. R. CIV. P. 1.530(a).

583. *Wagner v. Bieley, Wagner & Assoc., Inc.*, 263 So. 2d 1, 4 (Fla. 1972). Justice Dekle dissented on the basis that rule 1.530(a) does not specify that only orders granting summary judgments fall within its scope.

584. *De Witt v. Seaboard Coast Line R.R.*, 268 So. 2d 177 (Fla. 2d Dist. 1972).

585. *Laytner v. Humble Oil & Refining Co.*, 262 So. 2d 675 (Fla. 1972).

586. *Bullard v. Canale*, 260 So. 2d 237 (Fla. 4th Dist. 1972). A court has much broader discretion in determining whether to grant a new trial than in the case of a summary judgment. *Fletcher Co. v. Melroe Mfg. Co.*, 261 So. 2d 191 (Fla. 1st Dist. 1972). However, once a motion for summary judgment is granted, the trial court's normal discretion is narrowed in ruling upon any subsequent motion for rehearing by the losing party. *Anderson v. Aamco Transmissions, Inc.*, 265 So. 2d 5 (Fla. 1972).

587. *Pittman v. Smith*, 252 So. 2d 279, 279 (Fla. 4th Dist. 1971).

588. *Hutto v. Washington County Kennel Club, Inc.*, 253 So. 2d 726 (Fla. 1st Dist. 1971).

589. *Seaboard Coast Line R.R. v. McKelvey*, 259 So. 2d 777, 780 (Fla. 3d Dist. 1972).

590. *Fletcher Co. v. Melroe Mfg. Co.*, 261 So. 2d 191 (Fla. 1st Dist. 1972).

591. *Seaboard Coast Line R.R. v. McKelvey*, 259 So. 2d 777, 780 (Fla. 3d Dist. 1972).

592. *Id.* at 781.

Because a litigant's right to an impartial jury is paramount, a new trial should be granted if the jury was prejudiced in any way. Thus, where the jury returned a verdict covering only medical bills and repairs to the plaintiff's automobile, with zero damages for pain and suffering, the fact that one of the jurors was involved in an accident similar to the plaintiff's on the morning of the last day of trial and told the other jurors of the incident resulted in a new trial for the plaintiff. The court held that the coincidence between the zero damages award and the juror's accident showed that the other jurors might have been influenced improperly.<sup>593</sup>

Other matters which may improperly influence a jury and result in a new trial include admission of prejudicial evidence,<sup>594</sup> and, in some cases, failure to give a requested instruction.<sup>595</sup> Considerable latitude, however, is apparently allowed in closing arguments to the jury. A new trial will not be granted unless the remarks are so prejudicial as to be incurable by instruction,<sup>596</sup> or unless they are highly prejudicial and inflammatory;<sup>597</sup> even so, "[a]n appellant must assume the heavy burden of showing inherent and actual prejudice, which cannot be inferred solely from an adverse verdict."<sup>598</sup>

As noted above,<sup>599</sup> a new trial will also be in order if the verdict returned was either grossly inadequate or excessive in view of the evidence presented. In a number of cases during the survey period, the appellate courts affirmed trial court orders granting a new trial where the verdict was contrary to the manifest weight of the evidence;<sup>600</sup> and in one instance, where the trial court had granted a new trial as to damages only, the appellate court ruled that a close question existed as to whether the inadequate verdict resulted from compromise by the jury as to liability, and therefore ordered a new trial on all the issues.<sup>601</sup> In another case, the trial court denied the plaintiff's motion for new trial where the jury awarded only \$394 in favor of the plaintiff father and zero damages to his

593. *Lockhart v. Prudot*, 271 So. 2d 157 (Fla. 2d Dist. 1972). A new trial was also granted where a juror's failure to answer truthfully on voir dire had a prejudicial effect on the jury's verdict. *Ellison v. Cribb*, 271 So. 2d 174 (Fla. 1st Dist. 1972); see note 561 *supra* and accompanying text.

594. *Morrison v. Bohne*, 274 So. 2d 896 (Fla. 2d Dist. 1973), where a new trial on damages was justified by the admission of mortality tables into evidence where there was no evidence to show that the plaintiff's injury was permanent.

595. In *Lawn v. Wasserman*, 248 So. 2d 548 (Fla. 3d Dist. 1971), the trial court ruled that it would give a requested charge on loss of future earnings; failure to do so resulted in a new trial. See also *Rittenberry v. Eddins*, 272 So. 2d 840 (Fla. 1st Dist. 1973).

596. *American Express Co. v. Juhasz*, 281 So. 2d 245 (Fla. 3d Dist. 1973).

597. *Carson v. Iacona*, 281 So. 2d 226 (Fla. 1st Dist. 1973).

598. *Id.* at 226.

599. See note 588 *supra* and accompanying text.

600. *Aircraft Taxi Co. v. Ford*, 272 So. 2d 7 (Fla. 3d Dist. 1973); *Hubbard v. Brown*, 260 So. 2d 267 (Fla. 2d Dist. 1972); *Bullard v. Canale*, 261 So. 2d 237 (Fla. 4th Dist. 1972); *Thompson v. Williams*, 253 So. 2d 897 (Fla. 3d Dist. 1971). In *Thompson*, the court noted that the order for a new trial need not specifically state that the verdict was against the manifest weight of the evidence; it was sufficient to state that the evidence was uncontroverted that the defendant's negligence was the sole proximate cause of injury.

601. *1661 Corp. v. Snyder*, 267 So. 2d 362 (Fla. 1st Dist. 1972).

injured minor son. In reversing and ordering a new trial on the damages issue, the appellate court noted that the jury's verdict was contrary to the law and the evidence, and that its verdict could have been reached only by disregarding the trial court's instruction as to pain and suffering.<sup>602</sup>

Appellate courts will not reverse trial court orders granting a new trial unless an abuse of discretion is clearly shown; a stronger showing of abuse is required to reverse an order allowing a new trial than to reverse one denying it.<sup>603</sup> Such a showing was successfully made in two automobile accident cases from the District Court of Appeal, Second District, where the juries awarded zero damages for pain and suffering for claimed neck injuries. The trial courts granted a new trial in both cases but were reversed by the appellate court because the records did not show that the verdicts were unreasonable or that the juries were improperly influenced by other factors.<sup>604</sup> Finally, a new trial may not always be the most appropriate means for correcting an erroneous jury verdict. In a wrongful death action where it was apparent that the amounts awarded to the plaintiff as decedent's widow and executrix had been transposed, the trial judge should have entered judgment in accordance with the obvious intent rather than ordering a new trial.<sup>605</sup>

Occasionally, where an excessive verdict has been rendered, a trial judge will offer the plaintiff the alternatives of a remittitur of part of the verdict or a new trial. This procedure has been held improper where the record revealed no reasonable basis on which to determine the amount of excess.<sup>606</sup> However, a remittitur order was affirmed in another case<sup>607</sup> where the excessiveness of the verdict appeared on the record; the trial court had discretion to calculate the amount of excess "through any process of reasoning actuated or controlled by the facts in the record,"<sup>608</sup> even though the amount of excess could not be worked out precisely from the face of the record. Where, however, an insufficient verdict was returned, the trial court may not enter an additur, as "there is no authority in this jurisdiction to require a party to consent to an additur as a condition to refusal to grant a new trial."<sup>609</sup>

Rule 1.530(b) provides that a motion for new trial or rehearing must

602. *Hancock v. Smith*, 248 So. 2d 211 (Fla. 3d Dist. 1971); *accord*, *Meana v. St. Petersburg Kennel Club, Inc.*, 279 So. 2d 329 (Fla. 2d Dist. 1973). Apparently, however, the trial court need not grant a new trial even though the jury returned inconsistent verdicts, if the complaining parties failed to point out the inconsistency in time for resubmission of the issues to the jury. *Lindquist v. Covert*, 279 So. 2d 44 (Fla. 4th Dist. 1973).

603. *Ashland Oil, Inc. v. Pickard*, 269 So. 2d 714 (Fla. 3d Dist. 1972).

604. *Frazier v. Merricks*, 271 So. 2d 36 (Fla. 2d Dist. 1972); *Tejon v. Broome*, 261 So. 2d 197 (Fla. 2d Dist. 1972). In *Tejon*, the district court of appeal noted that although it would probably have decided otherwise, it would not usurp the jury's function.

605. *Cory v. Greyhound Lines, Inc.*, 257 So. 2d 36 (Fla. 1971).

606. *Blair v. Chrysler Cred. Corp.*, 260 So. 2d 236 (Fla. 3d Dist. 1972).

607. *Cohen v. Margoa, Inc.*, 281 So. 2d 406 (Fla. 3d Dist. 1973).

608. *Id.* at 408, *quoting* *De la Vallina v. De la Vallina*, 90 Fla. 905, 107 So. 339 (1926).

609. *City of Fort Walton Beach v. Southern State Steel Corp.*, 249 So. 2d 62, 62 (Fla. 1st Dist. 1971); *accord*, *Healy v. Atwater*, 269 So. 2d 753 (Fla. 3d Dist. 1972).

be served no later than ten days after the jury has rendered its verdict or after the judgment has been entered in a non-jury action.<sup>610</sup> This time limit is mandatory, and where the movant filed his motion one day late, the trial court had already lost jurisdiction over the cause.<sup>611</sup> It should be noted that the rule refers to *service* rather than filing as the dispositive act, and considerable confusion has been generated as a result. Despite the language in the rule, Florida courts evidently require that motions for new trial be "filed" within ten days,<sup>612</sup> and in the opinions frequently the terms "filed" and "served" are used interchangeably.<sup>613</sup>

## XV. RELIEF FROM JUDGMENT

A final judgment may, upon proper motion, be set aside for a variety of reasons;<sup>614</sup> most often, judgments have been set aside when a party has demonstrated "mistake, inadvertence, surprise or excusable neglect."<sup>615</sup> Where the movant advances those arguments as warranting relief from judgment, the facts of each case should control whether relief under rule 1.540(b) should be granted.<sup>616</sup> Most cases falling within the "excusable neglect" area have been decided, however, on the basis of the liberal interpretation in *North Shore Hospital, Inc. v. Barber*.<sup>617</sup> For example, when a corporate defendant's representative was served by the sheriff but took no action allegedly because he thought the sheriff would also serve the corporation's resident agent and counsel, who would presumably file an answer, the trial court's denial of the defendant's motion to vacate the judgment was reversed; the appellate court noted that where no substan-

610. FLA. R. CIV. P. 1.530(b).

611. *Investment Corp. v. Florida Thoroughbred Breeders Ass'n*, 256 So. 2d 227 (Fla. 3d Dist. 1972). The court noted that if the timely "filing" requirement were not mandatory, the appeal time might be extended indefinitely. *Contra*, *Kuhn v. Kuhn*, 261 So. 2d 532 (Fla. 3d Dist. 1972), where an untimely motion for rehearing was instead considered as one for relief from judgment under FLA. R. CIV. P. 1.540.

612. *See, e.g.*, *Investment Corp. v. Florida Thoroughbred Breeders Ass'n*, 256 So. 2d 227 (Fla. 3d Dist. 1972).

613. *E.g.*, *Behm v. Department of Transp.*, 275 So. 2d 545 (Fla. 4th Dist. 1973). Although the question before the court was the timeliness of a motion for judgment notwithstanding the verdict, the court discussed extensively the closely related aspect of the timeliness of motions for new trial and recommended that

the several rules which require the filing, service, or moving, with time deadline and jurisdiction in balance, should be clarified with minute specificity by the rule making authority, and hopefully with a degree of uniformity to the end that the reader and user will know precisely what is required.

*Id.* at 547.

614. FLA. R. CIV. P. 1.540(b).

615. FLA. R. CIV. P. 1.540(b)(1).

616. *Edwards v. City of Fort Walton Beach*, 271 So. 2d 136 (Fla. 1972). Here, on conflict certiorari, the supreme court disapproved the holding in *Lawn v. Wasserman*, 226 So. 2d 261 (Fla. 3d Dist. 1969), that misplaced reliance upon an insurance company for a timely defense did not constitute excusable neglect, insofar as it suggested a general rule.

617. 143 So. 2d 849 (Fla. 1962). Although this is the leading case on excusable neglect, it should be noted that the court was concerned only with setting aside an interlocutory order of default, not one on which a final judgment had been entered.

tial disadvantage to the plaintiff would result, courts should be liberal in setting aside default judgments to allow trial on the merits.<sup>618</sup>

Courts are especially reluctant to allow a judgment to stand where it would operate to unduly penalize a litigant,<sup>619</sup> particularly when an attorney's neglect is the underlying cause of the problem. Where, for example, a defendant's attorney failed to appear at the pretrial conference, the appellate court reversed the resulting judgment, suggesting that judicial sanctions could more appropriately be imposed on the attorney than on the client.<sup>620</sup>

An interesting variation on the inadvertence or excusable neglect theme was raised in *Smiles v. Young*,<sup>621</sup> where a settlement was negotiated between the parties and a judgment entered thereon. Later the plaintiff moved for relief from the judgment, claiming that her doctor had told her she had only a sprain, whereas the court-appointed physician had found a fracture; the latter's report had, however, been given only to the defendant. After an evidentiary hearing, the trial court granted the motion based upon the plaintiff's excusable neglect in relying upon her own doctor's findings and her mistake of fact as to the nature of her injury. This was reversed on appeal, however, with instructions to reinstate the final judgment. The district court of appeal reasoned that the plaintiff's failure to request a copy of the doctor's report was not "inadvertent," since rule 1.360(b) could supply good tactical reasons for such conduct.<sup>622</sup>

Finally, an unrepresented defendant may be excused from failure to plead where such failure was caused by the plaintiff's efforts to resolve

618. *Imperial Indus., Inc. v. Moore Pipe & Sprinkling Co.*, 261 So. 2d 540 (Fla. 3d Dist. 1972); *accord*, *Renuart-Bailey-Cheely Lumber & Supply Co. v. Hall*, 264 So. 2d 84 (Fla. 3d Dist. 1972); *Bates v. Keyes Co.*, 261 So. 2d 549 (Fla. 3d Dist. 1972); *Martinez v. Kanitz*, 254 So. 2d 405 (Fla. 3d Dist. 1971). Before an appellate court will reverse the trial court's denial of a 1.540(b) motion, however, there must be a clear showing that the trial court abused its discretion in finding no excusable neglect. *Bennett v. Halper*, 248 So. 2d 522 (Fla. 3d Dist. 1971).

619. For example, in *Lum's, Inc. v. Farish*, 251 So. 2d 338 (Fla. 3d Dist. 1971), a summary judgment was entered for the plaintiff where the defendant's answers to the plaintiff's request for admissions were timely filed but not sworn to and properly signed, and despite the defendant's motion for leave to file properly executed answers. In reversing, the District Court of Appeal, Third District, held that the judgment violated the spirit and intent of the Florida Rules of Civil Procedure and operated as a penalty. However, the supreme court reversed, requiring a showing of abuse of discretion by the trial judge, "who sees the parties first-hand and is more fully informed of the situation . . ." *Farish v. Lum's, Inc.*, 267 So. 2d 325, 327 (Fla. 1972). Such abuse was shown in two cases during the period surveyed. *Old Equity Life Ins. Co. v. Suggs*, 263 So. 2d 280 (Fla. 2d Dist. 1972); *Curry Ford Apts., Inc. v. Blackton, Inc.*, 249 So. 2d 693 (Fla. 4th Dist. 1971).

620. *Crystal Lake Golf Course, Inc. v. Kalin*, 252 So. 2d 379 (Fla. 4th Dist. 1971). Similarly, in *Taylor v. Wells*, 265 So. 2d 402 (Fla. 1st Dist. 1972), an action for dissolution of marriage, the appellate court set aside a default which resulted from the wife's attorney's incorrect calendar entry, even though the plaintiff husband had died in the meantime, since property rights were in controversy and the wife had not had her day in court because of her attorney's neglect.

621. 271 So. 2d 798 (Fla. 3d Dist. 1973).

622. See Section VI, B, 5 *supra*.

the controversy by arbitration,<sup>623</sup> and where the plaintiff's correspondence "suggested not the slightest reason why the defendant ought to divert its attention from arbitration to litigation . . . ."<sup>624</sup>

Although relief is most often granted under rule 1.540(b) in cases of excusable neglect, the rule<sup>625</sup> lists a number of other reasons which may justify relieving a party from a final judgment, such as newly discovered evidence and fraud or other misconduct by an adverse party. Relief should also be granted if the original judgment upon which the contested judgment was based has since been reversed,<sup>626</sup> or if "it is no longer equitable that the judgment or decree should have prospective application."<sup>627</sup> If the moving party is unable to show that any of the enumerated grounds exist, however, the final judgment remains binding, whether erroneous or not;<sup>628</sup> for example, the gross inadequacy of price obtained at a judicial sale will not, of itself, void the sale so as to afford relief under rule 1.540(b)(4); new grounds must be presented.<sup>629</sup> In the absence of special circumstances such as mistake or fraud perpetrated on the court, a successor judge cannot on the same facts vacate a dismissal judgment rendered by his predecessor.<sup>630</sup> Furthermore, if a motion for relief from judgment is denied, that denial may have a *res judicata* effect upon any subsequent rule 1.540 motion.<sup>631</sup>

Rule 1.540(a) provides that clerical mistakes in judgments and

623. *Palmer Johnson, Inc. v. Buxton*, 262 So. 2d 892 (Fla. 2d Dist. 1972).

624. *Id.* at 893. The court further observed: "Our guild is not so clannish that every defendant so lulled into a sense of security is obligated to hire one of our profession to proceed within twenty days to file something as a token of defendant's distrust." *Id.* at 893.

625. FLA. R. CIV. P. 1.540(b).

626. *Riley v. Gustinger*, 252 So. 2d 583 (Fla. 3d Dist. 1971).

627. FLA. R. CIV. P. 1.540(b)(5). According to the District Court of Appeal, Second District, at least, this refers only to matters which existed prior to the entry of the judgment, and presupposes that the judgment was valid to begin with. *Hensel v. Hensel*, 276 So. 2d 227 (Fla. 2d Dist. 1973). Thus, where judgment was rendered on a promissory note and the defendant based a motion for relief therefrom on the language quoted, the trial court granted the motion on the strength of exhibits showing prior release and partial payment. However, that decision was reversed on interlocutory appeal; the court held that since these "affirmative defenses" existed *before* the judgment was rendered, they may not be introduced at this late stage: "[T]he equities spoken of in ground No. 5 of the rule are those which come to fruition *after* a final judgment, not those which would theretofore have been available as defenses to the action." *Id.* at 228 (original emphasis). Nor could the defendant bring the evidence within ground number 2, that of newly discovered evidence.

628. *Cribb v. Cribb*, 261 So. 2d 566 (Fla. 4th Dist. 1972), where a divorced wife, more than two years after entry of the divorce decree, sought to vacate that portion of the decree which awarded exclusive possession of jointly-owned property to the husband. No direct appeal had been taken; the court held that a rule 1.540 motion could not then be granted.

629. *American Nat'l Bank v. Lau*, 268 So. 2d 567 (Fla. 2d Dist. 1972). The sale is merely voidable, requiring a showing of mistake, fraud, etc., in addition to gross inadequacy of price. *Id.*

630. *Barnard v. Overstreet*, 259 So. 2d 517 (Fla. 3d Dist. 1972).

631. In *Perkins v. Salem*, 249 So. 2d 466 (Fla. 1st Dist. 1971), the court found that the grounds presented by the second motion could or should have been included in the first motion; therefore the denial of the first motion was *res judicata* as to all grounds assigned as bases for relief in the second motion. As to amended motions, see notes 640 & 641 *infra* and accompanying text.



errors in the record arising from oversight or omission may be corrected by the court at any time by motion of a party or on its own initiative,<sup>632</sup> as opposed to mistakes in substance,<sup>633</sup> for which a motion must be filed within one year.<sup>634</sup> Cases arise under this section usually as a result of disagreement as to the nature of the mistake which a party seeks to correct.<sup>635</sup>

If a clerical mistake is not discovered until after an appeal has been filed and docketed in the appellate court, leave of that court is required before the mistake may be corrected by the trial court.<sup>636</sup> This is also true of motions to vacate judgment under section 1.540(b), where the judgment has already been reviewed by an appellate court.<sup>637</sup> It should be noted, however, that rule 1.540 does not limit the power of a court to entertain an *independent action* to vacate a judgment for fraud upon the court, and no time limit is specified for bringing such an independent action.<sup>638</sup> Fraud on the court should be narrowly defined, however, since the policy of the law favors termination of litigation; in order to succeed in such an independent action, a party would have to show that the trial court was misled as to its jurisdiction, or that the complaining party was

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632. FLA. R. CIV. P. 1.540(a), *cited in* Stella v. Craine, 281 So. 2d 584 (Fla. 4th Dist. 1973).

633. Wilder v. Wilder, 251 So. 2d 311 (Fla. 4th Dist. 1971).

634. FLA. R. CIV. P. 1.540(b), referring to mistakes in substance, states:

The motion shall be made within a reasonable time, and for [mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, fraud or misrepresentation] not more than one year after the judgment, decree, order or proceeding was entered or taken.

635. Thus, in a divorce action, where the oral order of the trial judge that the wife was to be named irrevocable beneficiary of the husband's life policy was, through error, stated in the written judgment as entitling her to be beneficiary for only so long as she was entitled to alimony, the wife obtained a court order clarifying and amending the judgment accordingly one year and eleven days after the judgment was rendered. The husband appealed, claiming only "pure clerical error" was correctible at any time, and that mistakes in substance must be corrected within one year. The court agreed, holding the error to be one of substance, and that the wife's motion was therefore untimely. Wilder v. Wilder, 251 So. 2d 311 (Fla. 4th Dist. 1971).

Similarly, the lack of a provision in a divorce decree for termination of alimony upon the wife's remarriage was held to be a mistake of substance and not subject to correction after one year. Keller v. Belcher, 256 So. 2d 561 (Fla. 3d Dist. 1971).

636. FLA. R. CIV. P. 1.540(a). Thus, where the defendants sought to dismiss the plaintiff's appeal on the grounds that the plaintiffs were non-residents and had failed to post the cost bonds required by FLA. STAT. § 57.011 (1971), the appellate court relinquished its jurisdiction to allow those plaintiffs who were Florida residents (and had so stated in their answers to interrogatories) to apply to the trial court for correction of its order to post the bonds. Churruca v. Miami Jai-Alai, Inc., 271 So. 2d 818 (Fla. 3d Dist. 1973).

637. Lesperance v. Lesperance, 257 So. 2d 66 (Fla. 3d Dist. 1971). The appellate court ruled that:

After the opinion and mandate of this court was rendered . . . , the final judgment of the trial court became the judgment of this court and the trial court had no authority or jurisdiction to entertain a motion to vacate its original judgment without permission therefor having been obtained from this court.

*Id.* at 67.

638. Board of Pub. Instr. v. Dinkines, 278 So. 2d 663 (Fla. 3d Dist. 1973).

prevented from effectively presenting his case, or that some equally serious misrepresentation was made.<sup>639</sup>

Finally, an amended motion for relief from judgment presented after the one-year period will be considered timely even if no new grounds are presented, since it is deemed to relate back to the original motion;<sup>640</sup> and if the original motion was *granted* but later reversed on appeal, the time for filing an amended motion "should be tolled from the entry of the order granting said relief to the termination of any appeal challenging the order which granted the relief."<sup>641</sup>

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639. In an action to set aside conveyances allegedly fraudulently made in order to defeat the plaintiff's efforts to collect its outstanding deficiency judgment, the defendant counterclaimed that the plaintiff had obtained its earlier deficiency judgment by fraud upon the court and sought to have it set aside. The appellate court affirmed the trial court's action in striking the counterclaim, holding that a rule 1.540(b) motion for relief from judgment should have been made in the original action, and that the counterclaim did not sufficiently allege facts showing fraud on the court to sustain an independent action to vacate the judgment: *Alexander v. First Nat'l Bank*, 275 So. 2d 272 (Fla. 4th Dist. 1973).

640. *American Nat'l Bank v. Lau*, 268 So. 2d 567 (Fla. 2d Dist. 1972), where an amended motion to vacate made four and one-half years later was held to be timely in that it raised no new or different grounds for relief but merely sought to join other parties, against whom it was untimely. As to the res judicata effect of denial of such a motion, see note 631 *supra*.

641. *In re Will of Aston*, 262 So. 2d 246, 248 (Fla. 4th Dist. 1972), a case of first impression in Florida. The court justified its construction as an effort to achieve the "'just, speedy and inexpensive determination of every action'" required by FLA. R. Civ. P. 1.010. *Id.* at 248 (court's emphasis). The original motion was "inadequate as a matter of pleading"; the amended motions were in more detail and sufficiently distinguishable so that the trial court was not precluded by the original appellate reversal from passing on the merits of the amended motions. *Id.* at 248-49.