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FLORIDA NOTE

THE 1966 AMENDMENTS TO THE FLORIDA RULES OF CIVIL PROCEDURE

That which follows is simply a brief capsule reporting and analysis of the amendments to the Florida Rules of Civil Procedure, as they went into effect on January 1, 1966. This brief analysis is merely intended to act as a checklist for the practitioner. Each of these amendments will be more fully discussed in the forthcoming *Survey of Civil Procedure* to be published in the next issue of the *University of Miami Law Review*.

ACTIONS AT LAW AND IN EQUITY

Rule 1.3(b)(d): Formerly the rules provided only for the issuance of a "summons" by the clerk or judge. The new rule provides for "summons or other process."

Rule 1.6(a): In computing time, if the last day falls on a Saturday, it is excluded, as well as Sundays.

(b): The new rule prohibits the court from extending the time for making a motion for a new trial, for filing a petition for rehearing or motion to alter or amend judgment or to make a motion for relief under Rule 1.38(b) [excusable neglect, etc.] or for taking an appeal or filing a petition for certiorari or for making a motion for a directed verdict.

Rule 1.7(a): In addition to a Complaint, the new rule also provides for a petition, "when so designated by statute or rule." The old term, "reply" to a counterclaim, has been changed to "answer." The new rule now conforms to the Federal Rule which requires a party to answer a counterclaim only when the counterclaim is "denominated as such." The new rule also provides for a Third Party Complaint and Answer. [See Rule 1.41.]

Rule 1.8(b): The amended rule provides that all claims for relief [Complaint, Counterclaim, Cross-Claim and Third Party Claim] must contain "a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it."

Rule 1.10(a): Formerly, it was only necessary to attach to a pleading those documents which were the basis of one's claim. The new rule also requires the attachment of documents which are the basis of the pleader's defenses.

(b): Now this rule permits one to adopt, by reference, statements contained in a pleading, in a different part of the same pleading, or in another pleading or in any motion.

Rule 1.11(a): The amendment changes terminology from “reply” to the counterclaim to “answer,” consistent with Rule 1.7(a).

(b): In making a motion to dismiss, the pleader is now required to state specifically the grounds for the motion, as well as the substantial matters of law which he intends to argue. [But the rule does not provide the consequences of making an insufficient motion under this new rule.].

Subdivision (b) has also added a provision to the effect that any ground available under Rule 1.11(b) which is not raised in the motion [assuming one has been made] is waived, except for a motion to dismiss for lack of jurisdiction over the subject matter, which “may be raised at any time.”

Rule 1.13(a): Compulsory Counterclaims: The new rule requires the pleader to assert as a counterclaim any claim “which at the time of serving the pleading the pleader has against any opposing party.” Thus, the subject matter of the counterclaim must have accrued prior to the time the Answer is served.

The new rule also provides that it is not necessary to assert a counterclaim, if, at the time the action is commenced, (at the plaintiff’s filing of the Complaint) the defendant’s claim is the subject of another pending claim. Formerly, the defendant was required to assert a compulsory counterclaim “whether the subject of a pending action or not.”

The new rule also provides that it is not necessary for the pleader to assert a counterclaim, if the opposing party sued the pleader by attachment or by other process by which the court’s in personam jurisdiction was not invoked.

(b): **Permissive Counterclaim:** Formerly, the pleader was permitted to assert as a counterclaim any claim “within the jurisdiction of the court.” This clause has been deleted, which raises the question of whether it may now be proper to assert a permissive counterclaim even when there are no independent jurisdictional grounds to support it.

(c): **Counterclaim Exceeding Opposing Claim:** Formerly, the rule provided that a counterclaim was not to be construed as admitting any part of the plaintiff’s claim. This provision was deleted from the new rule, thus raising the question of whether statements in a

counterclaim may now be construed to admit part of the plaintiff's claim.

(g): *Cross-Claims*: Formerly, the rule permitted a cross-claim against a co-party if the claim was "within the jurisdiction of the court." This phrase has been deleted and it remains to be seen whether a cross-claim still requires independent jurisdictional grounds to support it.

Rule 1.15: Amended or Supplemental Pleadings:

(a): Formerly, a party was required to respond to an amended pleading within the time remaining to respond to the original pleading, or within 10 days after service of the amended pleading, whichever was longer. The new rule now gives the pleader 20 days, outright, after service of the amended pleading. It also provides that if a motion or response to the original pleading is served, and the party does not move or respond to an amended pleading, the original response will be considered as pleaded to the amended pleading.

Rule 1.16: Pre-trial Procedure: Formerly, the rule provided for a pre-trial calendar on which actions might be placed "for trial or consideration." The new rule only provides for placing actions on pre-trial calendar "for consideration."

A new paragraph has been added, which requires the court to serve the attorneys with a copy of the order setting the pre-trial at least 20 days prior to the pre-trial conference. If the attorney fails to attend the conference, the court has the discretion to dismiss the action, strike the answer, or "take such action as justice requires."

Rule 1.19(a): This rule formerly permitted the substitution of parties, in the case of the death of a party, within 2 years of his death. It now requires a motion to substitute within 90 days after the death is suggested on the record. If no such motion is made the action will be dismissed as to the deceased party.

There also are changes concerning death or separation from office of a public officer.

Rule 1.21(a): Depositions: Formerly, the plaintiff needed leave of court to take the deposition of the defendant within 20 days after the "commencement of the action" [*filing* of the complaint]. Under the new rule, the plaintiff needs leave of court within 20 days after *service* of the complaint on the defendant.

Rule 1.22(b): Depositions Pending Appeal: Formerly, the rule permitted depositions pending appeal from a judgment of the *circuit* court only; the rule now permits in connection with appeal from "any court."

Rule 1.23(b): This rule now sets forth procedure for taking depositions in a foreign country.

Rule 1.24(d): Protective Orders Re Depositions: Formerly, any person seeking a protective order had to apply to the court where the action was pending or to "the court in the circuit where the deposition is being taken." The latter alternative has been changed to the "circuit court where the deposition is being taken."

Rule 1.27: Interrogatories to Parties: Formerly, the plaintiff could not serve interrogatories without leave of court within 10 days after "commencement of the action" [filing of the complaint]. The plaintiff is now required to wait 10 days from the *service* of the complaint on the defendant, or else seek leave of court.

The period of time in which to answer interrogatories has been enlarged from 15 to 20 days.

Rule 1.30: Admission of Facts and Genuineness of Documents:

(a): Formerly, the plaintiff needed leave of court to serve such requests within 10 days after "commencement of the action" [filing of complaint]. He now must wait 10 days after "*service*" of the complaint on the defendant.

Formerly, the party was required to respond within the time stated in the Request, which could not be less than 10 days after service of the Request; the minimum time for requiring admissions has now been extended from 10 to 20 days.

Rule 1.31(a): Refusal To Answer Questions: Formerly, in certifying questions, notice was required to be given "to all persons affected thereby." This has been changed to "all parties and the deponent."

Rule 1.34(c): Subpoena: Now provides that a subpoena may be served by "any person who is not a party and who is not less than 21 years of age."

Rule 1.35: Dismissal of Actions: This rule has been completely revised:

(a) *Voluntary Dismissal*:

(1) Except in actions where property has been seized or is in the custody of the court, the plaintiff may dismiss without order of court, by:

(i) Serving a *notice of dismissal* at any time before hearing on a motion for summary judgment, or if none is served or if the motion is denied, before the jury retires, or before submitting a non-jury case to the court

for decision. This new rule, in effect, reinstates the non-suit to its former status.

- (ii) Filing a *stipulation of dismissal* signed by all parties who have appeared in the action.

Unless otherwise stated in the notice or stipulation, the dismissal is *without prejudice*, except that the old "two-dismissal rule" still applies.

- (2) Any other action can be dismissed only *by order of court* and upon such terms and conditions as the court deems proper. If the defendant serves a counterclaim before being served with a notice of dismissal, the action cannot be dismissed unless the counterclaim can remain for independent adjudication by the court. [Query: new Rule 1.13 seems to dispense with the old requirement of independent jurisdictional grounds; are these rules in conflict?].

Unless otherwise stated, a dismissal by order of court under this paragraph is *without prejudice*.

(b) *Involuntary Dismissal*: Any party may move for a dismissal against an adverse party who fails to comply with these rules or any order of the court. This subsection also provides for the equivalent of a directed verdict in a non-jury trial.

Unless otherwise specified by the court in its order, a dismissal under this subdivision "and any dismissal not provided for in this rule" other than for lack of jurisdiction, improper venue or lack of an indispensable party, operates as an *adjudication on the merits*. The new rule seems to be a return to the rule as it was originally worded; under that rule, the courts had interpreted it as providing that a dismissal under Rule 1.11(b) for *failure to state a cause of action* was a "dismissal not provided for in this rule," and therefore was *with prejudice* unless it specified to the contrary. This new rule seems to overrule the case of *Hardee v. Gordon Thompson Chevrolet, Inc.*, 154 So.2d 174 (Fla. 1st Dist. 1963), and to reinstate *Hammac v. Windham*, 119 So.2d 822 (Fla. 1st Dist. 1960) as the law in Florida.

(c) The provisions of (a) and (b) above also apply to the dismissal of any counterclaim, cross-claim or third party claim.

(d) The amended rule also provides for the assessment of, and entry of, judgment for costs in the case of dismissals under this rule.

(e) *Dismissal for Failure To Prosecute*: Suits not prosecuted for one year are abated and shall be dismissed by the court sua sponte, or on the motion of any interested person, whether a party or not, after

notice to the parties. But the suit may not be reinstated without showing good cause, and such motion must be served by a party within one month after the entry of the order of dismissal.

Rule 1.36(c): Summary Judgments: Formerly, the motion for summary judgment had to be served at least 10 days prior to the date set for hearing; this time is now enlarged to 20 days.

Rule 1.39: Transfer of Actions Erroneously Begun:

(b): If the suit is pending in the wrong court of the proper county, it may be transferred to the proper court within that county by the same method as provided in Rule 1.13(j).

(c): The new rule now provides for the transfer to the proper court in the proper county when venue has been improperly laid, by the same method as provided in Rule 1.13(j). This is a change from the former law, which did not permit transfer, but only provided for dismissal of the action and refile and serving in the proper county.

Rule 1.41: Third Party Practice: This rule is all new and is based on Rule 14 of the Federal Rules of Civil Procedure.

(a): Any time after the plaintiff has filed his complaint, the defendant, as a third party plaintiff, may serve a summons and complaint on any person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. Leave of court is required if the defendant files his third party complaint within 20 days after serving his original answer.

The third party defendant may assert defenses to the third party plaintiff's claim, and he may counterclaim against the third party plaintiff and assert cross-claims against other third party defendants. The third party defendant may assert, against the original plaintiff, any defenses which the third party plaintiff has to the plaintiff's claim, and can assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff. The plaintiff may assert any claim against the third party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff and the third party defendant must then assert his defenses, counterclaims and cross-claims. Any party may move to strike the third party claim or for its severance or separate trial.

A third party defendant may also proceed as a fourth party plaintiff against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third party defendant. And so on

(b): When a counterclaim is asserted against the plaintiff, he may bring in a third party under the same circumstances as provided in subsection (a) above.

ACTIONS AT LAW ONLY

Rule 2.2: Setting Cases for Trial: New rule—

(a): The action is at issue after any motions directed to the last pleading served have been disposed of, or, if no such motions are served, 20 days after service of the last pleading.

(b): Thereafter, any party may file and serve a *motion for trial* and the clerk shall notify the court and the action will be set for trial.

(c): When the motion is filed, the court shall set the action for trial and notify all parties in writing. The trial date must be at least 30 days after the motion, unless the parties agree to shorten the time. The court may also set the case for trial on its own motion.

Rule 2.7(a): This rule provides that the order directing a verdict is effective without the assent of the jury.

Rule 2.8(b): A motion for new trial, for rehearing in non-jury cases, or for rehearing of any motion or judgment must be served within 10 days of the rendition of the verdict or entry of such judgment. A timely motion may be amended, in the discretion of the court, to state new grounds any time before the motion is disposed of.

(f): Orders granting a new trial must specify the specific grounds therefor. [However, this rule does not require that grounds be stated in the order denying a new trial.]

Rule 2.13: Executions and Final Process:

(a): No execution or other final process shall issue until the judgment is recorded, nor within the time for a motion for a new trial. If such motion is served, execution or final process may not issue until the motion is determined. However, it may be issued on special order of the court.

(b): The court may stay execution and suspend proceedings for good cause on motion and notice to all adverse parties.

Rule 2.18: Prohibition: The new rule changes the terminology from "suggestion" to "petition" stating the nature of the proceeding sought to be prohibited.

Rule 2.20: Quo Warranto: The former rule required proceedings to be instituted in the circuit court; the new rule does not refer to any particular court.

Rule 2.23: Jury View: This rule provides that the party who makes the motion for a jury view must advance expenses, which are later taxable as costs.

ACTIONS IN EQUITY ONLY

Rule 3.9: This rule now provides that a party may plead at any time until a decree pro confesso is entered.

Rule 3.16(a): Now the rule provides for a petition for rehearing of a summary decree; formerly, the case law had established this.

(b) A new provision allows the court to grant a rehearing or enter a new or amended decree sua sponte within 10 days after entry of a decree or within the time of ruling on a timely petition for rehearing.

Rule 3.19(b): No temporary injunction may be granted without notice to the adverse parties unless there is filed a verified complaint or supporting affidavit which shows the existence of irreparable harm. Formerly, the language of the rule referred to a "sworn" (rather than "verified") complaint.