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Civil Procedure: 1990 Survey of Florida Law

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Abstract

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KEYWORDS: civil, survey, law

Civil Procedure: 1990 Survey of Florida Law

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I. INTRODUCTION

During the survey period there were some significant developments in the area of Florida Civil Procedure. The first development occurred in the area of subject matter jurisdiction. As of October 1, 1990, the subject matter jurisdiction of the county court was increased, both as to the jurisdictional amount in controversy and as to the county court's power to hear "matters in equity."¹ Although the overall scope of the changes to the subject matter jurisdiction of the county courts is not totally clear, the changes do warrant discussion.

The Florida Supreme Court also decided a significant case concerning jurisdiction over the person. In *Venetian Salami Co. v. Parthenais*,² the court clarified the procedure to be followed when resolving disputed factual issues relating to jurisdiction over the person. The court approved the use of brief evidentiary trial court hearings to resolve disputed issues of fact concerning in personam jurisdiction.³

Florida's highest court also addressed the continuing problems of general and specific jurisdiction over the person: specifically, whether the Florida long-arm statutes require a relationship between a cause of action and the activities of a defendant corporation in the state (connexity) when the corporation has designated a residential agent for service of process in conjunction with its license to do business within the state.⁴ In *White v. Pepsico*,⁵ the court held that the Florida statutes did not require "connexity" between the cause of action and activities of the defendant corporation.

Developments in other areas of Florida Civil Practice were not as

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1. See *infra* notes 21-28 and accompanying text.
2. 554 So. 2d 499 (Fla. 1989).
3. See *infra* notes 29-34 and accompanying text.
4. See *infra* notes 37-63 and accompanying text.
5. 568 So. 2d 886 (Fla. 1990).

conspicuous as those in the jurisdictional area. However, a survey of recent appellate decisions in the areas of venue,⁶ disqualification of judges,⁷ pleadings,⁸ discovery,⁹ default,¹⁰ dismissal,¹¹ offer of judgment,¹² summary judgment,¹³ directed verdict,¹⁴ prejudgment interest,¹⁵ costs and interest,¹⁶ attorney's fees,¹⁷ and res judicata and collateral estoppel¹⁸ have been included for a review of the trends developing in those areas. Among these topics, the Florida Supreme Court's decision in *Aspen v. Bayless*¹⁹ (concerning the recovery of costs paid by a third party) and the court's discussion of attorney's fees in *Standard Guarantee Insurance Co. v. Quanstrom*²⁰ are well worth considering.

II. JURISDICTION OVER THE SUBJECT MATTER: CHANGES IN COUNTY COURT JURISDICTION

Effective October 1, 1990,²¹ the county court's jurisdictional amount in controversy was increased from \$5,000 to \$10,000, exclusive of interest, costs and attorney's fees.²² The amended statute also in-

6. See *infra* notes 88-111 and accompanying text.
7. See *infra* notes 112-130 and accompanying text.
8. See *infra* notes 131-57 and accompanying text.
9. See *infra* notes 158-205 and accompanying text.
10. See *infra* notes 206-25 and accompanying text.
11. See *infra* notes 226-55 and accompanying text.
12. See *infra* notes 265-76 and accompanying text.
13. See *infra* notes 277-85 and accompanying text.
14. See *infra* notes 286-95 and accompanying text.
15. See *infra* notes 296-301 and accompanying text.
16. See *infra* notes 302-15 and accompanying text.
17. See *infra* notes 316-25 and accompanying text.
18. See *infra* notes 326-39 and accompanying text.
19. 564 So. 2d 1081 (Fla. 1990).
20. 555 So. 2d 828 (Fla. 1990).

21. There was a textual ambiguity on the face of the new law. The new law purported to take effect on both July 1, 1990 and October 1, 1990. The Florida Supreme Court, by administrative order, resolved this conflict in favor of the later date. Administrative Order, *In Re County Court Jurisdiction* (Fla. July 3, 1990) (unpublished).

22. 1990 Fla. Laws 269, codified at FLA. STAT. § 34.01(1)(c)(3) (Supp. 1990). Section 34.01 now reads:

Jurisdiction of county court

(1) County courts shall have original jurisdiction:

- (a) In all misdemeanor cases not cognizable by the circuit courts;
- (b) Of all violations of municipal and county ordinances; and
- (c) As to causes of action accruing:

creases the amount in controversy to \$15,000 for causes of action accruing on or after July 1, 1992.²³

The amendments to Florida Statute section 34.01 also expand the county court's jurisdiction in equitable matters. The revised statute states that "[j]udges of county courts may hear all matters in equity involved in any case within the jurisdictional amount of the county court, except as otherwise restricted by the State Constitution or Laws

1. Before July 1, 1980, of all actions at law in which the matter in controversy does not exceed the sum of \$2,500, exclusive of interest, costs, and attorney's fees, except those within the exclusive jurisdiction of the circuit courts.

2. On or after July 1, 1980, of all actions at law in which the matter in controversy does not exceed the sum of \$5,000, exclusive of interest, costs, and attorney's fees, except those within the exclusive jurisdiction of the circuit courts.

3. On or after July 1, 1990, of actions at law in which the matter in controversy does not exceed the sum of \$10,000, exclusive of interest, costs, and attorney's fees, except those within the exclusive jurisdiction of the circuit courts.

4. On or after July 1, 1992, of actions at law in which the matter in controversy does not exceed the sum of \$15,000, exclusive of interest, costs, and attorney's fees, except those within the exclusive jurisdiction of the circuit courts.

The party instituting any civil action, suit, or proceeding pursuant to this schedule where the amount in controversy is in excess of \$5,000 shall pay to the clerk of the county court the filing fees and service charges in the same amounts and in the same manner as provided in § 28.241

(2) The county court shall have jurisdiction previously exercised by county judges' courts other than that vested in the circuit court by § 26.012, except that county court judges may hear matters involving dissolution of marriage under the simplified dissolution procedure pursuant to Rule 1.611(c), Florida Rules of Civil Procedure or may issue a final order for dissolution in cases where the matter is uncontested, and the jurisdiction previously exercised by county courts, the claims court, small claims courts, small claims magistrates courts, pal courts, and courts of chartered counties, including but not limited to the counties referred to in §§ 9, 10, 11, and 24 of Art. VIII of the State Constitution, 1885.

(3) Judges of county court shall be committing magistrates. Judges of county courts shall be coroners unless otherwise provided by law or by rule of the Supreme Court.

(4) Judges of county courts may hear all matters in equity involved in any case within the jurisdictional amount of the county court, except as otherwise restricted by the State Constitution or the laws of Florida.

FLA. STAT. § 34.01 (Supp. 1990).

23. *Id.* at § 34.01(1)(c)(4).

of Florida.”²⁴ These recent amendments have created some ambiguity concerning the application of the revised statute. While the former statute allowed the assertion of “equitable defenses,” and the amendment’s language would allow counterclaims, it is unclear whether a permissive equitable counterclaim is within the purview of the 1990 amendments to the statute. Although the statutory language has been broadened by the amendments, there is not an expressed indication that an equitable permissive counterclaim could now be considered by the county court. Also, the revised statute does not make it clear whether the transfer of an action to the circuit court is now precluded when an equitable counterclaim is asserted.

Other questions flowing from the 1990 amendments include: first, whether or not the county court may now hear a compulsory equitable counterclaim that exceeds \$10,000; and, second, what procedure does the county court use to determine whether or not a permissive equitable counterclaim is greater, or less, than \$10,000. The answer to the first question appears to be “no” in light of the fact that the statute restricts the county court to equitable matters “within the jurisdictional amount” of the court. However, the statute does not expressly address compulsory counterclaims, and a different construction of the statute may later emerge. As to the second question, under the prior statute, Florida courts did not have to value equitable permissive counterclaims because the circuit court had exclusive jurisdiction over such claims. Assuming the amended statute is construed to require such valuation, the discussion of the United States Court of Appeals for the Seventh Circuit — determining the federal jurisdictional amount in an injunction case — in *McCarty v. Amoco Pipeline Co.*,²⁵ provides an example of the proper method for determining the value of an equitable counterclaim. However, evaluating the monetary value of equitable claims is often fraught with difficulties as it involves the complicated process of evaluating intangible equitable rights.

Until there is a judicial construction of the new statute, it is this author’s opinion that the better course is to err on the side of caution and construe the statute narrowly. Such a construction, in essence, would view the amendments as a supplementary grant of jurisdiction to

24. *Id.* at § 34.01(4). Compare this new language with former section 34.01(1)(c)(2) which simply stated that “[a]ll equitable defenses in a case properly before a county court may be tried in the same proceeding.” FLA. STAT. § 34.01(1)(e)(2)(1989) (amended 1990).

25. 595 F.2d 389 (7th Cir. 1979).

the county court to hear only limited equitable matters. This approach would allow the county court to hear equitable claims arising out of the same transaction of the case, but would not vest the county court with exclusive jurisdiction over all equitable claims properly joined as additional counts to the plaintiff's claim or that could be asserted by way of permissive counterclaims. Also, this construction would permit the transfer of the action to the circuit court.

The recent amendments also addressed some other issues. County courts are now empowered to hear, or decide, certain dissolution of marriage proceedings.²⁶ Further, Florida Statute section 86.011 was amended to comply with the county court's increased equitable jurisdiction.²⁷ The county court is now expressly granted "jurisdiction within [its] respective jurisdictional amount[s] to declare rights, status, and other equitable or legal relations whether or not further relief is or could be claimed."²⁸

III. JURISDICTION OVER THE PERSON

A. *Procedures for Determination of Jurisdiction*

In *Venetian Salami Co. v. Parthenais*,²⁹ the Florida Supreme Court clarified the procedure to be followed in resolving disputed fact issues governing jurisdiction over the person. Florida requires the plaintiff to plead facts upholding jurisdiction over a non-resident served outside the state. The pleading requirement, and the confusion as to whether ultimate or evidentiary facts must be pled,³⁰ was greatly sim-

26. 1990 Fla. Laws 269, *codified at* FLA. STAT. § 34.01(2) (Supp. 1990).

27. 1990 Fla. Laws 269.

28. FLA. STAT. § 86.011 (Supp. 1990).

29. 554 So. 2d 499 (Fla. 1989).

30. The commentary to the 1980 Amendment to Rule 1.070 addresses this confusion:

1980 Amendment. Subdivision (i) is added in 1980 to eliminate pleading evidentiary facts for "long-arm" service of process. It is based on the long standing principle in service by publication that pleading the basis for service is sufficient if it is done in the language of the statute. See *McDaniel v. McElvy*, 91 Fla. 770, 108 So. 820 (1926). Confusion has been generated in the decisions under the "long-arm" statute. See *Wm. E. Strasser Construction Corp. v. Linn* 97 So. 2d 458 (Fla. 1957); *Hartman Agency, Inc. v. Indiana Farmers Mutual Insurance Co.*, 353 So. 2d 665 (Fla. 2d Dist. Ct. App. 1978), and *Drake v. Scharlau*, 353 So. 2d 961 (Fla. 2d Dist. Ct. App. 1978). The amendment is not intended to change the distinction be-

plified by the 1980 amendments adding Rule 1.070(i), allowing the pleading to track the language of the long-arm statute.³¹ When the plaintiff has pled the statutory language under which jurisdiction is claimed, the defendant who desires to oppose jurisdiction must file evidentiary affidavits contesting the factual basis for jurisdiction. Once the plaintiff's pleadings are challenged by the defendant's affidavit, the burden of proof to establish, by evidentiary facts, the existence of jurisdiction is upon the plaintiff. Traditionally this has been done in several ways: attaching supporting affidavits to the complaint; filing separate affidavits; and using discovery materials. This paper war often produced conflicting affidavits concerning an identical evidentiary fact. In *Venetian Salami*, the court required the trial court to conduct a live evidentiary hearing to resolve disputes.³² This hearing enables the trial court to judge credibility, weight of the evidence, and resolve the conflict.

Discovery, including interrogatories and requests for admissions, as well as depositions, can be an important tool for the plaintiff in gathering information to satisfy the burden of proof at the jurisdictional hearing. Indeed, the United States Supreme Court upheld, as a sanction for the defendant's failure to respond to interrogatories, the striking of the defense of lack of jurisdiction.³³ In view of the *Venetian Salami* decision, the use of discovery and brief but evidentiary trial court hearings to determine jurisdiction over the person will be the rule rather than the exception. Appellate courts should give deference to the trial court's resolution of fact issues, although the question of law that

tween pleading and proof as enunciated in *Elmex Corp. v. Atlantic Federal Savings & Loan Association of Fort Lauderdale*, 325 So. 2d 58 (Fla. 4th Dist. Ct. App. 1976). It is intended to eliminate the necessity of pleading evidentiary facts as well as those of pecuniary benefit that were used in the *Elmex* case. The amendment is limited to pleading. If the statutory allegations are attacked by motion, the pleader must then prove the evidentiary facts to support the statutory requirements. If denied in a pleading, the allegations must be proved at trial. Otherwise, the allegations will be admitted under Rule 1.110(e).

31. Rule 1.070(i) states: "[W]hen service of process is to be made under statutes authorizing service on non-residents of Florida, it is sufficient to plead the basis for service in the language of the statute without pleading the facts supporting service." FLA. R. CIV. P. 1070(i).

32. *Venetian*, 554 So. 2d 499 (Fla. 1989).

33. *Insurance Corp. of Ireland Ltd. v. Compagnie Des Bauxites de Guinee*, 456 U.S. 694, 707 (1982).

may be involved would be reviewed de novo.³⁴

In *Devaney v. Solitron Devices, Inc.*,³⁵ the court reversed on due process grounds, the trial court's determination of jurisdiction at a hearing noticed for other purposes. The jurisdictional hearing in *Devaney* had been scheduled for a later date and the court held that it was error to determine the jurisdictional question at a hearing noticed only for motions to compel discovery.³⁶

B. *Connexity: The Problems of General and Specific Jurisdiction*

In *White v. Pepsico Inc.*,³⁷ the Florida Supreme Court answered a jurisdictional question certified by the Eleventh Circuit³⁸ as to whether Florida long-arm statutes required a relationship between the cause of action and the defendant corporation's activities in Florida ("connexity") where the corporation had designated a residential agent for service of process in Florida in conjunction with its license to do business in the state.³⁹ The supreme court ruled that the Florida *statute* did not require connexity.⁴⁰ The Eleventh Circuit only certified the question as to the construction and meaning of the Florida statute, not to question whether federal due process would require connexity. In this respect, it has long been held that a state, if it so chooses, could subject a foreign corporation that has appointed a resident agent for service of process to general in personam jurisdiction over causes of action that have no re-

34. Mercedes Lighting and Electrical Supply, Inc., v. Department of Gen. Serv., 560 So. 2d 272, 277 (Fla. 1st Dist. Ct. App. 1990); compare Alexander Proudfoot Co. v. Thayer, 877 F.2d 912 (11th Cir. 1989).

35. 564 So. 2d 1229 (Fla. 4th Dist. Ct. App. 1990).

36. *Id.* at 1229-30.

37. 568 So. 2d 886 (Fla. 1990).

38. The Eleventh Circuit certified the following question:

WHETHER, IN ACTIONS THAT ACCRUED BEFORE 1984, SERVICE ON A REGISTERED AGENT PURSUANT TO FLA. STAT. ANN. §§ 48.081(3) and 48.091(1) [1983] CONFERRED UPON A COURT PERSONAL JURISDICTION OVER A FOREIGN CORPORATION WITHOUT A SHOWING THAT A CONNECTION EXISTED BETWEEN THE CAUSE OF ACTION AND THE CORPORATION'S ACTIVITIES IN FLORIDA.

White v. Pepsico, Inc., 866 F.2d 1325, 1326 (11th Cir. 1989).

39. *White*, 568 So. 2d 886.

40. *Id.*

lationship to the forum.⁴¹

Service upon a foreign corporation's resident agent in the state is analogous, if not tantamount, to jurisdiction over a foreign citizen who is personally served with process in the state. The United States Supreme Court in *Burnham v. Superior Court of California*,⁴² reaffirmed a state's power over a transient non-resident, personally served within the state, notwithstanding that the transient actions of the defendant within the state were not the basis of the cause of action asserted.⁴³

General versus specific concepts of jurisdiction have been the source of confusion and debate. The Florida Supreme Court in *White* quoted the definition offered by the United States Supreme Court in *Helicopteros Nacionales de Colombia, S.A. v. Hall*:⁴⁴

When a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the State has been said to be exercising 'general jurisdiction' over the defendant.' General jurisdiction is to be distinguished from 'specific jurisdiction,' which occurs 'when a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum.'⁴⁵

In view of the Florida Supreme Court's citation to both *Helicopteros*⁴⁶ and *Perkins v. Benguet Consolidated Mining Co.*,⁴⁷ some additional comments are necessary. Unlike *White v. Pepsico Inc.*, the corporations in *Perkins* and *Helicopteros* had not obtained a license to do business in the forum state and consequently had not appointed a resident agent for service of process. Thus, neither *Perkins* nor *Helicopteros* is apropos concerning the issue decided in *White*.

In *Perkins*, the foreign corporation was generally carrying on all of its business activities in Ohio, and had, as a practical matter ceased all business operations in the Philippines. The United States Supreme Court held that federal due process would not bar Ohio courts from

41. *Perkins v. Benquet Consol. Mining Co.*, 342 U.S. 437, 441 (1952).

42. 110 S. Ct. 2105 (1990).

43. *Id.* at 2111.

44. 466 U.S. 408 (1984).

45. 568 So. 2d at 888 n.3 (citations omitted).

46. 568 So. 2d at 888 n.3 (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984)).

47. 568 So. 2d at 888 (citing *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 487 (1951)).

exercising jurisdiction over the foreign corporation that was generally and systematically carrying on business activities in Ohio, even though the cause of action was in relation to matters which had occurred in the Philippines.⁴⁸

In *Helicopteros*, the United States Supreme Court held that more than a million dollars worth of business activities by the foreign entities in Texas were not the equivalent of the general and systematic activities of Benguet Mining in Ohio, and refused to extend the *Perkins* doctrine of general jurisdiction.⁴⁹ The plaintiffs in *Helicopteros* (wrongful death actions for a helicopter crash in Peru) did *not* argue “specific” jurisdiction (*i.e.* the purchase of the helicopter, obtaining parts, and training of pilots, all in Texas, was related to the cause of action), and instead relied upon the concept of general jurisdiction.

Helicopteros, by limiting the theory of general jurisdiction over a foreign corporation (that does not have a resident agent) to the *Perkins* quality and quantum of facts, has eliminated practical utilization of the concept. Perhaps the problem is that the dichotomy of general and specific jurisdictional theories is so deceptively simple. Indeed, the United States Supreme Court in wrestling with substantiality of minimum contacts for specific jurisdiction has found two separate aspects: first, the question of what constitutes power; and second, the question of what is reasonable if such power exists.

The question of whether the activities of the foreign corporation that took place in the forum state were the basis for the cause of action, was clear in *International Shoe Co. v. Washington*.⁵⁰ That case spawned the recognition of the “traditional notions of fair play and substantial justice” test, a wonderfully warm usage of constitutional prose that promotes flexibility rather than certainty.⁵¹ In *Hanson v. Denckla*,⁵² the question of the relationship between the trustees’ conduct in Florida and the cause of action was more ambivalent with the Court, more by judicial fiat than analysis. The Court determined that there were no contacts in Florida because the claim concerned the validity of the power of appointment of a trust that had been created in Delaware.⁵³ That the power of appointment had been executed in Flor-

48. *Id.*

49. 466 U.S. at 416.

50. 326 U.S. 310 (1945).

51. 326 U.S. at 316 (citations omitted).

52. 357 U.S. 235 (1958).

53. *Id.* at 251.

ida, and the will probated in Florida, were not consensual minimum contacts because the legal question was whether the appointment clause of the Delaware trust authorized it to be exercised by a will.⁵⁴

Although *Hanson* took a narrow view of what activities may be deemed related to the claim for relief, this question of the relationship is not easily resolved. A case of substantial interest to Florida's cruise line business is now pending before the United States Supreme Court.⁵⁵ The Court is reviewing a Ninth Circuit decision upholding jurisdiction over a passenger's *Washington* action for a slip and fall aboard ship in international waters off the coast of Mexico.⁵⁶ Unlike *Helicopteros*, special jurisdiction is claimed upon the relationship of the business activities (*i.e.* soliciting Washington residents for international cruises by Florida agents) to the cause of action.⁵⁷ This author believes jurisdiction should be upheld. But whatever the ruling, the case will be of significance.

Conley v. Boyle Drug Co.,⁵⁸ decided shortly after *White*, also involved construction and application of the Florida long-arm statutes. The Florida Supreme Court ruled that cross-petition motions to dismiss for lack of personal jurisdiction should have been granted because the plaintiff failed to offer any counter-affidavits or other evidentiary proof of their allegations in response to the defendants' affidavits opposing jurisdiction.⁵⁹ The court also held against retroactive use of amendments to the long-arm statutes: "The prohibition against retroactive application applies in connection with both aspects of the long-arm statute at issue."⁶⁰

A correct and clear illustration of the principle that obligations for payment pursuant to a contract made outside the State of Florida, for services to be performed outside the state, do not vest jurisdiction in Florida simply because the payee subsequently moved to Florida, is found in *Cookbook Publishers Inc. v. American Dental Program*.⁶¹ *Cookbook Publishers* recognized that jurisdiction over the payer of an obligation is not carried on the back of the payer and simply does not

54. *Id.* at 253.

55. *Carnival Cruise Lines, Inc. v. Shute*, 111 S.Ct. 39 (1990).

56. *Shute v. Carnival Cruse Lines*, 897 F.2d 377 (9th Cir.), *cert. granted*, 111 S.Ct. 39 (1990).

57. *Id.*

58. 570 So. 2d 275 (Fla. 1990).

59. *Id.* at 288-89.

60. *Id.* at 288.

61. 559 So. 2d 1301 (Fla. 4th Dist. Ct. App. 1990).

exist in any new forum in which the payee chooses to relocate.⁶² However, a different situation arises when the parties have contracted for payment within Florida. Such a situation would involve consideration of the totality of the transaction with a due process analysis of reasonableness.⁶³

C. *Waiver by Appearance of Plaintiff or Defendant / Collateral Attack / Child Support and Custody*

Ever since the decision by the United States Supreme Court in *Baldwin v. Iowa State Traveling Men's Ass'n*,⁶⁴ it has been established that a party who has appeared is bound by that court's jurisdictional ruling and may not collaterally attack the decree for lack of jurisdiction. Moreover, if a party appears and does not raise the defense of lack of jurisdiction over the person, it has been deemed to be waived.⁶⁵ Indeed, the United States Supreme Court in *York v. Texas*⁶⁶ upheld a state's right to make every appearance a general appearance and thus bar the use of a special appearance to challenge jurisdiction. But where a party has not appeared and final judgment based upon default is obtained, it has been established since the days of *Pennoyer v. Neff*⁶⁷ that a collateral attack may be made. These principles were recognized in *Riskin v. Miklos*,⁶⁸ which held a "defensive jurisdictional motion filed by an attorney who was not admitted to the Ohio bar and which, for that reason, was - quite correctly - stricken by the Ohio court" did not constitute an appearance.⁶⁹ Subsequently, the court ordered the trial court on remand to hear the jurisdictional attack.⁷⁰

In *Edwards v. Johnson*,⁷¹ the question was whether an out-of-state plaintiff, by voluntarily appearing and invoking the jurisdiction of a Florida court, is submitted to the jurisdiction of such court over permissive counter-claims authorized by Rule 1.170. The court opined:

62. *Id.*

63. *See id.* at 1303.

64. 283 U.S. 522 (1931).

65. FLA. R. Civ. P. 1.140.

66. 137 U.S. 15 (1890).

67. 95 U.S. 714 (1877).

68. 569 So. 2d 940 (Fla. 3d Dist. Ct. App. 1990).

69. *Id.* at 941.

70. *Id.*

71. 569 So. 2d 473 (Fla. 1st Dist. Ct. App. 1990).

The general rule with regard to personal jurisdiction is that a plaintiff who initiates an action in Florida court subjects himself to the jurisdiction of that court, and to such lawful orders which are thereafter entered, only with respect to the subject matter of the action.⁷²

The Third District Court of Appeal opinion in *Burden v. Dickman*, although cited by the First District as authority, does not support the *Edwards* opinion. In *Burden*, jurisdiction was upheld over the plaintiff because “[b]y petitioning the probate court to be appointed joint guardians of the property, the Burdens submitted themselves to the court’s jurisdiction. They cannot now be heard to allege lack of personal jurisdiction.”⁷³

None of the cases cited held that a permissive counterclaim creates an exception to the general rule. In *Frazier v. Frazier*,⁷⁴ which was also cited in *Edwards*, Florida was simply not the proper forum to modify the parties’ foreign dissolution decree.

With due deference, this rule that a foreign plaintiff is not subject to a permissive counterclaim appears, at first glance, to have little merit and substance. Upon further analysis, the rule makes even less sense. If a Florida plaintiff files suit in Florida, that Florida plaintiff is certainly subject to jurisdiction of any and all counterclaims, permissive or compulsory. The Rules do not require, or even provide, for the issuance of a summons for service of an answer (a counterclaim is not a separate pleading, it is to be included in the answer)⁷⁵ upon the plaintiff. It is to be served (without a summons) on the plaintiff’s attorney (or plaintiff if pro se) as provided in Rule 1.080.⁷⁶

Contrary to the First District’s reasoning, there is no statutory provision in Chapter 48 of the Florida Statutes, or elsewhere, that requires the defendant to obtain service by summons over the plaintiff. What possible rationale could exist for judicially creating an immunity in favor of a foreign plaintiff who chooses to voluntarily invoke the Florida’s judicial system to assert a claim against a Florida citizen? Is the quality of Florida justice so low and inferior that in good conscience we should protect foreign plaintiffs from the evils of the Florida

72. *Id.* at 474 (citing *Burden v. Dickman*, 547 So. 2d 170, 172 (Fla. 3d Dist. Ct. App. 1989)).

73. *Burden*, 547 So. 2d at 172.

74. 442 So. 2d 1116 (Fla. 4th Dist. Ct. App. 1983).

75. FLA. R. CIV. P. 1.170.

76. *See generally* FLA. R. CIV. P. 1.080.

judicial system? Surely Florida's jurisprudence recognizes that the achievements of its legal system are at least as good as, if not better than, those of its sister states. Perhaps the reason for the Rule is that, if the foreign plaintiff had not filed suit in Florida, the Florida defendant would have had to invoke the aid of a foreign forum to obtain relief. With deference, the refusal to exercise jurisdiction should not be predicated on what the foreign party plaintiff did not do, but on what the party did do - which was to file suit in Florida and invoke the operation of the Florida judicial system. There is neither a constitutional prohibition — state or federal — nor any Florida Supreme Court case, that would mandate that jurisdiction over a plaintiff be limited to the claim contained in the complaint.⁷⁷

Florida specifically has provided for jurisdiction over a spouse residing in Florida pursuing an action for alimony or child support.⁷⁸ This provision does, however, continue to raise questions as to its proper meaning.

In *Durand v. Durand*,⁷⁹ the husband contended that the provisions of the statute did not apply because he did not reside in Florida "immediately" prior to filing of the action. The court recognized that the residency should "'proximately proceed the commencement of the action'" but upheld jurisdiction notwithstanding the passage of several years, upon the "'totality of the circumstances.'"⁸⁰ In *Dunlop v. Dunlop*,⁸¹ the parties had been married in New York and divorced in London some 14 years later. After the divorce, the wife moved to Florida and the husband made support payments. The court held jurisdiction did not exist in reference to her suit to domesticate a foreign judgment and to increase child support.⁸²

In *Alvarez v. Alvarez*,⁸³ following a Florida divorce and the granting of custody to the mother, the father kidnapped the child from Florida and concealed the child in New York for six years.⁸⁴ After the mother regained custody in Florida, the father, nevertheless, was allowed limited visitation.⁸⁵ After the mother, now remarried, had moved

77. See generally *White*, 568 So. 2d 886.

78. FLA. STAT. § 48.193(1)(e) (1989).

79. 569 So. 2d 838, 839 (Fla. 3d Dist. Ct. App. 1990).

80. *Id.* at 839 (citations omitted).

81. 564 So. 2d 618 (Fla. 4th Dist. Ct. App. 1990).

82. *Id.* at 619.

83. 566 So. 2d 516 (Fla. 3d Dist. Ct. App. 1990).

84. *Id.* at 516.

85. *Id.*

to New Jersey with her child, the husband brought the child to Florida and, believe it or not, obtained an emergency change of custody at a 7:15 a.m. hearing based upon a telephonic notice to the mother in New Jersey.⁸⁶ The Florida District Court of Appeal reversed on the basis that Florida should decline to exercise jurisdiction in favor of New Jersey pursuant to section 61.1316(3) of Florida's Statutes.⁸⁷

IV. VENUE

Unlike the significant statutory changes in the subject matter jurisdiction of the Florida circuit and county courts, and a number of significant cases concerning jurisdiction over the person, the venue cases were mainly representative of typical problems. Nevertheless, there are several matters worth noting.

Among the recurring issues is the standard of review. In *Hickman v. Sacino*,⁸⁸ the court stated that the standard for review for granting or refusing a change of venue under *forum non conveniens* is "'palpable' abuse or a grossly 'improvident' exercise of discretion."⁸⁹ In *Carter v. Fleming*,⁹⁰ the complaint alleged that a promissory note was due and payable (to the holder after default) in Escambia County. The appellate court found an abuse of discretion:

Because the promissory note designated Duval County as the place of payment and the complaint contains no allegation of fact that

86. *Id.*

87. The statute provides in pertinent part:

(3) In determining if it is an inconvenient forum, the court shall consider if it is in the interest of the child that another state assume jurisdiction. For this purpose if may take into account the following factors, among others:

(a) If another state is or recently was the child's home state;

(b) If another state has a closer connection with the child and his family or with the child and one or more of the contestants;

(c) If substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state;

(d) If the parties have agreed on another forum which is no less appropriate; and

(e) If the exercise of jurisdiction by a court of this state would contravene any of the purposes stated in s. 61.1304.

FLA. STAT. § 61.1316(3) (1989).

88. 566 So. 2d 903 (Fla. 4th Dist. Ct. App. 1990)(per curiam).

89. *Id.* at 903 (citation omitted).

90. 567 So. 2d 535 (Fla. 1st Dist. Ct. App. 1990)

prior to Carter's breach for nonpayment a holder in due course of the note designated another place of payment, the cause of action alleged in count two could only have accrued in Duval County. Thus, the trial court abused its discretion in ruling that proper venue for count two lies in Escambia County.⁹¹

Several appeals involved related law suits pending in different counties. In *Independent Fire Insurance Co. v. Arvidson*,⁹² an insurer had previously filed a suit for a declaratory judgment against the insured to void a policy allegedly procured by misrepresentation. The present suit was brought by the insured against the tortfeasor and the insurance company for PIP and uninsured/underinsured benefits. No abuse of discretion was found in the trial court's refusal to transfer the personal injury action; however, the district court ordered the trial action stayed pending the declaratory judgment suit.⁹³

Several cases accomplished a consolidation by transferring. In *Towers Construction Co. v. Key West Polo Club Apartments, Ltd.*,⁹⁴ while a contractor's suit to foreclose on a mechanic's lien was pending in Monroe County, a subsequent suit alleging fraud and other matters was filed in Bay County and transferred by stipulation to Monroe County. The defendant in those proceedings then filed an unjust enrichment action in Orange County based upon a mistake in making payments. The court ordered the Orange County suit transferred:

[W]here there are two actions between the same parties pending in different circuits, jurisdiction is in the circuit where service of process was first perfected. Where the suits revolve around the same set of facts, the claims are interrelated and one lawsuit can resolve the issues, it is judicially prudent to permit both suits to be resolved in the same forum.⁹⁵

Similarly, in *Edward J. Gerritts Inc. v. Chambers Truss Inc.*,⁹⁶ the court stated: "In the interest of justice, venue should be transferred where it will avoid piecemeal litigation and the possibility of inconsistent results. In addition, a change of venue is intended to prevent a

91. *Id.* at 536-37.

92. 564 So. 2d 1254 (Fla. 4th Dist. Ct. App. 1990).

93. *Id.* at 1255.

94. 569 So. 2d 830 (Fla. 5th Dist. Ct. App. 1990).

95. *Id.* at 831 (citations omitted).

96. 564 So. 2d 625 (Fla. 4th Dist. Ct. App. 1990).

miscarriage of justice in the correct venue or to afford a more convenient venue."⁹⁷

The interpretation of "or other representative" contained in the venue statute section 47.051 was at issue in *Piper Aircraft Corp. v. Schwendemann*.⁹⁸ The statute, which is of substantial importance because it governs venue over foreign corporations, states in full:

Actions against corporations. -Actions against domestic corporations shall be brought only in the county or district where such corporation has, or usually keeps an office for transaction of its customary business, where the cause of action accrued, or where the property in litigation is located. Actions against foreign corporations doing business in this state shall be brought in a county where such corporation has an agent or other representative, where the cause of action accrued, or where the property in litigation is located.⁹⁹

The Third District Court of Appeal held that Piper Aircraft had representatives in Dade County on the basis of having two independent and separate entities there that were "contractually authorized by Piper to perform repair, warranty, and maintenance work."¹⁰⁰

The rule that a specific venue statute governs an action when a general venue provision is also available was cited in *Bryant v. Bryant*.¹⁰¹ The court held, in a suit to enforce alimony and child support resulting from a Dade County judgment, that venue properly lay in Orange County, the location where the mother and child were now residing.¹⁰²

Spector v. Old Town Key West Development Ltd.,¹⁰³ recognized the general rule that a "local action" construction requires transfer of an action to the county where the land at issue is located. The court held, however, that a claim for the appointment of a liquidating trustee for the assets of a limited partnership — assets which included real property — was a transitory rather than a local action.¹⁰⁴

97. *Id.* at 625.

98. 564 So. 2d 546 (Fla. 3d Dist. Ct. App. 1990).

99. FLA. STAT. § 47.051 (1989).

100. 564 So. 2d at 547.

101. 566 So. 2d 65 (Fla. 5th Dist. Ct. App. 1990).

102. *Id.* at 68.

103. 567 So. 2d 1017 (Fla. 3d Dist. Ct. App. 1990).

104. *Id.* at 1018.

*Posey v. Sheldon*¹⁰⁵ involved the question of which party should pay fees upon the transfer of an action. The Orange County Circuit Court ordered plaintiff's suit on a note executed in Okaloosa County transferred for improper venue, but nonetheless directed the defendant to pay the transfer fees. The district court reversed the ruling on fees under section 47.091 of the Florida Statutes which requires the party initially filing the action to pay the fees where the action was filed initially in the improper forum. Apparently, the trial court had confused a transfer under Rule 1.170(j), where a defendant's counterclaim or cross-claim exceeds the jurisdiction of county court and where the defendant pays the fees, with a transfer under Rule 1.060, which provides for transfer when the court in which the plaintiff filed suit lacks subject matter jurisdiction or venue. The Fifth District was clearly correct in holding that the plaintiff who has filed in the wrong venue must pay the transfer costs, not only because of section 47.091¹⁰⁶ of the Florida Statutes, but also because of Rule 1.060(c) which states:

Method. The service charge of the clerk of the court to which an action is transferred under this rule shall be paid by the party who commenced the action within 30 days from the date the order of transfer is entered, subject to taxation as provided by law when the action is determined. If the service charge is not paid within the 30 days, the action shall be dismissed without prejudice by the court that entered the order of transfer.¹⁰⁷

What is strange, is why would the defendant want the suit transferred instead of dismissed for improper venue? Ordinarily the defendant moves to dismiss for lack of venue, and the plaintiff will request transfer rather than refile a new action in the proper county (which should be done, of course, before the statute of limitations runs).

One final note concerning transfers under Rule 1.060 and 1.170(j) is that although Rule 1.060(a) and (b) specify that the transfer is to be "by the same method as provided in Rule 1.170(j),"¹⁰⁸ section (c) of Rule 1.060 mandates a different method. Not only must the defendant tender the transfer fee under Rule 1.170(j), the defendant must do so at the time the counterclaim is filed (unless the court in its discretion

105. 560 So. 2d 357 (Fla. 5th Dist. Ct. App. 1990).

106. FLA. STAT. § 47.091 (1989)

107. FLA. R. CIV. P. 1.060(c).

108. See FLA. R. CIV. P. 1.060(a) and (b).

extends the time).¹⁰⁹ Under Rule 1.170(j), if the fee is paid, "the action shall be transferred forthwith."¹¹⁰ In contrast, under Rule 1.060(c) the plaintiff is to pay the fee within 30 days after the case is ordered transferred, which transfer the court "may" order instead of "shall" order.¹¹¹

V. DISQUALIFICATION OF JUDGES

Concepts of equity and justice are predicated on the policy of unbiased judges making impartial judicial decisions. In the common mind, judges are expected to be above reproach, totally objective, and Solomon-like as they distribute justice to the masses.

Unfortunately, most judges are merely human, notwithstanding our desires that they be otherwise. When the question of a "fair trial" or "conflict of interest" arises, two mechanisms come into play: Article V of the Florida Constitution, through the Judicial Qualifications Commission, regulating the grounds for admonishment or continuance in office; and recusal, either initiated by the judge himself, by suggestion, or by motion by one of the parties involved who might be threatened by the judge's potential for bias. Disqualification is a sensitive area for judges regardless of what mechanism is utilized.

While the Judicial Administration Rule 2.060 requires a lawyer to disregard the unfounded request of a client for disqualification of a judge, a more difficult decision must be made when the client's fears appear to be valid. Unfortunately, parties are able to abuse the system and eliminate, under the guise of bias, a competent, intelligent, and unbiased judge in the hope and expectation of obtaining a successor judge who would be friendly to the movant. Undoubtedly, this has happened and will continue to happen, but there is no effective way of precluding this possible evil because it appears essential that a challenged judge not conduct a hearing to refute ill-founded allegations. The lawyer must weigh his professional and ethical responsibilities to represent his client's best interests against personal concerns about offending the judge and living with the possible ramifications in future cases. Following an unsuccessful motion, a lawyer may find there is some truth in the old adage that if one is going to shoot at the king, it is better not to merely wound him. Additionally, the replacement may

109. FLA. R. CIV. P. 1.060(c).

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

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

cause the original judge to look more attractive in retrospect.

Proper procedures for disqualification of judges are discussed in the Florida Code of Judicial Conduct, Canon 3-C, and are based on Rule 1.432¹¹² and chapter 38 of the Florida Statutes. If a legally sufficient motion is filed, the judge must proceed to enter an order of disqualification and may take no further actions on the case.¹¹³ “[L]egal sufficiency” is met by technical compliance with the statutory and Rule requirements as well as a determination of whether the allegations would cause “a reasonably prudent person” to fear an unfair or biased hearing before the judge in question.¹¹⁴ While technical noncompliance has not barred valid claims in the past,¹¹⁵ not all courts are tolerant of motions which do not meet section 38.10 guidelines requiring the inclusion of an affidavit of prejudice.¹¹⁶

Motions must be made within a “reasonable time” following the discovery of valid grounds for disqualification.¹¹⁷ Timely filing alleviates unnecessary costs, delay, and adverse effects on the other parties.¹¹⁸

“[A]n allegation in a motion that a litigant or counsel for a litigant has made a legal campaign contribution to the political campaign of the trial judge, or the trial judge’s spouse, without more, is not a legally sufficient ground [for disqualification].”¹¹⁹ In *MacKenzie v. Super Kids Bargain Store*,¹²⁰ two suits were consolidated¹²¹ around a

112. FLA. R. CIV. P. 1.432.

113. *Mackenzie v. Super Kids Bargain Store, Inc.*, 565 So. 2d 1333 (Fla. 1990); *Thunderbird Ltd., v. Great Am. Ins. Co.*, 566 So. 2d. 1296 (Fla 1st Dist. Ct. App. 1990).

114. *Thunderbird*, 566 So. 2d. at 1304 (citation omitted).

115. *Caleffe v. Vitale*, 488 So. 2d 627 (Fla. 4th Dist. Ct. App. 1986) (failure to comply with statutory requirements by attaching a certificate of good faith to the motion to disqualify, did not require that movant’s motion to disqualify be denied).

116. *Lee v. Lee*, 563 So. 2d 754, 755 (Fla. 3d Dist. Ct. App. 1990)(per curiam).

117. FLA. R. CIV. P. 1.432(c).

118. *Fischer v. Knuck*, 497 So. 2d 240 (Fla. 1986).

119. *MacKenzie*, 565 So. 2d at 1335 (footnote omitted).

120. 565 So. 2d 1333 (Fla. 1990).

121. *Breakstone v. MacKenzie*, 561 So. 2d 1164 (Fla. 3d Dist. Ct. App. 1990), was consolidated with *Super Kids Bargain Store, Inc. v. MacKenzie* for the purpose of en banc consideration at the appellate level. In *Breakstone*, at the trial court level, the defendant’s motion was denied by MacKenzie. A renewed motion was also denied. In *Super Kids*, after the defendant moved for disqualification on the basis of the same \$500 campaign contribution, plaintiff’s counsel’s ore tenus motion for substitution of counsel was granted, but the motion for disqualification was denied.

common allegation of bias due to a \$500 campaign contribution given by the plaintiff's counsel to the trial judge's husband. The Florida Supreme Court determined that, although there are valid concerns with campaign contributions under the judicial election system,¹²² such contributions are an unavoidable part of the election process. The court then found "that Florida's Code of Judicial Conduct together with . . . statutory limitations[s] upon campaign contributions and the requisite public disclosure of such contributions, provided adequate safeguards" and a per se rule of disqualification because of campaign contributions was not necessary.¹²³ The court then held that when a campaign contribution is the sole grounds for a judge's suggested recusal, it will be considered legally insufficient for disqualification purposes. Additionally, the court confirmed that judges are not to go "beyond a mere determination of the legal sufficiency of the motion" and should not attempt to defend or refute the allegations of impartiality.¹²⁴

When more than one disqualification is requested by any party to a suit, "a subsequent disqualification under section 38.02 shall be treated in the same manner as an initial disqualification under that statute."¹²⁵ An important distinction exists between a disqualification under section 38.02 and a disqualification under section 38.10. While subsequent disqualifications by the same party under section 38.02 are treated "in the same manner," a party, under section 38.10, has only "one unfettered right" for a judge's disqualification so that the same party's subsequent motion for a disqualification under section 38.10 is governed by the stricter standard stated in the second portion of that statute.¹²⁶

122. *MacKenzie*, 565 So. 2d at 1335, 1340. Justice Kogan notes how easily the Rules could be abused if the district court of appeal ruling had been affirmed, allowing a \$500 contribution to be legally sufficient for disqualification. "Attorney's who wished to steer their cases away from a particular judge need do not more than contribute a large sum to that judge's campaign [T]hese attorneys in actuality would be buying insurance that the judge could never hear their cases." *Id.* at 1340 (Kogan J., concurring specially).

123. *Id.* at 1336.

124. *Id.* at 1339 (quoting *Bundy v. Rudd*, 366 So. 2d 440, 442 (Fla. 1978)) ("[W]hen a judge has looked beyond the mere legal sufficiency of a suggestion of prejudice and attempted to refute the charges of partiality, he has then exceeded the proper scope of his inquiry and on that basis alone established grounds for his disqualification." (emphasis omitted)).

125. *Brown v. St. George Island, Ltd.*, 561 So. 2d 253, 256 (Fla. 1990).

126. *Id.* at 256.

In *Brown v. St. George Island, Ltd.*,¹²⁷ the original trial judge was recused under section 38.02 and the succeeding judge had been disqualified under section 38.10. The Florida Supreme Court agreed that a negative statement by a trial judge causes a party to feel that the judge is biased against him, and it is reasonable for such a litigant to fear they would not receive a fair trial under that judge.¹²⁸ One month later, the supreme court revisited *Brown* and held that when an opposing party to a suit moves under section 38.10 to disqualify a judge, the motion is regarded as an initial motion for that party even if it is a second or third disqualification within the same suit.¹²⁹ The court noted that a second request by a party who had previously sought a disqualification is subjected to a stricter standard under section 38.10, but when a second disqualification is sought by a party who has not previously filed such a motion, then "each side has the right to seek the disqualification of one judge under the standard enumerated in the first portion of section 38.10."¹³⁰

VI. PLEADINGS

Florida has adopted liberal rules on pleading, and forms of action and technical forms for pleas have been abolished.¹³¹ In *Mayedo v. Oolite Industries, Inc.*,¹³² the court reversed the trial court's ruling because the "judgment represents an aggravated and obviously unacceptable case of . . . reliance upon a meaningless technicality." Leave of the court to amend pleadings "shall be given freely when justice so requires."¹³³ However, despite liberal rules for pleadings, problems have arisen on appeal. Generally, recent cases reflect a trend to allow amendment as required. In *Salamon v. Munuswamy, M.D., P.A.*,¹³⁴ the court ruled that although an amended complaint had been filed exclusively for declaratory relief, the court would allow supplementary

127. *Id.* at 254.

128. *Id.* at 257.

129. *Brown v. St. George Island, Ltd.*, 562 So. 2d at 684, 685 (Fla. 1990).

130. *Id.* at 685. The court stated that "[i]t would be illogical to assume that the legislature intended for the party that first disqualifies a judge under section 38.10 to have that motion measured by a less stringent standard than a later motion filed by an opposing party seeking to remove a successor judge." *Id.*

131. FLA. R. CIV. P. 1.110.

132. 566 So. 2d 879 (Fla. 3d Dist. Ct. App. 1990).

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

134. 566 So. 2d 899 (Fla. 4th Dist. Ct. App. 1990).

relief and an amendment that included injunctive relief as well.¹³⁵ In *Johnson Engineering, Inc. v. Pate*,¹³⁶ the appellate court allowed amendment after the trial court had denied a demand for jury trial as untimely.¹³⁷ The appellate court ruled that although the case had already been noticed for a nonjury trial, raising of new issues which are triable by a jury, embodied by an amended answer, warrant granting of such a jury trial.¹³⁸ In *Estate of Bobinger v. Deltona Corp.*,¹³⁹ the court overturned a trial court's dismissal with prejudice of a class action suit, stating that the appellants should have been allowed an opportunity to amend their complaint.¹⁴⁰ In this particular case, the trial court had dismissed for failure to state a cause of action.¹⁴¹ The appellate court upheld the dismissal, and only took issue with the lower court's disallowance of leave to amend the complaint.¹⁴²

However, blanket leave to amend is not guaranteed. At a minimum, "[f]undamental concepts of due process require a party seeking modification of a prior court order to file a written pleading and provide appropriate notice to all parties concerned."¹⁴³ Furthermore, appellate courts appear disinclined to review cases where the appellant has not sought leave of the trial court to amend before pressing an appeal. In *Perruzzi v. Ferretti*,¹⁴⁴ the court held that an appellant who did not seek leave of the trial court to amend his complaint cannot complain that he should have been granted leave to amend.¹⁴⁵ The appellate court dismissed the appeal because "[t]o bring this claimed right to amend to the appellate court before giving the trial court the opportunity to consider such [an] assertion is untimely."¹⁴⁶ Clearly, there are some limits regarding the court's patience when it comes to allowing amendments to complaints. In *Feigin v. Hospital Staffing Ser-*

135. *Id.* at 900.

136. 563 So. 2d 1122 (Fla. 3d Dist. Ct. App. 1990).

137. *Id.* at 1123.

138. *Id.*

139. 563 So. 2d 739 (Fla. 2d Dist. Ct. App. 1990).

140. *Id.* at 740.

141. *Id.*

142. *Id.*

143. *Herman v. Herman*, 565 So. 2d 835 (Fla. 3d Dist. Ct. App. 1990) (emphasis omitted).

144. 564 So. 2d 621, 622 (Fla. 4th Dist. Ct. App. 1990).

145. *Id.* at 622.

146. *Id.*

vices, Inc.,¹⁴⁷ the appellate court supported the trial court's refusal to grant leave to amend, saying that "[r]efusal to grant leave to amend was not an abuse of discretion since this was the seventh complaint filed over a four-year period and the record clearly reflects the court's warning that this was the plaintiff's 'last bite at the apple.'"¹⁴⁸

Courts have also focused on whether leave to amend, particularly at the trial stage, would unfairly prejudice other parties. For example, in *Saunders v. Goulard*,¹⁴⁹ the court noted that the appellants were:

[D]eprived of any and all discovery as to the 'other extras' discovered at the eleventh hour by the plaintiff, and, additionally, the absence of information in regard to this additional claim prior to trial impacted upon the formulation of the defendants' offer of judgement and the subsequent post-trial determination by the trial court as to the 'prevailing party' for the purposes of assessment of costs and fees.¹⁵⁰

The appellate court then reversed and remanded for entry of judgment exclusive of the additional items allowed by the trial court.¹⁵¹

Similarly, within limits, courts have been liberal in determining that improper pleadings should be recast properly without penalty. For example, in *In re Forfeiture*,¹⁵² the court stated that "[w]e believe that respondents' Motion to Determine Damages should be treated as a counterclaim by supplemental pleading under Florida Rule of Civil Procedure 1.170(e)."¹⁵³ Likewise, in *Yost v. American Nat'l Bank*,¹⁵⁴ the court determined that the trial court's severance of a counterclaim was improper, since it should have been treated as a compulsory counterclaim, even if it was not cast in that mold originally.¹⁵⁵ However, the court in *Turkey Creek, Inc. v. Londono*,¹⁵⁶ noted that when there are substantial differences in issues between the claim and counterclaim, the fact that there is a logical relationship is not enough to allow re-

147. 569 So. 2d 941, 942 (Fla. 4th Dist. Ct. App. 1990) (citations omitted).

148. *Id.* at 942.

149. 569 So. 2d 1305, 1307 (Fla. 5th Dist. Ct. App. 1990).

150. *Id.* at 1306.

151. *Id.*

152. 569 So. 2d 1274, 1277 (Fla. 1990) (footnote omitted).

153. *Id.* at 1277.

154. 570 So. 2d 350 (Fla. 1st Dist. Ct. App. 1990).

155. *Id.* at 352.

156. 567 So. 2d 943, 946 (Fla. 1st Dist. Ct. App. 1990).

casting as a compulsory counterclaim.¹⁵⁷ Thus, as in amending pleadings, the record is mixed, but the trend appears to be in favor of liberal application of the Rules.

VII. DISCOVERY

A. *In General*

Liberal “notice pleading” in Florida requires that some form of discovery be used in almost every case. Florida’s broad discovery provisions reflect a policy of trial on the merits instead of trial by ambush. Florida Rule of Civil Procedure 1.280 provides the general framework for discovery in Florida. Rule 1.280(b)(1) allows discovery of “any matter, not privileged, that is relevant to the subject matter of the pending action”¹⁵⁸ Rule 1.280 also provides the various methods for complying with discovery under the general rule. These methods of discovery include: oral or written depositions (Rules 1.310, 1.320); interrogatories (Rule 1.340); production of documents and things and entry upon land for inspection and other purposes (Rules 1.350, 1.351); physical and mental examinations (Rule 1.370); and requests for admissions (Rule 1.370).

Information is discoverable if it is “reasonably calculated to lead to the discovery” of evidence admissible at trial.¹⁵⁹ The courts have supported the broad use of discovery, even at the pre-suit stage. For example, in *Adventist Health System v. Hegwood*,¹⁶⁰ an en banc panel of the Fifth District Court of Appeal affirmed the trial court’s grant of an equitable “pure bill of discovery” — allowing depositions of witnesses — even though the applicable medical malpractice statute granted only limited and informal presuit discovery and would have prevented the depositions.¹⁶¹

There are, however, some limits on the use of discovery. While the Rule provides broad authority to delve into “relevant” matters, discovery may not be used for harassment purposes.¹⁶² Thus, in *FDIC v. Balkany*, the appellate court invalidated an expansive discovery order

157. *Id.* at 945.

158. FLA. R. CIV. P. 1.280(b)(1).

159. FLA. R. CIV. P. 1.280(b)(1).

160. 569 So. 2d 1295, 1297 (Fla. 5th Dist. Ct. App. 1990)(en banc).

161. *Id.* at 1296.

162. *See* *Caribbean Security Systems Inc. v. Security Control Systems Inc.*, 486 So. 2d 654 (Fla. 3d Dist. Ct. App. 1986).

that allowed a party access to transactions contained in bank records not even remotely related to the requestor's business.¹⁶³ The court held that the defendant's hope of finding some reference to misplaced documents did not justify an order that amounted to a "fishing expedition."¹⁶⁴ The principal discovery tool is the deposition. The discovery rules have kept pace with technology concerning the manner in which this discovery tool may be used so that oral depositions may now be conducted via telephone¹⁶⁵ or videotape,¹⁶⁶ provided that the proper procedures, outlined in the Rule,¹⁶⁷ are followed.

In an oral deposition under Rule 1.310, section (d) provides the proper manner for suspending or terminating the deposition and failure to comply with the Rule may result in a waiver of any objections to questions asked at the deposition. This point was illustrated in *DeGennaro v. Janie Dean Chevrolet, Inc.*,¹⁶⁸ where the appellate court held that, although counsel objected to a limited waiver of his client's attorney-client privilege, proceeding with the deposition waived the privilege and the court could not "unring the bell."¹⁶⁹ When an objection has been raised to a question asked during a deposition, the proper procedure under Rule 1.310(d) is to suspend the deposition pending a ruling on the objectionable question. It is improper for a lawyer to instruct a witness not to answer a question and then continue with the deposition. In *Smith v. Grady*,¹⁷⁰ the court stated that such an improper procedure, through "selective adherence to the rules of civil procedure," amounts to "arrogance of the defense attorney" and "is without legal justification."¹⁷¹ Similarly, where a request for a continuation is not made at a summary judgment hearing, a party cannot later claim that they did not have enough time to complete discovery.¹⁷²

The 1988 Amendments to Florida's discovery rules clarified the scope of discovery. The existence and content of insurance and indemnity agreements are now discoverable.¹⁷³ Additionally, expert witnesses

163. 564 So. 2d 580, 581 (Fla. 4th Dist. Ct. App. 1990).

164. *Id.*

165. FLA. R. CIV. P. 1.310(b)(7).

166. FLA. R. CIV. P. 1.310 (b)(4).

167. FLA. R. CIV. P. 1.310(b)(7); FLA R. CIV. P. 1.30(b)(4).

168. 568 So. 2d 1008, 1009 (Fla. 4th Dist. Ct. App. 1990).

169. *Id.* at 1009.

170. 569 So. 2d 504, 507 (Fla. 4th Dist. Ct. App. 1990).

171. *Id.* at 507.

172. *Light v. Weldarc Co., Inc.*, 569 So. 2d 1302 (Fla. 5th Dist. Ct. App. 1990).

173. FLA. R. CIV. P. 1.280(b)(2) (indemnity agreements are discoverable but not

“expected to be called” at trial may now be deposed without leave of the court.¹⁷⁴ However, in *Edwards v. Humana, Inc.*,¹⁷⁵ the court recognized that “it is clear that the intent of rule 1.280 (b)(4)(E) is to afford protection from the discovery of a consulting expert.”¹⁷⁶ The court’s holding in *Edwards* is consistent with the language of the Rule that protects a consulting expert except under “exceptional circumstances.”

Interrogatories were also addressed under the 1988 Amendments to the Rule. A party may now serve up to 30 interrogatories on another party without leave of the court.¹⁷⁷ Further, if the Florida Supreme Court has approved a standard form¹⁷⁸ for initial interrogatories, then that form must be used.¹⁷⁹ Examination of persons was also broadened under the 1988 amendments to the Rules. An examination of a person, as to matters in controversy, may now be performed by experts other than physicians.¹⁸⁰

B. *Work Product/Attorney—Client Privilege*

The work product privilege¹⁸¹ protects materials “prepared in anticipation of litigation” by allowing discovery of materials only upon a requestor’s showing of “need” and inability, “without undue hardship to obtain the substantial equivalent of the materials by other means.”¹⁸² The courts have limited the reach of this “privilege” through the construction of the term “substantial equivalent.” Illustrative of this concept is *Florida Mining and Materials Corp. v. Continental Casualty Co.*,¹⁸³ where the court protected a party’s internal memoranda by finding that “admissions provide[d] the ‘substantial

admissible at trial).

174. FLA. R. CIV. P. 1.280(b)(4)(A).

175. 569 So. 2d 1315, 1316 (Fla. 5th Dist. Ct. App. 1990).

176. *Id.* at 1316.

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

178. There are currently three standard interrogatory forms: Automobile Negligence-Interrogatories to Plaintiff; Automobile Negligence-Interrogatories to Defendant; and Marriage Dissolution-Interrogatories to Party. See FLA. R. CIV. P. Appendix.

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

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

181. Technically speaking, work product is not an evidentiary privilege, instead, it is an exception to disclosure created by the Rules of Civil Procedure rather than the Rules of Evidence.

182. FLA. R. CIV. P. 1.280(b)(3).

183. 556 So. 2d 518, 519 (Fla. 2d Dist. Ct. App. 1990).

equivalent' of the internal memoranda."¹⁸⁴ While materials, or fact work product, are discoverable upon a showing of need and the lack of a substantial equivalent, opinion work product is "absolutely, or nearly absolutely, privileged."¹⁸⁵ In appropriate cases, the work product protection may apply to the investigative materials prepared on behalf of a nonparty. For example, in *Zaban v. McCombs*,¹⁸⁶ corporate officers and directors were named as defendants in a work-related wrongful death action, but the corporation was not named as a party. The corporation had, however, hired an investigator and had prepared investigative materials concerning the accident and the plaintiff, claiming that the materials were not protected because of the corporation's nonparty status, requested discovery of the materials. The appellate court held that the plaintiff, in such a situation, could not circumvent the work product protection of Rule 1.280 (b)(3) merely because the producer of the work product was not named as a party.¹⁸⁷

Under the attorney-client privilege, a recognized evidentiary privilege, undisclosed communications between an attorney and a client are protected from involuntary disclosure even when the communications "arise in the course of a transaction which itself later becomes the subject of litigation."¹⁸⁸ An in-camera examination of requested material is proper in order to determine if privileged information is protected by the attorney-client privilege.¹⁸⁹ Waiver of the attorney-client privilege may result from disclosure of the information.¹⁹⁰

The courts have not been receptive towards attempts at circumventing an evidentiary privilege. In *Paper Corp. v. Schneider*,¹⁹¹ the defendant, in a post-judgment execution proceeding, tried to shield financial records from disclosure by turning them over to his accountant and then seeking protection under the accountant-client privilege.¹⁹²

184. *Id.* at 519.

185. *State v. Rabin*, 495 So. 2d 257, 262 (Fla. 3d Dist. Ct. App. 1986); *see also* FLA. R. CIV. P. 1.280(b)(3) ("The court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.").

186. 568 So. 2d 87, 89 (Fla. 1st Dist. Ct. App. 1990).

187. *Id.* at 89.

188. *Florida Mining and Materials Corp.*, 556 So. 2d at 519.

189. *Blank v. Mukamal*, 566 So. 2d 54 (Fla. 4th Dist. Ct. App. 1990) (certiorari granted and trial court's order demanding production of counsel's entire files quashed).

190. *Id.* at 55.

191. 563 So. 2d 1134, 1135 (Fla. 3d Dist. Ct. App. 1990).

192. FLA. STAT. §§ 90.5055, 473.316 (1989).

However, the court refused to accept the defendant's claim of evidentiary privilege and held that the defendant could not shield otherwise discoverable material by shifting that material into the possession of a person granted a statutory privilege.¹⁹³

C. Sanctions

Rule 1.380 provides sanctions for a party's failure to comply with a discovery order. A trial court has the discretion to order dismissal¹⁹⁴ or default¹⁹⁵ for failure to comply with discovery requirements and a dismissal or default entered by the trial court will be reviewed under an "abuse of discretion" standard.¹⁹⁶ The Florida Supreme Court recently addressed what factual findings are necessary before the trial court may enter a default or dismissal under Rule 1.380. In *Commonwealth Federal Savings and Loan v. Tubero*,¹⁹⁷ the Florida Supreme Court considered the following certified question:

IS AN EXPRESS WRITTEN FINDING OF WILLFUL OR DELIBERATE REFUSAL TO OBEY A COURT ORDER TO COMPLY WITH DISCOVERY UNDER FLORIDA RULE OF CIVIL PROCEDURE 1.380 NECESSARY TO SUSTAIN THE SEVERE SANCTIONS OF DISMISSAL OR DEFAULT AGAINST A NONCOMPLYING PLAINTIFF OR DEFENDANT.¹⁹⁸

The court answered the question in the affirmative, and, though reaffirming the trial judge's discretionary power to enter a default or dismissal for noncompliance with discovery requirements, required that an order of dismissal or default "contain an explicit finding of willful noncompliance."¹⁹⁹

An order of dismissal or default is the exception rather than the general rule and thus, as the court noted in *Yanks v. Amerifirst*

193. *Schneider*, 563 So. 2d at 1135.

194. *Delta Information Serv., Inc. v. Jannach*, 569 So. 2d 1353 (Fla. 3d Dist. Ct. App. 1990).

195. *Commonwealth Federal Saving and Loan v. Tubero*, 569 So. 2d 1271 (Fla. 1990).

196. *Id.* at 1273.

197. *Id.* at 1271.

198. *Tubero v. Chapnich*, 552 So. 2d 932, 936 (Fla. 4th Dist. Ct. App. 1989).

199. *Tubero*, 569 So. 2d at 1273.

Bank,²⁰⁰ “the severity of the sanction [for noncompliance with a discovery order] must be commensurate with the violation.”²⁰¹ The range of appropriate sanctions include: prohibiting the introduction of evidence;²⁰² refusing to allow a party to present a claim or defense;²⁰³ or the awarding of fees and costs.²⁰⁴ The court’s contempt power may also be used to remedy an individual’s noncompliance with discovery requirements. In *Anderson Inv. Co. v. Lynch*, the court noted that a deponent may be found in contempt of court if he fails to be sworn or to answer questions after being directed to do so by the court.²⁰⁵

VIII. DEFAULT

The terms “default” and “judgment” are *not* synonyms. “Default,” as used in the Rules, refers to an entry or order of default by the clerk or judge. “Judgment,” as used in the Rules, refers to the final disposition of the proceeding, rendered by the judge, following the entry of a default. The term “default judgment,” when it is used in court opinions or legal literature, usually refers to a final judgment that was rendered as a result of default. Occasionally the term “default judgment” is used to incorrectly denote an entry of default, requiring that the context in which the term is used be examined in order to ascertain what the writer intended through the use of the term.

Rule 1.500 addresses the entry of default, the entry of judgments upon the default, and the setting aside of defaults.²⁰⁶ Rule 1.500 is distinct from Rule 1.380(b); the later provision allows a judgment by default for a party’s failure to comply with discovery while Rule 1.500 addresses a party’s failure to plead.²⁰⁷ In addition to a default for failure to plead, a default may also be entered for: filing a sham pleading;²⁰⁸ failure to comply with a discovery order;²⁰⁹ failure of a party to appear for his deposition or to answer properly propounded interrogato-

200. 569 So. 2d 496 (Fla. 3d Dist. Ct. App. 1990).

201. *Id.*

202. FLA. R. Civ. P. 1.380(b)(2)(B).

203. *Id.*

204. *Dean Witter Reynolds, Inc. v. Hammock*, 489 So. 2d 761 (Fla. 1st Dist. Ct. App. 1986).

205. 540 So. 2d 832 (Fla. 4th Dist. Ct. App. 1988).

206. FLA. R. Civ. P. 1.500.

207. FLA. R. Civ. P. 1.380(b); FLA. R. Civ. P. 1.500.

208. FLA. R. Civ. P. 1.150(a).

209. FLA. R. Civ. P. 1.380(b)(2)(C).

ries;²¹⁰ or, failure to attend a pretrial conference.²¹¹

The courts have liberally construed Rule 1.500, and are hesitant to uphold an entry of default that could deny a party the opportunity of a decision on the merits of the case.²¹² In *Apolaro v. Falcon*,²¹³ the court held that a delay of 30-40 days in seeking relief from a default did not justify denying the relief.²¹⁴ The court stated that “[w]here there exists any reasonable doubt in the matter, and where there has been no trial on the merits, the trial court is to exercise its discretion in the direction of vacating the default.”²¹⁵

In *Rapid Credit Corp. v. Sunset Park Centre*,²¹⁶ “Rapid” had erroneously filed a motion to transfer and consolidate in the wrong case. Despite knowledge of these motions, opposing counsel sought, and was granted, a clerk-entered default in the other case pending between the parties. The appellate court remanded for vacation of the default and held that opposing counsel, in this situation, was “on notice” that Rapid intended to contest the action²¹⁷ and thus had an affirmative duty to provide the court, and Rapid’s counsel, with information regarding the procedural status of a case prior to default being entered.²¹⁸

Entry of an order of default can be avoided by filing a responsive pleading prior to a motion for default. In *Houswerth v. Sheriff’s Dep’t*, the court allowed dismissal for failure to prosecute, but held that a default could not be entered in the action when a responsive pleading was filed before the motion for default.²¹⁹

If the trial court enters a default, until the entry has formed the basis for a final judgment, the defaulted party can move to vacate or set the order aside. A defendant is permitted, upon motion for relief from a default judgment, to attack the “sufficiency of the complaint

210. FLA. R. CIV. P. 1.380(d).

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

212. *Ole, Inc. v. Yariv*, 566 So. 2d 812 (Fla. 3d Dist. Ct. App. 1990) (default judgment vacated and default set aside when defendant was unaware he was no longer represented by counsel and plaintiff applied for ex parte default and obtained a default judgment).

213. 566 So. 2d 815, 816 (Fla. 3d Dist. Ct. App. 1990).

214. *Id.* at 816.

215. *Id.* at 816.

216. 566 So. 2d 810, 811 (Fla. 3d Dist. Ct. App. 1990).

217. *Id.* at 811.

218. *Id.*

219. 567 So. 2d 476 (Fla. 5th Dist. Ct. App. 1990).

and its allegations to support the judgment.”²²⁰ A default may also be set aside when, on the face of the pleadings, there is confusion over the amount of time allowed for a response.²²¹

Under Rule 1.500, only the court may enter an order of default when “any paper” has been filed by the opposing party.²²² The term “any paper” has been construed liberally to allow a default entered without notice to be vacated when a motion to consolidate and transfer was erroneously filed in the wrong lawsuit²²³ or when a motion to quash service of process was filed.²²⁴ After entry of a default, a party in default may only file a pleading requesting relief from the default.²²⁵

IX. DISMISSAL

Rule 1.420 provides for both voluntary and involuntary dismissals.²²⁶ A party’s failure to attend a pretrial conference may also result in a dismissal of the action but Rule 1.200(c) governs the court’s action in that situation.²²⁷ Rule 1.420 allows for dismissal of claims with or without prejudice.²²⁸

Because dismissal is such a drastic remedy, the courts have required evidence of “wilful or flagrant or persistent disobedience” of a court order prior to allowing dismissal of an action.²²⁹ As noted by the court in *Epps v. Hartley*, dismissal of a plaintiff’s complaint suspends the plaintiff’s right to proceed but does not serve as an adjudication on the merits.²³⁰ However, an order granting a motion to dismiss should plainly indicate that the action has in fact been dismissed, and should

220. *Cabral v. Diversified Serv., Inc.*, 560 So. 2d 246 (Fla. 3d Dist. Ct. App. 1990)(citations omitted) (abuse of discretion to enter default when failure to respond was due to confusion resulting from the pendency of a case with a related subject matter).

221. *Hader v. American Builders and Contractors Co.*, 564 So. 2d 271 (Fla. 4th Dist. Ct. App. 1990)(pleading that read “[t]he Defendants have _____ number of days” to respond was sufficient to demonstrate excusable neglect that justified setting aside the default).

222. FLA. R. CIV. P. 1.500(b).

223. *Rapid Credit Corp.*, 566 So. 2d 810.

224. *Carson v. Rossignol*, 559 So. 2d 433 (Fla. 4th Dist. Ct. App. 1990).

225. *Hines v. Hines*, 494 So. 2d 297 (Fla. 3d Dist. Ct. App. 1986).

226. FLA. R. CIV. P. 1.420.

227. FLA. R. CIV. P. 1.200(c).

228. FLA. R. CIV. P. 2.420.

229. *Anthony v. Schmitt*, 557 So. 2d 656, 662 (Fla. 2d Dist. Ct. App. 1990).

230. 495 So. 2d 921, 922 (Fla. 4th Dist. Ct. App. 1986).

contain the "requisite words of finality" in order to vest an appellate court with jurisdiction to review the order.²³¹

Much litigation arises regarding just what is meant by dismissal of an action for "failure to prosecute." If "no record activity in furtherance of the suit"²³² has occurred for a period of one year, then dismissal of the suit for failure to prosecute²³³ may be proper. In *Anthony v. Schmitt*, the Second District Court of Appeal provided an in-depth analysis of Rule 1.420(e).²³⁴ The court noted the conflict between the First District²³⁵ and the Fourth District²³⁶ and opted for an interpretation of Rule 1.420(e) that would allow the trial court more discretion than the rule of the Fourth District, but less than that of the First District.²³⁷ The court stated that:

[A] trial court may dismiss an action if the only activity within the relevant year is discovery activity by the plaintiff taken in bad faith merely as a means to avoid the application of Rule 1.420(e) and without any design 'to move the case forward toward a conclusion on the merits or to hasten the suit to judgment.'²³⁸

The appellate court noted that its "bad faith activity" test was similar to striking discovery that amounted to "sham or pretextual record activity" when used by a plaintiff to circumvent Rule 1.420(e).²³⁹

A motion to dismiss for failure to prosecute need not be filed by a party to the action since the Rule itself grants standing to file the motion to "any interested person."²⁴⁰ Under the Rule, the one-year period without record activity accrues from the date of filing the action, not the date of service of notice in the proceeding.²⁴¹ Rule 1.420(e) is not

231. *Henrion v. New Era Realty IV, Inc.* 567 So. 2d 562, 563 (Fla. 4th Dist. Ct. App. 1990).

232. *Rosa v. Hodges*, 559 So. 2d 1289, 1290 (Fla. 2d Dist. Ct. App. 1990).

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

234. 557 So. 2d 656.

235. *Karcher v. F.W. Schinz & Assoc.*, 487 So. 2d 389 (Fla. 1st Dist. Ct. App. 1986) (trial court may determine whether discovery was "genuine" when deciding whether such discovery constituted record activity under Rule 1.420(e)).

236. *Philips v. Marshall Berwick Chevrolet, Inc.* 467 So. 2d 1068 (Fla. 4th Dist. Ct. App. 1985) (dismissal is proper only when discovery is "repetitious").

237. *Anthony*, 557 So. 2d at 662.

238. *Id.* (quoting *Barnett Bank v. Fleming*, 508 So. 2d 718, 720 (Fla. 1987)).

239. *Id.*

240. FLA. R. CIV. P. 1.420(e); *Rosa*, 559 So. 2d at 1290.

241. *Scharlin v. Broward County Property Appraisal Bd.*, 500 So. 2d 345 (Fla.

self-executing, record activity prior to a party, or the court on its own motion, moving for a dismissal for failure to prosecute will preclude dismissal.²⁴²

No consensus exists among the appellate courts regarding what particular actions by the parties constitute record activity that is sufficient to survive a motion to dismiss for failure to prosecute: each case turns on the specific facts before the court. Litigation concerning costs and fees as to one defendant has been held to constitute record activity precluding dismissal against co-defendants.²⁴³ A notice of trial,²⁴⁴ a filing of summons,²⁴⁵ service of process,²⁴⁶ and paying a new filing fee in order to transfer the case²⁴⁷ have all been viewed as acts intended to hasten a suit toward judgment and thus sufficient record activity to preclude dismissal. Non-frivolous discovery activity may also constitute record activity within the meaning of Rule 1.420(e).²⁴⁸

On the other hand, the following actions have been viewed as non-record activity, thus permitting dismissal for failure to prosecute: the taking of depositions;²⁴⁹ notices of withdrawal and substitution of counsel;²⁵⁰ and responses to interrogatories filed after a motion to dismiss.²⁵¹ In *Caldwell v. Mantei*,²⁵² the court held that status requests and reports, even though technically record activity, did not further the case toward disposition and were held insufficient to shield against a motion to dismiss for failure to prosecute.

Upon a showing of "good cause", the court has the discretion to allow an action to continue despite a party's failure to prosecute the

4th Dist. Ct. App. 1987).

242. *Barnes v. Escambia County Employees Credit Union*, 488 So. 2d 879 (Fla. 1st Dist. Ct. App. 1986).

243. *Freeman v. Schuele*, 566 So. 2d 817 (Fla. 2d Dist. Ct. App. 1990).

244. *Mitchell v. Coker Fuel Inc.*, 511 So. 2d 344 (Fla. 2d Dist. Ct. App. 1987)(notice for trial controlled the action even though filed simultaneously with motion to dismiss for failure to prosecute).

245. *Garland v. Southeastern Palm Beach County Hospital Taxing Dist.*, 526 So. 2d 725 (Fla. 4th Dist. Ct. App. 1988).

246. *Glassalum Eng'g Corp. v. 392208 Ontario Ltd.*, 487 So. 2d 87 (Fla. 3d Dist. Ct. App. 1986).

247. *Henkel v. Chua*, 507 So. 2d 791 (Fla. 4th Dist. Ct. App. 1987).

248. *Anthony*, 557 So. 2d 656 (Fla. 2d Dist. Ct. App. 1990).

249. *Smith v. DeLoach*, 556 So. 2d 786 (Fla. 2d Dist. Ct. App. 1990).

250. *Nesbitt v. Community Health, Inc.*, 566 So. 2d 1 (Fla. 3d Dist. Ct. App. 1989).

251. *Caldwell v. Mantei*, 544 So. 2d 252 (Fla. 2d Dist. Ct. App. 1989).

252. *Id.* at 254.

claim within one year.²⁵³ In *A & W Electric, Inc. v. Abraira*, the court held that the plaintiff's heart surgery and subsequent rehabilitation period were sufficient reasons to preclude dismissal, even though the plaintiff did not seek a continuance prior to a one-year period of record inactivity.²⁵⁴ However, in *Denson v. Meyer*,²⁵⁵ the court refused to view settlement negotiations between the parties as "good cause" for not dismissing an action that was without record activity for over one year.

X. OFFER OF JUDGMENT

Florida Rule of Civil Procedure 1.442 seeks to encourage parties to settle claims without litigation.²⁵⁶ At any time, not later than 60 days before trial or less than 15 days after service of a counteroffer, either party in an action may make an offer to settle "all pending claims."²⁵⁷

The Florida Supreme Court's amended version of Rule 1.442 (Offer of Judgment) took effect as of January 1, 1990.²⁵⁸ When considering the amendment of the Rule, the court rejected the argument that the court should declare sections 768.79 and 45.061, Florida Statutes, unconstitutional based on possible conflicts between the statutes and Rule 1.442, saying "[w]e agree with the Committee that sections 768.79 and 45.061 impinge upon this Court's duties in their procedural details . . . [t]o the extent the procedural aspects of new rule 1.442 are inconsistent . . . the rule shall supersede the statutes."²⁵⁹

Applying only to money damages,²⁶⁰ offers of judgment must be accepted within 30 days after service of the offer or the offer will be deemed rejected.²⁶¹ A rejection of an offer terminates the offer.²⁶² A counteroffer is also considered a rejection.²⁶³ The court may impose "sanctions equal to reasonable attorneys fees and all reasonable costs of

253. *A & W Electric Inc. v. Abraira*, 567 So. 2d 36 (Fla. 3d Dist. Ct. App. 1990).

254. *Id.*

255. 565 So. 2d 758 (Fla. 3d Dist. Ct. App. 1990).

256. FLA. R. CIV. P. 1.441; *Aspen v. Bayless*, 564 So. 2d 1081 (Fla. 1990).

257. FLA. R. CIV. P. 1.442.

258. 550 So. 2d 442 (Fla. 1989).

259. *Id.* at 443.

260. FLA. R. CIV. P. 1.441(a).

261. FLA. R. CIV. P. 1.441(f)(1).

262. FLA. R. CIV. P. 1.441(f)(3).

263. FLA. R. CIV. P. 1.441(f)(2).

the litigation accruing from the date the relevant offer of judgment was made²⁶⁴ when the rejection of the offer was unreasonable, resulting in further litigation costs,²⁶⁵ and when, either the damages awarded to the offeree “are less than 75 percent of the offer” or, “more than 125 percent of the offer.”²⁶⁶

Offers of judgment may not contain extraneous conditions which must be met in order to accept the monetary settlement offer.²⁶⁷ In *Martin v. Brousseau*,²⁶⁸ the appellate court ruled that a conditional offer of judgment made by the appellee was invalid because of the conditions attached to the offer. The court then reversed the trial court’s decision imposing costs and attorney’s fees upon the prevailing litigant who had been awarded damages of twenty-five percent less than the conditional offer of judgment.²⁶⁹ The conditions attached to the offer of judgment were “to execute a full and complete release and satisfaction, a hold harmless affidavit, and a stipulation for dismissal with prejudice.”²⁷⁰

In *Aspen v. Bayless*,²⁷¹ a landmark case, the Florida Supreme Court held that “a party is not precluded from recovering costs under Florida Rule of Civil Procedure 1.442, or after judgment in its favor, when someone other than the named party pays or advances those costs.”²⁷² The court reasoned that a nonprevailing plaintiff should not reap windfall benefits simply because litigation costs were borne by an insurance carrier.²⁷³ In keeping with the goal of settling disputes without going to trial, the court further reasoned that “[i]f a named insured is unable to obtain costs under rule 1.442, there would be less incentive to accept an offer to settle and no penalty for failing to do so.”²⁷⁴ Additionally, the insurer who expends funds to pay for litigation has a right of subrogation against the named party who was awarded costs by the court and thus the awarding of such costs is appropriate.²⁷⁵ The ruling

264. FLA. R. CIV. P. 1.441(h)(1) (footnote omitted).

265. FLA. R. CIV. P. 1.441(h)(1)(A).

266. FLA. R. CIV. P. 1.441(h)(1)(B)(i)(ii).

267. *Martin v. Brousseau*, 564 So. 2d 241 (Fla. 4th Dist. Ct. App. 1990).

268. *Id.*

269. *Id.* at 241.

270. *Id.* (footnote omitted).

271. 564 So. 2d 1081 (Fla. 1990).

272. *Id.* at 1082.

273. *Id.* at 1083.

274. *Id.* at 1083.

275. *Id.* at 1082.

in *Aspen* should provide guidance in the cases involving a conflict between Rule 1.442 (offers of judgment) and section 768.79, Florida Statutes, regarding the amount of entitlement which may be taxed following the rejection of an offer of settlement.²⁷⁶

XI. SUMMARY JUDGMENT

In contrast with the trend toward the increased use of summary judgment in federal courts in recent years,²⁷⁷ the Florida courts have maintained a more conservative approach by demanding more of the moving party. For example, in *Freeman v. Fleet Supply, Inc.*,²⁷⁸ the court reviewed a summary judgment entered in favor of defendant in a faulty brake case. The trial court had found that the plaintiff's allegations failed to establish that the defective brakes proximately caused his injury, based on his testimony in deposition that he had performed a routine brake inspection before the accident, but that his knowledge of braking systems was limited. In reversing the lower tribunal, the appellate court outlined its restrictive view that:

[T]he movant carries the considerable burden of showing conclusively that there is no genuine issue of material fact. Until it is determined that the movant has successfully met this burden, the opposing party is under no obligation to show that there are no issues remaining to be tried.²⁷⁹

Freeman's failure, in his deposition, to establish the exact cause of the brake failure "did not mean that Fleet Supply had conclusively demonstrated the absence of a genuine issue of material fact."²⁸⁰ Similarly, in *Mason v. McCrory Corp.*, the court found that evidence of

276. *Kanaar v. Goodwin*, 567 So. 2d 1006 (Fla. 3d Dist. Ct. App. 1990). In *Royster v. Van Der Meulen*, 564 So. 2d 1204 (Fla. 1st Dist. Ct. App. 1990), the trial judge denied appellant's motion to tax costs and attorney's fees because his insurance company had paid the costs of the litigation. The first district reversed, and certified a conflict with the 1989 second district ruling in *Aspen*. Oddly enough, this case was decided on July 25, 1990 - just one day before the Florida Supreme Court ruling in *Aspen*.

277. See, e.g., *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

278. 565 So. 2d 870, 871 (Fla. 1st Dist. Ct. App. 1990).

279. *Id.* at 871 (citations omitted).

280. *Id.*

faulty shampoo packaging, "susceptible to different reasonable inferences," was more than adequate to establish a jury question and defeat a motion for summary judgment advanced by the defendant.²⁸¹

The appellate court also found an abuse of discretion in denials of requests for relief and rehearing in *Jeff-Ray Corp. v. Jacobson*,²⁸² where the trial court had granted summary judgment against a party which "made an un rebutted showing that it did not receive notice of the summary judgment motion or hearing until receipt of the judgment itself."²⁸³ In *Hialeah, Inc. v. Adams*, the appellate court found a similar abuse of discretion where the lower court had "denied the motion to vacate solely on the basis that the registered agent's affidavit failed to establish excusable neglect" in the mishandling of a complaint and summons.²⁸⁴ On the other hand, in *Slachter v. Ahundio Inv., Co.*, a case where a moving party did properly meet his burden, the simple allegation that the non-moving party had "'meritorious defenses'" was held to be insufficient to preclude summary judgment.²⁸⁵

XII. DIRECTED VERDICT

Motions for a directed verdict are governed by Rule 1.480.²⁸⁶ A directed verdict is improper unless the evidence, viewed in a light most favorable to the non-moving party, shows that the jury "could not reasonably differ as to the existence of any material fact" and that the moving party is "entitled to judgment as a matter of law."²⁸⁷ In *Jones v. Heil Co.*, the court overturned a directed verdict for the defendant and held that a directed verdict will not be upheld on appeal unless no evidence, or reasonable inferences from evidence presented, would support a jury's verdict for the non-moving party.²⁸⁸ While a directed verdict should not be granted without serious consideration, a failure to present competent evidence to support a claim will support the trial court's setting aside the jury's verdict.²⁸⁹ However, as the court noted

281. 567 So. 2d 1011, 1012 (Fla. 3d Dist. Ct. App. 1990).

282. 566 So. 2d 885 (Fla. 4th Dist. Ct. App. 1990).

283. *Id.*

284. 566 So. 2d 350 (Fla. 3d Dist. Ct. App. 1990).

285. 566 So. 2d 348, 349 (Fla. 3d Dist. Ct. App. 1990).

286. FLA. R. CIV. P. 1.480.

287. *Garrahan v. Sea Ray Boats, Inc.*, 569 So. 2d 518 (Fla. 4th Dist. Ct. App. 1990).

288. 566 So. 2d 565 (Fla. 1st Dist. Ct. App. 1990).

289. *Yanks v. Barnett*, 563 So. 2d 776 (Fla. 3d Dist. Ct. App. 1990) (directed

in *Reaves v. Armstrong World Industries Inc.*, if there is no evidence in the record to support the jury verdict, then a directed verdict is appropriate.²⁹⁰ A directed verdict is also appropriate if a claim is barred by an affirmative defense such as the statute of frauds.²⁹¹ As the appellate court recognized in *Cho v. Mackey*, certain issues, such as the question of foreseeability prior to imposing tort liability, are questions for the jury and a directed verdict is improper in such cases.²⁹²

Rule 1.480 requires that a motion for a directed verdict be made at the close of all the evidence.²⁹³ A judgment notwithstanding the verdict and a directed verdict are interrelated. Judgment notwithstanding the verdict will not be entered unless a party earlier moved for a directed verdict.²⁹⁴ Additionally, judgment notwithstanding the verdict is determined under the same test as a directed verdict: "[I]t will be granted only if there is no evidence or reasonable inference therefrom supporting a verdict for the other party."²⁹⁵

XIII. PREJUDGMENT INTEREST/COSTS AND INTEREST/ ATTORNEYS' FEES

A. *Prejudgment Interest*

Prejudgment interest compensates the aggrieved party for the time and use of his money beginning on the date, as determined by the verdict, when the claim began to accrue. For example, in a construction contract, the date of accrual could be the date the claim became liquidated by agreement of the parties.²⁹⁶ When there is no liquidation agreement fixing the rate of interest in the event of a breach, a court should impose the current statutory interest rate²⁹⁷ of 12 percent per

verdict upheld because of plaintiffs failure to present competent evidence in fraudulent misrepresentation claim).

290. *Reaves v. Armstrong World Indus.*, 569 So. 2d 1307, 1309 (Fla. 4th Dist. Ct. App. 1990) (testimony insufficient, as a matter of law, to support a jury finding of proximate causation).

291. *Kay v. Katzen*, 568 So. 2d 960 (Fla. 3d Dist. Ct. App. 1990).

292. 567 So. 2d 1064 (Fla. 2d Dist. Ct. App. 1990).

293. FLA. R. CIV. P. 1.480(b).

294. *Merrill Lynch, Pierce, Fenner v. Anderson*, 501 So. 2d 635 (Fla. 1st Dist. Ct. App. 1986).

295. *Id.* at 638.

296. *Delta D. Constr. Corp. v. Triangle Marine Constr., Inc.*, 567 So. 2d 1010 (Fla. 3d Dist. Ct. App. 1990).

297. *Id.* at 1010.

annum simple interest.²⁹⁸

When the statutory interest rate changes between the date of the original judgment and a later judgment, the court will apply the rate imposed on the date of each rendering of judgment.²⁹⁹ In *Herskowitz v. Herskowitz*,³⁰⁰ the appellate court reversed the trial court's modification of interest on an action to enforce a judgment. The court imposed six percent "from the entry of judgment" in June of 1972 to October 1985, "the date the judgment disposing of all pending matters was entered," with twelve percent interest thereafter.³⁰¹ Finally, it should be noted that while prejudgment interest is available in contract-based causes of action — if previously pled by the prevailing party — it is not recoverable in tort actions or usurious transactions.

B. Costs and Interest

Under section 57.041 of the Florida Statutes,³⁰² certain legal costs and charges may be awarded to the prevailing party in a civil action.³⁰³ The court may award costs and attorney's fees to the prevailing plaintiff of the original action even if the defendant prevailed on a counterclaim, causing both to be "prevailing parties."³⁰⁴ If the significant relief awarded to the prevailing plaintiff is "limited in comparison to the scope of the litigation," a reduced fee may be awarded at the court's discretion.³⁰⁵ As noted by the court in *Oriental Imports Inc., v. Alilin*, a trial court no longer has the discretion to deny costs to the party prevailing in the judgment,³⁰⁶ especially when taxed for refusal of a pre-trial offer of judgment.³⁰⁷ The "prevailing party" rule applies even when the counter claimant recovers an award of damages in excess of

298. 244. FLA. STAT. § 55.031 (1989).

299. *Herskowitz v. Herskowitz*, 569 So. 2d 475 (Fla. 3d Dist. Ct. App. 1990).

300. *Id.*

301. *Id.*

302. FLA. STAT. § 57.041 (1989).

303. *Reinhardt v. Bono*, 564 So. 2d 1233, 1235 (Fla. 5th Dist. Ct. App. 1990).

304. *Malagon v. Solari*, 566 So. 2d 352, 354 (Fla. 4th Dist. Ct. App. 1990)(a landlord-tenant action with damages awarded under FLA. STAT. §83.49(3)(c)).

305. *Id.* at 354 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983) ("Where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained.")).

306. *Oriental Imports, Inc. v. Alilin*, 559 So. 2d 442 (Fla. 5th Dist. Ct. App. 1990).

307. See FLA. R. CIV. P. 1.442; *Reinhardt*, 564 So. 2d 1233.

those awarded to the prevailing plaintiff.³⁰⁸ Additionally, any sales tax incurred due to the Florida service tax on attorney's fees will be added onto the sum total of any cost awards.³⁰⁹

The prevailing party may recover costs under Rule 1.442, even when someone other than the named party, such as an insurer, has paid the costs.³¹⁰ In a case where a party is awarded costs but the actual costs were paid by another party, no real windfall occurs because the party who actually paid the costs of the litigation has subrogation rights against the named party for reimbursement of those costs.³¹¹

Taxation of costs for discovery purposes, depositions, and requests for production, are allowed or disallowed depending on whether they serve a useful purpose in determining issues before the trial court. However, reliance upon the information gleaned through discovery depositions is not enough to invoke taxation of those costs.³¹² Attorneys who are found guilty of charges brought by the Florida Bar during disciplinary proceedings will be taxed any costs incurred by the Bar, including witness fees.³¹³

While the court has great discretion in taxation of costs, the cost of depositions should not be disallowed merely as a result of voluntary dismissal.³¹⁴ Finally, as to the appropriate amount of costs surrounding a party's use of expert witnesses, all that is required of the court in calculating taxation of fees for expert witnesses - who actually attend court to testify - is consideration of a listing of itemized costs per expert witness used and a determination as to whether the cost listed was reasonable.³¹⁵

308. *Salisbury Constr. Corp. v. Mitchell*, 491 So. 2d 308 (Fla. 4th Dist. Ct. App. 1986).

309. *See* FLA. STAT. § 57.071(3) (1989); *Waller v. Baxley*, 565 So. 2d 808, 809 (Fla. 2d Dist. Ct. App. 1990).

310. *Aspen*, 564 So. 2d 1081.

311. *Balseca v. Callies Electric, Inc.*, 566 So. 2d 322, 324 (Fla 3rd Dist. Ct. App. 1990).

312. *See generally Balseca*, 566 So. 2d at 328 (taxation of costs rests largely within the discretion of the trial court).

313. *The Florida Bar v. Blunt*, 564 So. 2d 129, 130 (Fla. 1990).

314. *Balseca*, 566 So. 2d at 324; *Allstate Ins. Co. v. Jasiacki*, 549 So. 2d 816 (Fla. 2d Dist. Ct. App. 1989).

315. *Balseca*, 566 So. 2d at 324; *Allstate*, 549 So. 2d 816.

C. Attorneys' Fees

Except where awarded by statute,³¹⁶ the taxing of attorneys' fees is a product of the common law. Section 57.105 of the Florida Statutes provides "for the award of attorney's fees to a prevailing party where 'the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party.'"³¹⁷ Fees are similarly awarded to the prevailing parties of post-divorce harassment cases through the continuous filing of motions³¹⁸ and frivolous action cases that are so devoid of merit, both on the facts and the law, as to be completely untenable.³¹⁹

If properly pled, a motion for attorneys fees may be made after final judgment and accompanied by proof of fees, personal testimony of the attorney who performed the services, and sufficient proof of reasonable time spent in arriving at the total amount of fees requested. The Florida Supreme Court has recognized that there are different categories of attorneys fees. In *Standard Guaranty Insurance Co. v. Quanstrom*, the court stated that "different types of cases require different criteria to achieve the legislative or court objective in authorizing the setting of a reasonable attorney's fee."³²⁰ Because of prevailing confusion among lawyers as to when the application of a multiplier is appropriate, the Florida Supreme Court discussed the logistics of proper multiplier usage in *Quanstrom*.³²¹ According to the court, the multiplier is not ordinarily used in estate and trust, eminent domain, or domestic relations cases.³²² In contractual disputes, the trial court should consider: (1) the market availability of competent counsel, (2) attorney mitigation of expenses/fees, and, (3) the relevance of the *Rowe*³²³ fac-

316. FLA. STAT. § 57.105 (Supp. 1990).

317. *Simmons v. Schimmel*, 476 So. 2d 1342, 1345-46 (Fla. 3d Dist. Ct. App. 1985).

318. *Steinfeld v. Steinfeld*, 565 So. 2d 366 (Fla. 4th Dist. Ct. App. 1990); *Elenewski v. Elenewski*, 528 So. 2d 1354, 1356 (Fla. 3d Dist. Ct. App. 1988).

319. *Rojas v. Drake*, 569 So. 2d 859, 860 (Fla. 2d Dist. Ct. App. 1990).

320. 555 So. 2d 828, 833 (Fla. 1990).

321. *Id.*

322. *Id.* Attorney's fees are usually guaranteed in the first two, while ethically inappropriate in the later cases.

323. *See Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985). Fee computation should be based on: 1) number of hours reasonably spent in litigation; 2) the reasonable hourly rate applicable to the specific type of litigation involved; 3) multiply (1) and (2), and when necessary; 4) allow adjustment of the fee to compensate for failure to prevail on the claims or based on the nature of the litigation.

tors, especially the total amount, post litigation results, and attorney/client fee agreements.³²⁴ As the First District Court of Appeal noted in *Jones v. Associates Fin. Inc.*, the *Rowe* factors must be applied by the trial court when determining attorney's fees in order to avoid reversible error.³²⁵

XIV. RES JUDICATA/COLLATERAL ESTOPPEL

A final judgment will bar further litigation under principles of res judicata (claim preclusion) when the judgment includes the identity of the cause of action, the identity of the thing sued for, the identity of the persons and parties to the action, and the identity of quality for or against whom the claim is made.³²⁶ Res judicata must be pled as an affirmative defense and is generally utilized in conjunction with a motion for summary judgment.³²⁷ Once a judgment has been entered, a second suit, filed by the same parties or parties who could have been in privity in the first suit, is barred by res judicata in order to inhibit the splitting of causes of action into multiple suits.³²⁸ Exceptions to the principle of res judicata may be raised in connection with recurring claims; however, without proof compelling modification of a previous final order, non-recurring issues which were clearly litigated in the first suit are barred by res judicata in all subsequent suits for recurring damages.³²⁹

Under res judicata or claim preclusion (also sometimes referred to as estoppel by judgment), all matters that were part of the initial cause of action are said to be merged into the final judgment and a party is said to be barred from relitigating any matters that were, or could have been, included as a part of that cause of action. The principle problem

Id.

324. *Quanstrom*, 555 So. 2d at 834; see also *Sun Bank v. Ford*, 564 So. 2d 1078, 1080 (Fla. 1990) (trial judge appropriately set the attorney's fees by the terms of the promissory note, \$150/hr for the time reasonably spent).

325. *Jones v. Associates Fin., Inc.*, 565 So. 2d 394 (Fla. 1st Dist. Ct. App. 1990).

326. *Personnel One, Inc. v. John Sommerer & Co.*, 564 So. 2d 1217, 1218 (Fla. 3d Dist. Ct. App. 1990).

327. *Id.* at 1218.

328. *DeCarlo v. Palm Beach Auto Brokers, Inc.*, 566 So. 2d 318 (Fla. 4th Dist. Ct. App. 1990).

329. See, e.g., *Nelson & Co. v. Holtzclaw*, 566 So. 2d 307, 309 (Fla. 1st Dist. Ct. App. 1990) (worker's compensation case); *Walker v. Walker*, 566 So. 2d 1350 (Fla. 1st Dist. Ct. App. 1990) (child support case).

of the application of claim preclusion generally concerns whether a matter which was not litigated could have been litigated as part of the cause of action. Issue preclusion or collateral estoppel (also sometimes called estoppel by verdict) precludes relitigation of an issue that was actually litigated and necessary to the holding. Three typical problems emerge in reference to collateral estoppel: (1) is it the same identical issue (i.e. same burden of proof); (2) was the litigated issue necessary to the court's judgment; and (3) whether the requirement of mutuality should be relaxed so that issue preclusion can be used as a shield or a sword.

When the first and second suits involve different causes of action between the same parties or parties who were in privity in the first suit, the doctrine of collateral estoppel is invoked; thus, the parties are estopped from litigating any common issues that were actually adjudicated in prior litigation.³³⁰ One example of collateral estoppel is seen in section 775.089(8) of Florida Statutes,³³¹ which dictates that, in civil suits for restitution arising from criminal convictions, collateral estoppel prevents the denial of any essential allegations which led to the criminal conviction in the previous proceeding.³³²

"Collateral Estoppel" (issue preclusion) and its synonymous term "estoppel by verdict" should not be confused with "estoppel by judgment" which refers to a res judicata bar (claim preclusion). Because of the confusion that could result, even synonymous terms should not be redundantly used together.³³³ Some Florida courts have used these terms interchangeably, much to the befuddlement of the reader. It would be helpful if Florida courts would adopt the definitions used by the Restatement of Judgments (Second) in order to provide greater uniformity.³³⁴

The modern view, allowing the use of collateral estoppel as a "sword" or a "shield," has been accepted by the United States Supreme Court in the landmark cases of *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*,³³⁵ and *Parklane Hosiery Co.*

330. *Personnel One, Inc.* 564 So. 2d 1217.

331. Fla. Stat § 775.089(8) (1989).

332. *Paterno v. Fernandez*, 569 So. 2d 1349 (Fla. 3d Dist. Ct. App. 1990).

333. *Glens Falls Ins. Co. v. Russell*, 567 So. 2d 939 (Fla. 4th Dist. Ct. App. 1990).

334. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1980).

335. 402 U.S. 313 (1971) (defensive "shield" usage - defendant in second patent infringement suit was able to defeat the action because the plaintiff had previously lost on an infringement action on the same patent against a different defendant).

v. Shore.³³⁶

Res judicata and collateral estoppel are dependant upon the entry of a final judgment or order.³³⁷ When the order is not final — such as when an evidentiary hearing is required or when a petition for a writ of certiorari is denied without an opinion, or when the first case is dismissed for lack of prosecution or as a sanction without adjudication on the merits — the doctrines of res judicata or collateral estoppel may not be invoked in the case.³³⁸ In the absence of a reversal, an order or judgment that is voidable bars later adjudication for res judicata purposes.³³⁹

336. 439 U.S. 322 (1979) (offensive “sword” usage - plaintiff was able to prevail in second suit by using a prior determination in an action by the United States against the same defendant).

337. *DeCarlo*, 566 So. 2d 318.

338. *See, e.g., Accent Realty, Inc. v. Crudele*, 496 So. 2d 158 (Fla. 3d Dist. Ct. App. 1986).

339. *See, e.g., Walker v. Walker*, 566 So. 2d 1350 (Fla. 1st Dist. Ct. App. 1990); *HRS v. Morley*, 570 So. 2d 402 (Fla. 5th Dist. Ct. App. 1990).