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Article 1

Civil Procedure

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Civil Procedure

William VanDercreek and Kimberly L. King

Abstract

Disqualification of judges generally is governed by Rule 1.432 and Florida Statutes chapter 38. Grounds which will support a suggestion of disqualification are stated in section 38.02.

KEYWORDS: witnesses, jurors, parties

Civil Procedure

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I. Judges and Counsel

A. Disqualification of Judges

Disqualification of judges generally is governed by Rule 1.432 and Florida Statutes chapter 38. Grounds which will support a suggestion of disqualification are stated in section 38.02. Where the basis for disqualification is prejudice, an applicant must file an affidavit stating the facts and reasons for the movant's belief that bias or prejudice exists.¹

The affidavit "shall be accompanied by a certificate of counsel of record that such affidavit and application are made in good faith."² Although the judge must determine the legal sufficiency of the motion for disqualification, she "shall not pass on the truth of the facts al-

1. FLA. STAT. § 38.10 (1985).

2. *Id.*; see *Parsons v. Motor Homes of America, Inc.*, 465 So. 2d 1285 (Fla. 1st Dist. Ct. App. 1985) (no error in judge's refusal to recuse where motion legally insufficient for failure to allege facts and reasons for belief of bias or prejudice and failure to file certificate of counsel).

leged” in a legally sufficient motion.³ A judge who undertakes to controvert the asserted grounds for recusal assumes an adversarial posture, and on that basis alone is disqualified.⁴ The remedy for a judge’s refusal to recuse herself is sought by petition for writ of prohibition filed in the appropriate appellate court.⁵

The rulings made before recusal of a judge are not invalid.⁶ However, an order entered simultaneously with an order of recusal is invalid.⁷ “[A] successor judge may not modify or otherwise disturb an unappealed final order of his predecessor permanently enjoining the use of a business name”⁸ A successor judge who has not heard all the evidence may not make determinations of fact or enter final judgment except after retrial or upon stipulation of the parties to use of the record of prior proceedings as the basis for the judgment.⁹

B. Counsel

1. Generally

The Third District Court of Appeal in *Lackow v. Walter E. Heller & Co. Southeast, Inc.*¹⁰ found that the plaintiff’s counsel should have been disqualified because an appearance of professional impropriety was created, contrary to the provision of Canon 9 of the *Code of Professional Responsibility*, when a secretary who was employed by the defendant’s counsel left the firm and went to work for plaintiff’s counsel. The court noted that the defendant’s firm consisted of only two lawyers, that the secretary had been primarily involved in the case and continued to be involved in the case in her employment with the plaintiff’s firm.

The Fourth District Court of Appeal in *Hub Financial Corp. v.*

3. FLA. R. CIV. P. 1.432(d); *Mangina v. Cornelius*, 462 So. 2d 602 (Fla. 5th Dist. Ct. App. 1985).

4. *Gieske v. Moriarty*, 471 So. 2d 80 (Fla. 4th Dist. Ct. App. 1985).

5. See *Mangina*, 462 So. at 602; *Gieske*, 471 So. 2d at 80.

6. *Foresight Enters., Inc. v. Leisure Time Properties, Inc.*, 466 So. 2d 283 (Fla. 5th Dist. Ct. App.), *petition for review denied*, 476 So. 2d 673 (Fla. 1985).

7. *Barnett Bank v. Garrett*, 468 So. 2d 467 (Fla. 4th Dist. Ct. App. 1985).

8. *Master Cleaners v. Chantres*, 471 So. 2d 646, 647 (Fla. 3d Dist. Ct. App. 1985).

9. See *Paragon Group, Inc. v. Hoeksema*, 475 So. 2d 244 (Fla. 2d Dist. Ct. App. 1985), *petition for review denied*, 486 So. 2d 597 (Fla. 1986).

10. 466 So. 2d 1120 (Fla. 3d Dist. Ct. App. 1985).

*Olmetti*¹¹ decided that a trial court erred in allowing counsel for a corporation to "withdraw on the day of trial without granting a continuance to permit [the corporation] to obtain new counsel"¹²

Florida Statutes section 454.18 guarantees the right of self-representation. The Third District Court of Appeal in *Herskowitz v. Herskowitz*¹³ quashed an order of an administrative law judge which required parties to be represented by counsel. The court distinguished another Third District case¹⁴ in which the court "prohibited self-representation to prevent abuse of court proceedings and interference with the orderly process of judicial administration."¹⁵

2. Attorney's Fees

(a) Frivolous Actions

Section 57.105, Florida Statutes,¹⁶ is designed to discourage frivolous civil litigation by permitting courts to award fees against losing parties who bring meritless actions.¹⁷ Attorney's fees statutes are narrowly construed.¹⁸ The Florida Supreme Court in *Whitten v. Progressive Casualty Insurance Co.*¹⁹ upheld the constitutionality of the statute and identified incipient district court standards for use by trial courts in determining whether to award fees under the statute. The action must be found "so clearly devoid of merit *both* on the facts and

11. 465 So. 2d 618 (Fla. 4th Dist. Ct. App. 1985).

12. *Id.* at 619.

13. 466 So. 2d 8 (Fla. 3d Dist. Ct. App. 1985).

14. *Shotkin v. Cohen*, 163 So. 2d 330 (Fla. 3d Dist. Ct. App.), *appeal dismissed*, 163 So. 2d 544 (Fla. 1964).

15. *Herskowitz*, 466 So. 2d at 9.

16. FLA. STAT. § 57.105 (1985) provides: "The court shall award a reasonable attorney's fee to the prevailing party in any civil action in which the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party."

17. *Whitten v. Progressive Casualty Ins. Co.*, 410 So. 2d 501, 505 (Fla. 1982).

18. The rationale supporting narrow construction has been based on a premise that such statutes are "in derogation of the common law." See *Whitten*, 410 So. 2d at 505. However, the Florida Supreme Court in *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985), stated that this premise is "historically incorrect," and that the statutes rather are exceptions to a general American rule that "attorney fees may be awarded by a court only when authorized by statute or by agreement of the parties." *Id.* at 1147-48.

19. 410 So. 2d at 501.

the law as to be completely untenable.”²⁰ A frivolous attempt to create a controversy justifies such a finding.²¹ The statute “may not be extended to every case and every unsuccessful litigant.”²² “Merely losing, either on the pleadings or by summary judgment, is not enough to invoke the operation of the statute.”²³ The entire action, not merely a portion of it, must be meritless.²⁴

Fees may not be awarded under section 57.105 merely because “events during the course of a lawsuit . . . reveal that the litigation is not sustainable.”²⁵ Fees may not be awarded against a party who merely defends a judgment on appeal.²⁶ Where an action is voluntarily dismissed as to some parties, but the action raised justiciable issues against them, those dismissed may not recover fees under the statute.²⁷

In a case of first impression, the Fourth District in *Ferrara v. Caves*²⁸ stated that fees may be awarded against an intervenor under section 57.105. The case arose when three town commissioners sought to have enjoined and declared void a recall petition which had been initiated against them. Although the commissioners originally sued the deputy town clerk and the town, the person who initiated the recall petition was granted leave to join as an indispensable party. The trial court granted summary judgment in favor of the commissioners on the ground that the recall petitions were legally insufficient. The court also awarded fees against the losing parties, which included the intervenor, under section 57.105. The district court reversed the award of fees,

20. *Id.* (quoting *Allen v. Estate of Dutton*, 384 So. 2d 171, 175 (Fla. 5th Dist. Ct. App.), *petition for review denied*, 392 So. 2d 1373 (Fla. 1980) (emphasis in original)).

21. *Id.*

22. *Id.* (citing *City of Deerfield Beach v. Oliver-Hoffman Corp.*, 396 So. 2d 1187 (Fla. 4th Dist. Ct. App.), *petition for review denied*, 407 So. 2d 1104 (Fla. 1981)).

23. *Id.* at 504 (citing *City of Deerfield Beach* and *Allen*).

24. *Glover v. School Board of Hillsborough County*, 462 So. 2d 116 (Fla. 2d Dist. Ct. App. 1985).

25. *Greater Clearwater Chamber of Commerce, Inc. v. Gray*, 464 So. 2d 594 (Fla. 2d Dist. Ct. App. 1985).

26. *McNee v. Biz*, 473 So. 2d 5 (Fla. 4th Dist. Ct. App. 1985).

27. *Poliard v. Zukoff*, 482 So. 2d 399 (Fla. 3d Dist. Ct. App. 1985); *accord Simmons v. Schimmel*, 476 So. 2d 1342 (Fla. 3d Dist. Ct. App. 1985), *petition for review denied*, 486 So. 2d 597 (Fla. 1986) (voluntary dismissal of one of the party defendants not related to merits of case but rather for strategic purpose; error to award fees where issue of negligence was raised against party who was dismissed).

28. 475 So. 2d 1295 (Fla. 4th Dist. Ct. App.), *petition for review denied*, 479 So. 2d 118 (Fla. 1985).

stating that the standard that must be met to win a summary judgment is not the same as that required to support a finding of frivolousness, which must be supported by competent substantial evidence.²⁹ The district court found that although the parties eventually reached a stipulation that the recall petition was legally insufficient and the intervenor accordingly lost on the merits, the intervenor had raised a justiciable issue of law which precluded an award of fees. The district court expressed concern that a contrary result might have a chilling effect on Florida's recall mechanisms.

The Fifth District affirmed an award of fees against a plaintiff who initiated an action for ejectment and trespass against one whom he erroneously believed was the owner of adjoining property.³⁰

(b) *Frivolous Appeals*

Florida Statutes section 57.105 has been invoked by district courts in awarding fees as penalties for frivolous appeals.³¹ In *Menkes v. Menkes*³² the district court awarded appellate attorney's fees because it regarded as "completely frivolous" a challenge to an equitable distribution of marital assets which was "plainly within the discretion of the trial court under the *Canakaris*³³ doctrine."³⁴ The Third District also awarded fees against an insurer whose arguments on appeal were characterized by the court as "patently frivolous."³⁵

The Fifth District in *Beasley v. Beasley*³⁶ warned that motions for fees under section 57.105 would be "favorably entertained"³⁷ in appeals relating to alimony awards where no record or stipulated statement was presented to the reviewing court. That court subsequently acted on its warning and awarded appellate attorney's fees where an appellant chal-

29. *Id.* at 1299.

30. *Parrino v. Ayers*, 469 So. 2d 837 (Fla. 5th Dist. Ct. App.), *petition for review denied*, 479 So. 2d 118 (Fla. 1985).

31. FLA. R. APP. P. 9.400(b) governs awards of appellate attorney's fees, which may not be awarded "unless otherwise permitted by substantive law." *Id.* at R. 9.400 committee notes on 1977 Revision.

32. 478 So. 2d 457 (Fla. 3d Dist. Ct. App. 1985).

33. *Canakaris v. Canakaris*, 382 So. 2d 1197 (Fla. 1980).

34. *Menkes*, 478 So. 2d at 457.

35. *National Union Fire Ins. Co. v. Gelfand*, 477 So. 2d 28, 29 (Fla. 3d Dist. Ct. App. 1985).

36. 463 So. 2d 1248 (Fla. 5th Dist. Ct. App. 1985).

37. *Id.* at 1248.

lenged a trial court's order increasing child support payments.³⁸ No record was made of the trial court proceedings. The appellant did not take advantage of Rule 9.200(b)(3),³⁹ which permits appellants to submit "statement[s] of the evidence or proceedings from the best available means, including . . . recollection."⁴⁰ The district court characterized the appeal as "spurious"⁴¹ because without a transcript or a Rule 9.200(b)(3) statement, the court had nothing upon which to evaluate the trial court's factual determination. The Fifth District seems to have disregarded the permissive nature of Rule 9.200(b)(3), and under penalty of section 57.105 has required that either a transcript or a Rule 9.200(b)(3) statement be presented on appeal.

(c) *Wrongful Acts*

Fees may be awarded to "an innocent party drawn into litigation with a third party by the wrong of another party."⁴² *Glance and Radcliffe, Inc. v. City of Live Oak*⁴³ involved a suit by a surety on a performance bond against the city and an engineering firm after a general contractor defaulted on a sewage construction project. The city prevailed on its cross-claim for indemnity against the firm, which a jury found was negligent in its work on the project. The district court affirmed an award of fees to the city. Similarly, in *Auto-Owners Insurance Co. v. Hooks*,⁴⁴ the district court affirmed an award of fees to a party who was forced to defend title to a car because of a prejudgment writ of replevin which was wrongfully obtained.

(d) *Fee Contracts*

Agreements that the prevailing party's fees shall be paid by the losing party are indemnificatory in nature.⁴⁵ As such, the amount of the fee awardable is the lesser of the amount agreed to by the prevailing

38. *Nicholason v. Bryant*, 468 So. 2d 311 (Fla. 5th Dist. Ct. App. 1985).

39. FLA. R. APP. P. 9.200(b)(3).

40. *Id.*

41. *Nicholason*, 468 So. 2d at 312.

42. *Glance & Radcliffe, Inc. v. City of Live Oak*, 471 So. 2d 144 (Fla. 1st Dist. Ct. App. 1985).

43. *Id.*

44. 463 So. 2d 468 (Fla. 1st Dist. Ct. App. 1985).

45. *Dunn v. Sentry Ins.*, 462 So. 2d 107, 108 (Fla. 5th Dist. Ct. App. 1985).

party and her attorney or the amount which has actually been paid.⁴⁶ That amount must be reasonable; that is, it must not be "excessive" within the meaning of that term in Florida's *Code of Professional Responsibility*.⁴⁷ Where the actual fee is found excessive, the court should award a reasonable fee.⁴⁸ Contractual provisions governing attorney's fees are strictly construed.⁴⁹

Fees may not be awarded under a contract against a partner who was not a party to the contract which created the partnership contract.⁵⁰ Fees may be awarded under contract to one who defended a suit which was voluntarily dismissed.⁵¹ Fees may be awarded under the "common fund rule" only in the absence of a controlling contract or statute⁵² and only where certain criteria are met.⁵³ Fees ordinarily may not be awarded where no basis for an award is pleaded or proved.⁵⁴

The First District Court of Appeal in *Cheek v. McGowan Electric*

46. *Id.*; accord *Pezimenti v. Cirou*, 466 So. 2d 274 (Fla. 2d Dist. Ct. App.), *review dismissed sub nom. Musca v. Cirou*, 475 So. 2d 695 (Fla. 1985).

47. *Id.*; see FLORIDA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(b); accord *Ennia Schadeverzekering, N.V. v. Buzinski*, 468 So. 2d 541 (Fla. 4th Dist. Ct. App. 1985); see also *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985) (discussing lodestar process).

48. *Hurley v. Slingerland*, 461 So. 2d 282, 283-84 (Fla. 4th Dist. Ct. App. 1985).

49. *Id.*

50. *Hatch v. Dance*, 464 So. 2d 713 (Fla. 4th Dist. Ct. App. 1985).

51. *Dunn*, 462 So. 2d at 109.

52. *Hurley*, 461 So. 2d at 283-84.

53. The court in *Estate of Hampton v. Fairchild-Florida Constr. Co.*, 341 So. 2d 759, 761 (Fla. 1976), stated that attorney's fees may be awarded to a prevailing party from a fund created or brought into court through an attorney's services. The Fourth District, in a second *Hurley* decision, 480 So. 2d 104, 107-108 (Fla. 4th Dist. Ct. App. 1985), recited a five-part test which must be satisfied for the rule to apply:

1. The existence of a fund over which the court has jurisdiction and from which fees can be awarded;
2. The commencement of litigation by one party which is terminated successfully;
3. The existence of a class which received, without otherwise contributing to the lawsuit, substantial benefits as a result of the litigation;
4. The creation, preservation, protection or increase of the fund as a direct and proximate result of the efforts of counsel for that party;
5. A reasonable relationship between the benefit established and the fees incurred.

54. See *American Housing and Dev. Corp. v. Sun Island Ass'n*, 466 So. 2d 4 (Fla. 2d Dist. Ct. App. 1985); *Brown v. Brown*, 473 So. 2d 844 (Fla. 4th Dist. Ct. App. 1985) (trial court erred in awarding fees without evidentiary hearing).

*Supply Co.*⁵⁵ ruled that fees may be awarded under a contract after final judgment even though the claim for fees was not presented to the jury. This ruling conflicts with decisions in the Second, Third, and Fifth Districts in which those courts held that claims for fees under contract are elements of damages which require determination by the jury.⁵⁶

The Fifth District affirmed an award of fees in a section 1983 suit⁵⁷ on a post-judgment motion to tax costs where there was no prayer for fees in the original complaint.⁵⁸ The court stated that the federal statute gives courts discretion to award fees to prevailing parties as part of the costs of litigation, and that costs, as opposed to damages, need not be pleaded.⁵⁹

The Second District reversed awards against losing parties' *attorneys* where the awards were not authorized by statute, contract, or the common fund rule and where the awards were ordered as penalties for improper attorney conduct.⁶⁰

The attorney general provides free representation to circuit court judges in suits for damages alleging that judicial immunity should not apply because a judge acted "in the clear absence of jurisdiction."⁶¹ The Fifth District affirmed a trial court's ruling that the fees of an attorney privately retained by a judge to defend a suit against him may

55. 483 So. 2d 1373 (Fla. 1st Dist. Ct. App. 1985).

56. *Id.* at 1380-81. The First District certified this question as one of great public importance:

Where attorney's fees are pled in a successful suit for recovery pursuant to a promissory note, and the note provides that the maker shall pay "reasonable attorney's fees," may the proof of such fees be presented for the first time after final judgment pursuant to a motion for attorney's fees by the prevailing party?

Id. at 1381.

57. 42 U.S.C. § 1983 (1982).

58. *City of Palm Bay v. Bauman*, 475 So. 2d 1322, 1327 (Fla. 5th Dist. Ct. App. 1985); *cf.* *Compton v. Gator Office Supply and Furniture, Inc.*, 471 So. 2d 216 (Fla. 4th Dist. Ct. App. 1985) (award of fees reversed where trial court failed to reserve jurisdiction to award fees).

59. *Bauman*, 475 So. 2d at 1327.

60. *See American Bank v. Hooven*, 471 So. 2d 657 (Fla. 2d Dist. Ct. App. 1985) (where trial court found attorney's conduct which lead to mistrial was not contemptuous, no authority to award fees and expenses as sanction); *Israel v. Lee*, 470 So. 2d 861 (Fla. 2d Dist. Ct. App. 1985) (no authority to hold attorney personally liable for appellate attorney's fees of prevailing opposing party, even when contempt rulings against client and attorney were jointly appealed).

61. *Salfi v. Ising*, 464 So. 2d 687, 688 (Fla. 5th Dist. Ct. App. 1985).

not be awarded under section 57.105 against the losing party.⁶² The court did not decide whether the attorney general could be awarded fees under section 57.105.⁶³

In *C.U. Associates, Inc. v. R.B. Grove, Inc.*⁶⁴ the Florida Supreme Court found that a prevailing party in a mechanic's lien action may be entitled to fees under section 713.29, Florida Statutes,⁶⁵ only where the party recovers an amount greater than a prior settlement offer.⁶⁶ The court distinguished Rule 1.442, which provides only for awards of costs incurred after an offer of judgment where the amount recovered by the party who rejected an offer does not exceed the amount offered.⁶⁷

The Fifth District in *George v. Northcraft*⁶⁸ decided that although one who accepts an offer of judgment under Rule 1.442 may be regarded as a "prevailing party" under a contractual provision entitling that party to fees, where an accepted offer makes no reference to fees, the party is precluded from later seeking them. The court noted that such fees are unliquidated and are part of the prevailing party's damages.⁶⁹ Thus, where the offer does not reserve to the accepting party a right to seek fees, any claim for fees is deemed included in the claim for damages, which was satisfied by the offer and acceptance of judgment.

II. Pleadings

A. Generally

A complaint must make specific allegations of fact to support the elements of a cause of action.⁷⁰ It is improper to draft a complaint so that subsequent counts incorporate by reference all the paragraphs of all the preceding counts.⁷¹

62. *Id.* at 689.

63. *Id.* at n.2.

64. 472 So. 2d 1177 (Fla. 1985).

65. FLA. STAT. § 713.29 (1981).

66. *C.U. Assocs.*, 455 So. 2d at 1110.

67. *Id.*; see FLA. R. CIV. P. 1.442.

68. 476 So. 2d 758 (Fla. 5th Dist. Ct. App. 1985).

69. *Id.* at 759.

70. See, e.g., *Reddish v. Smith*, 468 So. 2d 929 (Fla. 1985) (complaint alleging liability of state agency for personal injury inflicted by escaped prisoner insufficient as matter of law on elements of causation and foreseeability; insufficient allegations of fact on claim of impropriety and bad faith).

71. *Frugoli v. Winn-Dixie Stores, Inc.*, 464 So. 2d 1292 (Fla. 1st Dist. Ct. App.

The Florida Supreme Court in *Tamiami Trail Tours, Inc. v. Cotton*⁷² found that the second count in a two-count pleading was fatally defective for misjoinder of claims and parties. Two plaintiffs sued a common defendant and his employer. The first count of the complaint alleged tortious interference with a business relationship enjoyed by one of the plaintiffs. The second count consisted of the other plaintiff's allegation of battery. The court found that the causes of action were separate and the plaintiffs' interests not identical.⁷³ The misjoinder was not cured through incorporation by reference of the first count in the second.⁷⁴

Rule 1.190(b) provides that pleadings may be amended to conform to the evidence. It further provides that issues not presented by the pleadings but nonetheless tried by the parties are to be treated as if raised in the pleadings although no formal amendment was made.⁷⁵

B. Counterclaims

Counterclaims generally are governed by Rule 1.170.⁷⁶ A counterclaim may be stricken and dismissed as a sanction for failure to furnish discovery.⁷⁷ An order dismissing a compulsory counterclaim is nonfinal and not reviewable by interlocutory appeal.⁷⁸ An order denying a motion for leave to amend a counterclaim is also nonfinal and nonreviewable.⁷⁹ The Fifth District Court of Appeal in *Allie v. Ionata*⁸⁰ ex-

1985).

72. 463 So. 2d 1126 (Fla. 1985).

73. *Id.* at 1128.

74. *Id.*

75. *Cf. Wassil v. Gilmour*, 465 So. 2d 566 (Fla. 3d Dist. Ct. App. 1985) (where statute of limitations barred action on oral loan contract and subsequent promises to repay created new causes of action, plaintiff failed to raise this theory at trial and defendant's failure to object to testimony about the promises did not justify amendment under the rule where the testimony was relevant on other grounds and thus not objectionable); *99 Broadcasting Co., Inc. v. Crider*, 10 Fla. L. Weekly 1157 (Fla. 4th Dist. Ct. App. May 8, 1985) (error to permit amendment at close of evidence based on theory of damages suggested by witness whose name did not appear on witness list) (motion for rehearing filed May 20, 1985).

76. FLA. R. CIV. P. 1.170.

77. FLA. R. CIV. P. 1.380(b)(2)(C); *Cedars Assoc. v. E.R. Brownell & Assocs., Inc.*, 466 So. 2d 1130 (Fla. 3d Dist. Ct. App. 1985).

78. *Dennis v. Pavlokos*, 464 So. 2d 1323 (Fla. 5th Dist. Ct. App. 1985).

79. *Sciabbarrasi v. Uddo*, 466 So. 2d 19 (Fla. 5th Dist. Ct. App. 1985).

80. 466 So. 2d 1108 (Fla. 5th Dist. Ct. App.), *cause dismissed*, 469 So. 2d 749 (Fla. 1985).

amined the extent of recovery obtainable through the defense of recoupment raised in response to a counterclaim. Ionata sued Allie for rescission and restitution on real estate contracts on grounds of fraud and breach of fiduciary duty. Allie prevailed on an affirmative defense that the applicable statute of limitations had run and maintained a counterclaim for the unpaid balance on purchase money notes for the property. Ionata defended against the counterclaim by raising the defense of recoupment in a "counter-counterclaim" on the basis of constructive fraud. The Fifth District decided that the defense of recoupment was permissible. Although the statute of limitations barred Ionata from initiating an action based on constructive fraud, Ionata was free to raise the fraud as a defense to Allie's counterclaim.⁸¹ However, the court was persuaded by a decision of the Third District⁸² and decided that Ionata's recovery should be limited by the amount sought by Allie in his counterclaim. The court acknowledged conflict with *Cherny v. Moody*,⁸³ in which the First District permitted affirmative recovery on a counterclaim in recoupment although the claim would have been time-barred as an independent action. The Fifth District certified the question to the supreme court.⁸⁴

A timely amendment to a counterclaim (or any other pleading) that asserts a claim or defense that "arose out of the conduct, transaction or occurrence set forth . . . in the original pleading" relates back to the time of the original pleading.⁸⁵ "Even where there is a change in the legal theory upon which the action is brought, or in the legal description of the rights to be enforced, the amendment relates back if it is based on the same factual situation."⁸⁶ The Second District reviewed a case in which a plaintiff sought discharge of a mechanic's lien and the defendant timely brought a counterclaim seeking foreclosure on the lien. The counterclaim was dismissed with leave to amend. An amended counterclaim was filed later than the twenty days within which a lienor must show cause why the lien should not be discharged

81. *Id.* at 1111-13.

82. Horace Mann Ins. Co. v. De Mirza, 312 So. 2d 501 (Fla. 3d Dist. Ct. App. 1975).

83. 413 So. 2d 866 (Fla. 1st Dist. Ct. App. 1982).

84. "Does the running of the statute of limitation on an independent cause of action bar the recovery of an affirmative judgment in recoupment on a compulsory counterclaim?" *Id.* at 869.

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

86. Wen-Dic Constr. Co. v. Mainlands Constr. Co., 463 So. 2d 1187, 1189 (Fla. 2d Dist. Ct. App. 1985), *aff'd in part and rev'd in part*, 482 So. 2d 1369 (Fla. 1986).

as required by Florida Statutes section 713.21(4).⁸⁷ The district court noted that a “counterclaim seeking to foreclose [a] mechanic’s lien is a proper means to avoid cancellation of the lien” under the statute,⁸⁸ and found that the show cause requirement was satisfied and the lien improperly discharged by the trial court because the amended counterclaim related back.

The plaintiff in *Quality Coffee Service, Inc. v. Tallahassee Coca-Cola Bottling Co.*⁸⁹ sued for breach of contract and the defendant counterclaimed for breach of contract and express warranty. With leave of the court, the defendant amended its counterclaim to allege fraud and civil theft, and demanded a jury trial. The First District Court of Appeal quashed the trial court’s order denying a jury trial. The court began its well-reasoned analysis by observing that a demand for a jury trial must be made in compliance with Rule 1.430(b), or else the right to trial by jury is waived.⁹⁰ When leave is given to amend a counterclaim and new issues triable of right by jury are presented by the amendment, “the time for demand of jury trial is revived, despite an initial waiver.”⁹¹ When the original complaint is in equity and the counterclaim injects a legal issue, the legal issue may be tried separately before a jury unless the legal issue is so “similar or related to” the equitable issue that the finding of fact in the equitable proceeding would “bind the legal fact finder” and thus operate to “deprive the legal counterclaimant of his right to trial by jury.”⁹² The district court found that the factual elements common to causes of action based on breach of contract and warranty, fraud, and civil theft entitled the defendant to jury trial on all the issues raised by its counterclaim.⁹³

III. Parties, Witnesses, and Jurors

A. Parties

Rule 1.210(a) provides that a nominal beneficiary under a contract may prosecute in its own name, even though it is not the real party in interest. The Third District Court of Appeal in *Corat Interna-*

87. FLA. STAT. § 713.21(4) (1983).

88. *Wen-Dic*, 463 So. 2d at 1188.

89. 474 So. 2d 427 (Fla. 1st Dist. Ct. App. 1985).

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

91. *Quality Coffee Serv.*, 474 So. 2d at 429.

92. *Id.* at 429.

93. *Id.*

*tional, Inc. v. Taylor*⁹⁴ accordingly reversed a trial court's ruling that a party who was not the real party in interest could not properly prosecute an action in its own name. A consignor shipped goods under a C.I.F. (shipment) contract. Title passed to the consignee upon delivery to the carrier. The consignee bore the risk of loss. The consignor caused insurance on the goods to be purchased in its own name. Some of the goods were destroyed during shipment. The consignor paid for replacement of the goods and sued on the insurance contract. The trial court entered summary judgment for the insurer because the consignor was not the real party in interest under the insurance contract. The district court reversed on the basis of Rule 1.210(a). The Florida rule differs from its federal counterpart, Rule 17(a), which requires that "[e]very action shall be prosecuted in the name of the real party in interest."⁹⁵

Rule 1.260(a)(1) permits substitution of parties within ninety days after service of notice of the death of a party. The ninety day period may be extended upon a showing of excusable neglect,⁹⁶ inadvertance, or mistake.⁹⁷ The Fourth District Court of Appeal in *Stroh v. Dudley*⁹⁸ held that "Rule 1.260(a)(1) does not require mandatory, non-discretionary dismissal even in light of the terminology 'shall be dismissed as to the deceased party.'"⁹⁹ The court reversed an order dismissing a counterclaim with prejudice for failure to timely substitute a personal representative after the death of a counterclaimant. In a dissenting opinion, Judge Downey expressed his view that the mandatory language of the rule should be followed unless "the party has procured an extension of time prior to expiration of the ninety days or unless he can bring himself within the purview of Rule 1.540(b)"¹⁰⁰

The individual members of a partnership are generally regarded as indispensable parties to an action brought in behalf of the partnership, because "[e]ach partner is deemed to have an interest in the chose in

94. 462 So. 2d 1186 (Fla. 3d Dist. Ct. App.), *petition for review denied*, 471 So. 2d 44 (Fla. 1985).

95. FED. R. CIV. P. 17(a); *see Corat Int'l*, 462 So. 2d at 1187 n.2.

96. *See Somero v. Hendry Gen. Hosp.*, 467 So. 2d 1103 (Fla. 4th Dist. Ct. App.), *review denied sub nom. Hayslip v. Somero*, 476 So. 2d 674 (Fla. 1985) (reversing order dismissing cause where plaintiff's attorney failed to timely seek substitution of decedent's estate as party defendant).

97. *Stroh v. Dudley*, 476 So. 2d 230, 231 (Fla. 4th Dist. Ct. App.), *appeal dismissed*, 482 So. 2d 348 (Fla. 1985).

98. *Id.*

99. *Id.*

100. *Id.* at 232 (Downey, J., dissenting).

action"¹⁰¹ This rule protects defendants from exposure to the possibility of multiple suits and liability arising from the same claim.¹⁰² The composition of the partnership may be such that the rationale supporting treatment of the partners as indispensable parties is inapplicable as, for example, where claims by or against some of the partners are time-barred.¹⁰³ The composition of a partnership is a question of fact which may not be resolved by a trial judge on a directed verdict.¹⁰⁴

B. *Witnesses*

The common law rule permitting sequestration of witnesses has not been codified in the Florida Statutes or adopted as a rule of court.¹⁰⁵ The rule is invoked "to avoid the coloring of a witness' testimony by that which he has heard from other witnesses who have preceded him on the stand."¹⁰⁶ The Third District Court of Appeal in *Del Monte Banana Co. v. Chacon*¹⁰⁷ decided that a new trial was required where an attorney attempted to impeach the credibility of a witness by cross-examining him about a suspected violation of the rule. The district court stated that the attorney had usurped the function of the trial court by determining whether the rule was violated and what remedy was appropriate.¹⁰⁸ The court outlined the procedure which should be followed when a witness' compliance with the court's order is questioned.¹⁰⁹

In a pretrial order, a court may limit the names of the witnesses

101. *DeToro v. Dervan Invs. Ltd.*, 483 So. 2d 717 (Fla. 4th Dist. Ct. App. 1985); *Waterfront Developers, Inc. v. City of Miami Beach*, 467 So. 2d 733, 734 (Fla. 3d Dist. Ct. App. 1985); *cf.* *Bankers Multiple Line Ins. Co. v. Farish*, 464 So. 2d 530 (Fla. 1985) (no error in failure to add two additional members of law firm under circumstances).

102. *DeToro*, 483 So. 2d at 721.

103. *See* *Farish v. Bankers Multiple Line Ins. Co.*, 425 So. 2d 12, 16 (Fla. 4th Dist. Ct. App. 1982), *modified*, 464 So. 2d 530 (Fla. 1985).

104. *See DeToro*, 483 So. 2d at 721-22.

105. *Del Monte Banana Co. v. Chacon*, 466 So. 2d 1167, 1170 n.1 (Fla. 3d Dist. Ct. App. 1985).

106. *Id.* at 1170.

107. *Id.* at 1167.

108. *Id.* at 1170-71; *see also* FLORIDA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-108(G): "A lawyer shall reveal promptly to the court improper conduct by a venireman or a juror, or by another toward a venireman or a juror or a member of his family, of which the lawyer has knowledge."

109. *See Del Monte*, 466 So. 2d at 1171.

who may be called. For example, the court may order the parties to exchange witness lists and forbid testimony by unlisted witnesses.¹¹⁰ This pretrial practice serves as an aid to case management. It also serves as a discovery function in that disclosure of witnesses helps prevent unfair surprise and "trial by 'ambush.'"¹¹¹ The Third District Court of Appeal in *Capital Bank v. G & J Investments Corp.*¹¹² decided that a new trial was necessary where an expert witness was permitted to testify although his identity had not been disclosed, as was required by a pretrial order. The expert, who was a handwriting analyst, presented damaging testimony about a sequence of events which was determinative of liability on a negotiable instrument. The court found that the party against whom the testimony was offered was prejudiced by the testimony because the party was unprepared to conduct cross-examination of the witness. The court further found that the party was unable "to cure the prejudice . . . and that [the] noncompliance with the pretrial order was not in good faith."¹¹³

The Fourth District Court of Appeal decided in *99 Broadcasting Co. v. Gulfstream Broadcasting Co.*¹¹⁴ that a party should not have been permitted to amend its pleadings to add a new issue in conformity with testimonial evidence of a witness whose name did not appear on a witness list. The list had been furnished without a court order. The court reasoned that the outcome of the case may have been affected because the jury may have based its verdict on the new theory of damages raised by the witness. The district court directed the trial court on remand to order the parties to stipulate to the witnesses they would call.

C. Jurors

1. Jury Selection

Florida Statutes chapter 913 and Rule 1.431 provide for peremptory challenges¹¹⁵ and challenges of jurors for cause.¹¹⁶ Neither the rule

110. See generally FLA. R. CIV. P. 1.200.

111. *Binger v. King Pest Control*, 401 So. 2d 1310, 1314 (Fla. 1981).

112. 468 So. 2d 534 (Fla. 3d Dist. Ct. App. 1985).

113. *Id.* at 535.

114. 10 Fla. L. Weekly 1157 (Fla. 4th Dist. Ct. App. 1985) (motion for rehearing filed May 20, 1985).

115. FLA. STAT. § 913.08 (1985); FLA. R. CIV. P. 1.431(d).

116. FLA. STAT. § 913.03 (1985); FLA. R. CIV. P. 1.431(c).

nor the statute states the time for making a peremptory challenge in civil actions. However, in a criminal trial, the "defendant has a right to retract his acceptance and object to a juror at any time before the juror is sworn."¹¹⁷ There is conflict among the districts over whether in a civil action the "trial court [may] require the parties to exercise all of their peremptory challenges simultaneously in writing where the original panel has been thoroughly examined and challenges for cause exercised, and there remain sufficient members to comprise a jury after all peremptory challenges have been exhausted."¹¹⁸ The Third District has approved this method and twice certified the question to the supreme court.¹¹⁹ The Fourth District has disapproved the method, opining that the trial court "must permit either party to exercise any remaining peremptory challenges at any time before the jury is sworn."¹²⁰

The First District in *Video Electronics, Inc. v. Tedder*¹²¹ reviewed a trial court's limitation of the use of backstrikes in the jury selection process. The court permitted only one round of backstrikes before swearing some members of the jury panel. Counsel were not permitted to use peremptory challenges after the full panel was obtained. The district court found this procedure was contrary to the "better practice" recommended in *King v. State*¹²² and operated to deny the parties the effective and intelligent use of their peremptory challenges.¹²³ The court stated that the better practice is to permit counsel to consider the panel as a whole when exercising peremptory challenges.¹²⁴ Finding that unnecessary limitations on the use of peremptory challenges had brought many cases before the appellate courts, the court in *Video Electronics* announced a rule intended to guide trial courts in the exercise of their discretion over the jury selection process: "[W]henever a trial court exercises its discretion to . . . determine whether potential jurors should be sworn before the entire panel is selected . . . , the record should reflect substantial reasons therefore arising from excep-

117. *Dobek v. Ans*, 475 So. 2d 1266 (Fla. 4th Dist. Ct. App. 1985); accord *King v. State*, 461 So. 2d 1370 (Fla. 4th Dist. Ct. App. 1985); see FLA. R. CRIM. P. 3.310. The exercise of this right is known as "backstriking." *Dobek*, 475 So. 2d at 1267.

118. *Oliver v. Ghisiawan*, 478 So. 2d 104, 104 (Fla. 3d Dist. Ct. App. 1985).

119. *Id.* (quoting *Ter Keurst v. Miami Elevator Co.*, 453 So. 2d 501, 501 (Fla. 3d Dist. Ct. App. 1984)).

120. *Dobek*, 475 So. 2d at 1268.

121. 470 So. 2d 4 (Fla. 1st Dist. Ct. App. 1985).

122. 125 Fla. 316, 169 So. 747 (1936).

123. *Video Electronics*, 470 So. 2d at 8.

124. *Id.*

tional circumstances in the particular case."¹²⁵ The court certified the question to the supreme court.¹²⁶

The Fourth District in *Battle v. Safeway Insurance Co.*¹²⁷ cautioned trial courts "to be certain that prospective jurors are selected on purely a random basis. The jurors themselves should play no role in determining whether they are called to the box."¹²⁸ In another case, that court cautioned that "the impartiality of the finders of fact is an absolute prerequisite to our system of justice. Close cases should be resolved in favor of excusing the juror rather than leaving a doubt as to his or her impartiality."¹²⁹

The Third District in *City of Miami v. Cornett*¹³⁰ decided that "both parties may challenge the alleged improper use of peremptory challenges to exclude from jury service prospective jurors solely on the basis of race."¹³¹ The court thus adopted the rule of the criminal case of *State v. Neil*¹³² for application in civil actions. The court reasoned that the right to jury trial afforded by the Florida Constitution¹³³ would be meaningless without a requirement that the jury be impartial.¹³⁴

2. Post-Trial Interviews of Jurors

Rule 1.431(g) provides that a party who believes grounds exist to challenge a verdict may move the court for an order permitting interview of jurors to find out whether the verdict is subject to challenge.¹³⁵ The rule requires that the movant state the grounds for the challenge.

125. *Id.*

126.

In the absence of substantial reasons arising from exceptional circumstances shown to exist in the particular case, is it an abuse of discretion for a trial court to employ a jury selection procedure in which some but not all prospective jurors are sworn for the purpose of prohibiting the exercise of peremptory challenges to backstrike such jurors?

Id. at 9.

127. 468 So. 2d 462 (Fla. 4th Dist. Ct. App. 1985).

128. *Id.* at 463.

129. *Sydleman v. Benson*, 463 So. 2d 533, 533 (Fla. 4th Dist. Ct. App. 1985).

130. 463 So. 2d 399 (Fla. 3d Dist. Ct. App. 1985).

131. *Id.* at 400.

132. 457 So. 2d 481 (Fla. 1984).

133. FLA. CONST. art. I, § 22.

134. *Cornett*, 457 So. 2d at 402.

135. *See also* FLORIDA CODE OF PROFESSIONAL RESPONSIBILITY EC 7-29; *id.* DR 7-108(D).

The movant must allege specific facts and the challenge must not be based on matters which "inhere in the verdict," but rather must be based on matters that are "extrinsic to the verdict."¹³⁶ For example, an allegation that a juror misunderstood the verdict is inadequate.¹³⁷ An allegation that jurors improperly considered the finances of tortfeasors is likewise inadequate.¹³⁸ However, an allegation that a bailiff improperly told the jurors that they could not communicate with the judge is adequate.¹³⁹ Notice and hearing on the motion are required.¹⁴⁰

IV. Jurisdiction Over the Person

A. Service of Process on Natural Persons

Process and service of process generally are governed by Florida Statutes chapter 48 and Rule 1.070. Proper service effected through compliance with the applicable statute is necessary for a court to obtain personal jurisdiction over a defendant.¹⁴¹ Process may be served by the local sheriff or his appointee,¹⁴² or by a court-appointed server.¹⁴³ When a return of service is regular on its face,¹⁴⁴ a presumption of

136. *Dover Corp. v. Dean*, 473 So. 2d 710, 712 (Fla. 4th Dist. Ct. App. 1985).

137. *See id.*

138. *See Clark v. Merritt*, 480 So. 2d 649 (Fla. 5th Dist. Ct. App. 1985), *petition for review denied*, 488 So. 2d 831 (Fla. 1986).

139. *See Cedars of Lebanon Hosp. Corp. v. Silva*, 476 So. 2d 696 (Fla. 3d Dist. Ct. App. 1985).

140. FLA. R. CIV. P. 1.431(g).

141. *See, e.g., Smith v. Import Birds, Inc.*, 461 So. 2d 1026 (Fla. 4th Dist. Ct. App. 1985). While service on nonresident defendants in compliance with an applicable statute and rule is sufficient to satisfy the notice component of the process due those defendants under the fourteenth amendment, plaintiffs of course must have proper bases for asserting that a Florida court or a federal court applying Florida law should have jurisdiction over the persons of the nonresidents. The United States Supreme Court in *Burger King Corp. v. Rudzewicz*, 105 S. Ct. 2174 (1985), decided that plaintiffs who sue under a provision of Florida's long-arm statute, FLA. STAT. § 48.193(1)(g), through which the legislature has attempted to confer jurisdiction over nonresidents who breach contracts in this state, must show more than mere facial compliance with the statute. In addition, plaintiffs must satisfy the constitutional due process requirements stemming from *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and its progeny. *See generally* Note, *Due Process Limits the Reach of Florida's Long-Arm Statute in Bringing Contract Defendants to the Home of the Whopper*, 14 FLA. ST. U.L. REV. 127 (1986).

142. FLA. STAT. § 48.021 (1985).

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

144. The return of execution of process is governed by FLA. STAT. § 48.21 (1985)

valid service arises which may be overcome by clear and convincing evidence.¹⁴⁵

The Third District Court of Appeal was twice faced with challenges to service on the ground that the persons served were not "residing" at the defendants' usual places of abode within the meaning of section 48.031(1).¹⁴⁶ The court in *Magazine v. Bedoya*¹⁴⁷ decided that a mother-in-law enjoying a six week stay at the defendant's residence satisfied the statutory requirement. However, in *Montano v. Montano*¹⁴⁸ the court found that the presumption of valid service was overcome where evidence showed process was served at the defendant's residence upon a visitor who spoke no English.

Service of process not only determines jurisdiction over the person, but may also determine venue. "When two actions between the same parties are pending in different circuits, jurisdiction lies in the circuit where service of process is first perfected."¹⁴⁹ The Second District Court of Appeal in *Radice Corp. v. Sound Builders, Inc.*¹⁵⁰ examined a rather complicated chronicle of events to determine where service was first effected when opposing parties filed suits very close in time in different circuits over the same contractual dispute. Radice's attorney had agreed to accept service on behalf of his client and had thus waived the necessity of service of process. The court ultimately determined that Sound Builders' complaint was received by Radice's attorney in the mail before service of Radice's summons was perfected. Thus, venue lay in the circuit where Sound Builders filed.

In a suit on a guaranty of payment of a promissory note, the Third

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

145. *Magazine v. Bedoya*, 475 So. 2d 1035 (Fla. 3d Dist. Ct. App. 1985); cf. *Gonzalez v. Totalbank*, 472 So. 2d 861 (Fla. 3d Dist. Ct. App. 1985) (return facially defective).

146. FLA. STAT. § 48.031(1) provides:

Service of original process is made by delivering a copy of it to the person to be served with a copy of the complaint, petition, or other initial pleading or paper or by leaving the copies at his usual place of abode with any person residing therein who is 15 years of age or older and informing the person of their contents. Minors who are or have been married shall be served as provided in this section.

147. 475 So. 2d at 1035.

148. 478 So. 2d 456 (Fla. 3d Dist. Ct. App. 1985).

149. *Mabie v. Garden Street Management Corp.*, 397 So. 2d 920 (Fla. 1981), quoted in *Radice Corp. v. Sound Builders, Inc.*, 471 So. 2d 86, 87 (Fla. 2d Dist. Ct. App. 1985).

150. 471 So. 2d at 86.

District in *Gonzalez v. Totalbank*¹⁵¹ found that a return of service upon one of the defendants was facially defective for failure to comply with Florida Statutes section 48.21.¹⁵² The court further found that a general appearance by an attorney retained by another of the defendants did not operate to waive objection to lack of personal jurisdiction by a defendant who had not engaged the attorney's services.

Section 48.171 provides that substituted service on nonresident motor vehicle owners may be effected on the secretary of state as agent for that defendant. The Fourth District Court of Appeal in *Journell v. Vitanzo*¹⁵³ found that a complaint which alleged that the defendant was a Florida resident and did not allege concealment of whereabouts was facially insufficient to permit service on the secretary of state as agent.

B. Service of Process on Corporations

Service of process on corporations generally is governed by Florida Statutes section 48.081.¹⁵⁴ The Fifth District Court of Appeal in *Space Coast Credit Union v. First*¹⁵⁵ found that a final default judgment was void because jurisdiction was not perfected. The server, who was an employee of a firm engaged in the subpoena service business, was not authorized under section 48.021 to serve process. Further, the service did not comply with section 48.081 because it was made on a low-level employee with no attempt in the first instance to serve higher-level corporate functionaries.

Substituted service of process on a corporation's designated registered agent¹⁵⁶ is authorized by section 48.081(3). If a corporation fails to designate a registered agent as required by section 48.091, service may be made upon "any employee at the corporation's place of business."¹⁵⁷ The Fourth District in *Sierra Holding, Inc. v. Sayner*¹⁵⁸ decided that attempted service under this provision was ineffective because the person served in the defendant's office was not an employee.

Strict compliance with the statute is required for effective substi-

151. 472 So. 2d 861 (Fla. 3d Dist. Ct. App. 1985).

152. FLA. STAT. § 48.21 (1979).

153. 462 So. 2d 827 (Fla. 4th Dist. Ct. App. 1985).

154. FLA. STAT. § 48.081 (1985).

155. 467 So. 2d 737 (Fla. 5th Dist. Ct. App. 1985).

156. See FLA. STAT. § 48.091 (1985).

157. FLA. STAT. § 48.081(3) (1985).

158. 469 So. 2d 239 (Fla. 4th Dist. Ct. App. 1985).

tuted service on a nonresident under section 48.161.¹⁵⁹ The plaintiff bears the initial burden of showing compliance. "Once the defendant makes a prima facie showing of failure to comply, the burden again shifts to the plaintiff to demonstrate the statute's applicability."¹⁶⁰ In *Major Appliances, Inc. v. Mount Vernon Fire Insurance Co.*,¹⁶¹ the Third District reviewed a plaintiff's attempted substituted service on a nonresident defendant under section 48.161(1). A notice of suit was sent by certified mail to a member of the corporation's board of directors at the address listed in the last annual report filed before the corporation was involuntarily dissolved. The returned receipt was marked "unclaimed" and "unknown." The court held that "where the nonresident defendant doing business in the state fails to file a correct address for the purpose of substituted service, plaintiff's attempt to effect service at the address furnished by the defendant is valid."¹⁶² This decision marks a departure from the strict compliance with the statute ordinarily required for effective substituted service.

C. Constructive Service of Process by Publication

Florida Statutes chapter 49 permits constructive service of process by publication when personal service cannot be had. In a dissolution of marriage action, the Fifth District Court of Appeal in *Whigham v. Whigham*¹⁶³ decided that a trial court was without jurisdiction to adjudicate certain property rights because the published notice of action did not describe the property proceeded against, as required by section 49.08(4). Because the husband did not receive notice that his interests in property were to be adjudicated, he was denied the process due him under the Constitution.

In an action seeking foreclosure on a mortgage on real property, the Fifth District in *Tompkins v. Barnett Bank*¹⁶⁴ decided that service by publication was effective although the affidavit in support of service

159. *Smith v. Import Birds, Inc.*, 461 So. 2d 1026 (Fla. 4th Dist. Ct. App. 1985); *but cf.* *Major Appliances, Inc. v. Mount Vernon Fire Ins. Co.*, 462 So. 2d 561 (Fla. 3d Dist. Ct. App. 1985) (plaintiff excused from strict compliance with statutory requirements where nonresident corporate defendant doing business in state failed to file correct address for purpose of substituted service).

160. *Smith*, 461 So. 2d at 1027.

161. 462 So. 2d 561 (Fla. 3d Dist. Ct. App. 1985).

162. *Id.* at 563.

163. 464 So. 2d 674 (Fla. 5th Dist. Ct. App. 1985).

164. 478 So. 2d 878 (Fla. 5th Dist. Ct. App. 1985).

required by sections 49.031 and 49.041 contained an incorrect mailing address. The affidavit did contain the defendants' correct residential address, which the court found was sufficient.

V. Discovery

The rule governing the scope of discovery is that "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action"¹⁶⁵ Information may be discovered regardless of its admissibility at trial, provided that "the information sought appears reasonably calculated to lead to the discovery of admissible evidence."¹⁶⁶ Matters are discoverable only if "relevant to the subject matter of the litigation. A matter is relevant if it tends to establish a fact in controversy or to render a proposition in issue more or less probable."¹⁶⁷ Certiorari is the appropriate procedure for obtaining review of discovery orders, because "erroneously compelled disclosure, once made, may constitute irreparable harm which cannot be remedied by way of appeal."¹⁶⁸

A. Privileges

1. Attorney-Client

Matters protected by the attorney-client privilege are outside the scope of discovery.¹⁶⁹ The court must determine whether the privilege

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

166. *Id.*

167. *Oil Conservationists, Inc. v. Gilbert*, 471 So. 2d 650, 654 (Fla. 4th Dist. Ct. App. 1985) (discovery of corporate books and records not relevant to action seeking imposition of statutory penalty for corporation's denial of demand by shareholder to inspect books and records); *see Baron, Melnick & Powell, P.A. v. Costa*, 478 So. 2d 492 (Fla. 1st Dist. Ct. App. 1985) (error to order production of documents where no allegation or showing of relevancy to subject matter of action or relation to a claim or defense); *Whitman v. Bystrom*, 464 So. 2d 182 (Fla. 3d Dist. Ct. App. 1985) (post-assessment discovery of taxpayer's financial records not relevant to issue in litigation).

168. *Florida Cypress Gardens, Inc. v. Murphy*, 471 So. 2d 203, 204 (Fla. 2d Dist. Ct. App. 1985); *accord Carson v. Jackson*, 466 So. 2d 1188 (Fla. 4th Dist. Ct. App. 1985); *Baron, Melnick & Powell, P.A. v. Costa*, 478 So. 2d 492 (Fla. 1st Dist. Ct. App. 1985).

169. *See* FLA. R. CIV. P. 1.280(b)(1); *Gross v. Security Trust Co.*, 462 So. 2d 580 (Fla. 4th Dist. Ct. App. 1985); *Merlin v. Boca Raton Community Hosp., Inc.*, 479 So. 2d 236 (Fla. 4th Dist. Ct. App. 1985) (medical malpractice plaintiff's handwritten notes "prepared for and transmitted to [his] attorney either in contemplation of or

protects a matter.¹⁷⁰ The attorney-client privilege yields to the general requirement of disclosure found in Florida's Public Records Act,¹⁷¹ except that records in an agency attorney's litigation files reflecting a "mental impression, conclusion, litigation strategy, or legal theory" are exempted from disclosure until the conclusion of the litigation.¹⁷² The scopes of the discovery permissible under the *Florida Rules of Civil Procedure* and the Public Records Act are not coextensive.¹⁷³

2. Work Product

The work product privilege applies only to matters "prepared in contemplation of litigation."¹⁷⁴ A mere likelihood of litigation is not sufficient.¹⁷⁵ While the attorney-client privilege, if applicable, is absolute, work product may be discovered upon a showing of need and undue hardship.¹⁷⁶ The Fourth District Court of Appeal in *Airocar, Inc.*

during the litigation and kept confidential throughout" were protected by attorney-client privilege); see also FLA. STAT. § 90.502 (1985).

170. See *Gross*, 462 So. 2d at 581 (court properly made in camera examination of tape to determine existence of privilege).

171. FLA. STAT. ch. 119 (1985).

172. FLA. STAT. § 119.07(3)(o) (1985); see *City of Melbourne v. A.T.S. Melbourne, Inc.*, 475 So. 2d 270 (Fla. 5th Dist. Ct. App. 1985) (court properly ordered city attorney to appear at deposition and bring notes, memoranda, and correspondence between attorney and city relating to enactment of ordinances where order stated that scope of deposition would be limited by § 119.07(3)(o)); see also *Brevard County v. Nash*, 468 So. 2d 240 (Fla. 5th Dist. Ct. App. 1984) (holding that "all state, county and municipal records are controlled by the Public Records Act"; emphasis in original; question on this issue certified); see generally Smith, *The Public Records Law and the Sunshine Law: No Attorney-Client Privilege Per Se, and Limited Attorney Work Product Exemption*, 14 STETSON L. REV. 493 (1985); Comment, *Florida's Open Government Laws: No Exceptions for Attorney-Client Communications*, 13 FLA. ST. U.L. REV. 389 (1985).

173. *Department of Professional Regulation v. Spiva*, 478 So. 2d 382, 383 (Fla. 1st Dist. Ct. App. 1985) (grade reports exempt from disclosure under Florida Public Records Act are discoverable in administrative proceeding).

174. *Cotton States Mut. Ins. Co. v. Turtle Reef Assocs.*, 444 So. 2d 595, 596 (Fla. 4th Dist. Ct. App. 1984).

175. *Id.*

176. FLA. R. CIV. P. 1.280(b)(2) provides in part:

Subject to the provisions of subdivision (b)(3) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that party's representative, including his attorney, consultant, surety, indemnitor, insurer or

*v. Goldman*¹⁷⁷ found that a bus driver's written report of an incident was not privileged because the record failed to show the report was made in contemplation of litigation. The court explained that because the driver was required to report every incident, if the standard were read too broadly, every document, photograph, or tangible item would be protected because every incident could conceivably result in litigation. However, because the record showed that the statements elicited from the driver by management were part of an investigation for a pending suit, those statements were protected. The court encouraged trial courts to make specific findings about whether matters were prepared in contemplation of litigation.¹⁷⁸

The Second District has adopted a more expansive view of the work product privilege. In *Florida Cypress Gardens, Inc. v. Murphy*¹⁷⁹ the court extended protection to materials in Cypress Gardens' accident investigation file which were prepared by the corporation's insurer before a claim was filed. Although the trial court found the documents and photographs "were only obtained in the 'mere likelihood of litigation,' and ordered their production,"¹⁸⁰ the district court quashed the order on policy grounds. The court stated that a contrary result would penalize entities who were diligent in promptly investigating potential claims.¹⁸¹

The Third District has examined the scope of discovery of expert witnesses under Rule 1.280(b) and held that "reports prepared by experts expected to testify at trial are not protected by the work product privilege and are discoverable."¹⁸² The court noted that Rule 1.280 is derived from Federal Rule of Civil Procedure 26, which permits such discovery.¹⁸³ The court agreed with a note in which the federal advisory

agent, only upon a showing that the party seeking discovery has need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

177. 474 So. 2d 269 (Fla. 4th Dist. Ct. App. 1985).

178. *Id.* at 270.

179. 471 So. 2d 203 (Fla. 2d Dist. Ct. App. 1985).

180. *Id.* at 204.

181. *Id.* (citing *City of Sarasota v. Colbert*, 97 So. 2d 872, 874 (Fla. 2d Dist. Ct. App. 1957)); see also *Winn-Dixie Stores, Inc. v. Nakutis*, 435 So. 2d 307 (Fla. 5th Dist. Ct. App. 1985), *petition for review denied*, 446 So. 2d 100 (Fla. 1985) (grocery store's internally produced accident reports protected).

182. *Mims v. Casdemont*, 464 So. 2d 643 (Fla. 3d Dist. Ct. App. 1985).

183. See FED. R. Civ. P. 26(b)(4)(A).

committee stated that "discovery of expert trial witnesses [is] needed for effective cross-examination and rebuttal in 'cases present[ing] intricate and difficult issues as to which expert testimony is likely to be determinative.'" ¹⁸⁴

In a toxic shock syndrome case, the First District has held that "scientific and technical documents or tangible things prepared [by a company's in-house scientists and staff] in anticipation of litigation" may be protected as work product.¹⁸⁵ The court further decided that certain outside research received by the company was not protected and noted that there is no academic privilege recognized in Florida.¹⁸⁶

3. Other Privileges

Florida also recognizes a psychotherapist-patient privilege,¹⁸⁷ and by statute protects the proceedings of medical review committees.¹⁸⁸ The constitutional privilege against compelled self-incrimination was involved in two cases presenting discovery issues. In *Carson v. Jack-*

184. *Mims*, 464 So. 2d at 643. In another case dealing with discovery of experts, but not in the context of work product, the Fourth District held that "a request for admissions pursuant to Rule 1.370(a) is an inappropriate method in the first instance to obtain discovery regarding another party's expert." *Continental Ins. Co. v. Cole*, 467 So. 2d 309, 311 (Fla. 4th Dist. Ct. App. 1985). A party must first seek discovery through interrogatories under Rule 1.280(b)(3)(A) (discovery of experts expected to testify at trial) or proceed under subsection (b)(3)(B) (discovery of experts not expected to testify).

185. *Procter & Gamble Co. v. Swilley*, 462 So. 2d 1188, 1193 (Fla. 1st Dist. Ct. App. 1985).

186. *Id.*

187. *See Carson v. Jackson*, 466 So. 2d 1188 (Fla. 4th Dist. Ct. App. 1985) (psychotherapist-patient privilege in FLA. STAT. § 90.503(2) yields to § 415.512, which provides for abrogation of the privilege in cases involving child abuse or neglect); *Hall v. Spencer*, 472 So. 2d 1205 (Fla. 4th Dist. Ct. App. 1984) (tort defendant's record of alcohol abuse treatment protected by psychotherapist-patient privilege; exception under FLA. STAT. § 90.503(4) inapplicable where defendant patient did not place his emotional condition in issue as element of defense).

188. FLA. STAT. § 768.40(5) (1985); *see HCA of Florida, Inc. v. Cooper*, 475 So. 2d 719 (Fla. 1st Dist. Ct. App. 1985) (protection of FLA. STAT. § 768.40(4) (1983) (current version at FLA. STAT. § 768.40(5) (1985)) not overcome where no showing of exceptional necessity or extraordinary circumstances); *Suwanee County Hosp. Corp. v. Meeks*, 472 So. 2d 1305 (Fla. 1st Dist. Ct. App. 1985) (proceedings and records of hospital medical staff meeting protected where requirements of FLA. STAT. § 768.40 were satisfied).

son¹⁸⁹ the Fourth District Court of Appeal ruled that records of a court-ordered examination by a psychologist as a condition of probation in an unrelated criminal case were discoverable in a negligence and child-abuse action. The court reasoned that any statements to the psychologist were made with the understanding that they would be disclosed to others. Because the privilege was not asserted at the time of the session with the psychologist, the defendant's statements were not compelled.¹⁹⁰ The court noted, however, that although the psychotherapist-patient privilege is abrogated as to communications dealing with child abuse, other defenses to discovery such as irrelevancy and immateriality might apply.¹⁹¹

The Fourth District in *Austin v. Barnett Bank of South Florida, N.A.*¹⁹² decided that failure to produce documents under Rule 1.380(d) may be excused where a party makes a belated assertion of fifth amendment privilege. The court construed a part of the rule providing that failure to make discovery may not be excused when based on objectionability unless a protective order was sought and decided this provision should be inapplicable to objections on grounds of privileges. The court opined that "rule 1.380(d) does not require timely objection to privileged matters," and certified conflict with a decision of the First District.¹⁹³

In a case of importance to the increasing litigation surrounding the AIDS epidemic, the Third District decided that the identities of blood donors should be protected from discovery by a plaintiff who alleged he contracted the disease through a blood transfusion. The court in *South Florida Blood Service, Inc. v. Rasmussen*¹⁹⁴ reached this conclusion by applying a balancing test under Rule 1.280(c), weighing the plaintiff's interests against the donors' privacy interests under the Federal and Florida Constitutions and the institutional and societal interests in the free flow of donated blood. The court certified the issue to the supreme court as a question of great public importance.¹⁹⁵

189. 466 So. 2d 1188 (Fla. 4th Dist. Ct. App. 1985).

190. *Id.* at 1192.

191. *Id.*

192. 472 So. 2d 830 (Fla. 4th Dist. Ct. App. 1985).

193. *Id.*; see *American Funding, Ltd. v. Hill*, 402 So. 2d 1369 (Fla. 1st Dist. Ct. App. 1981).

194. 467 So. 2d 798 (Fla. 3d Dist. Ct. App. 1985).

195. *Id.* at 804 n.13.

B. *Discovery in Aid of Execution*

Rule 1.560 permits judgment creditors to obtain discovery under the rules to find assets on which to levy execution. The Fourth District Court of Appeal in *Lumpkins v. Amendola*¹⁹⁶ found that compelled attendance at a deposition was a proper sanction against a defendant who failed to furnish discovery on a judgment awarding child support, arrearages, and attorney's fees. The Third District in *Citibank, N.A. v. Plapinger*¹⁹⁷ decided that federal income tax returns and other financial records of partnerships in which a judgment debtor was general partner were not privileged and were discoverable. The court found that the information was relevant and "reasonably likely to disclose" assets and that the debtor had not asserted a need for protection.¹⁹⁸

C. *Discovery on Claims for Punitive Damages*

A plaintiff who properly states a factual basis to support a claim for punitive damages may discover a defendant's financial resources.¹⁹⁹ Because the threat of such discovery might be used coercively by plaintiffs against innocent defendants to force settlement, a court in ruling on a motion for protection under Rule 1.280(c)(3) may consider "whether or not an actual factual basis exists for an award of punitive damages."²⁰⁰ Accordingly, in a legal malpractice action, the Fifth District in *Solodky v. Wilson*²⁰¹ examined the standards governing the sufficiency of claims for punitive damages and ruled that a trial court erred in denying protection where the allegations in the complaint were insufficient.

D. *Discovery Sanctions*

Rule 1.380 provides that a party may move for an order compelling discovery, and provides penalties for failure to comply with a discovery order. The severity of the punishment must be commensurate with the violation.²⁰² Sanctions enumerated in the rule include orders

196. 466 So. 2d 1214 (Fla. 4th Dist. Ct. App. 1985).

197. 461 So. 2d 1027 (Fla. 3d Dist. Ct. App. 1985).

198. *Id.* at 1027.

199. *See generally* Tennant v. Charlton, 377 So. 2d 1169 (Fla. 1979).

200. *Id.* at 1170.

201. 474 So. 2d 1231 (Fla. 5th Dist. Ct. App. 1985).

202. Harless v. Kuhn, 403 So. 2d 423, 425 (Fla. 1981).

striking pleadings and dismissing actions or entering judgment,²⁰³ and orders of contempt.²⁰⁴

The Fifth District in *Wallraff v. T.G.I. Friday's, Inc.*²⁰⁵ decided that a trial court may dismiss an action with prejudice as a sanction for a plaintiff's failure to appear at a deposition although no order compelling appearance has issued. Conflict with cases in the Third and Fourth Districts was certified.²⁰⁶

VI. Default

Rule 1.500 provides that a clerk or a court may enter a default "[w]hen a party against whom affirmative relief is sought has failed to file or serve any paper in the action"²⁰⁷ If the party "has filed or served any paper in the action," only a court may enter default, and

203. See *Pey v. Turnberry Towers Corp.*, 474 So. 2d 1279 (Fla. 3d Dist. Ct. App. 1985) (order striking pleadings and entry of default judgment for failure to timely file answers to interrogatories too harsh under the circumstances); *Campagna Constr. Co. v. Riverview Condominium Corp.*, 467 So. 2d 807 (Fla. 3d Dist. Ct. App. 1985) (trial court properly struck pleadings and entered default judgment for "continued and willful" violations of discovery orders); *Cedars Assocs. v. E.R. Brownwell & Assocs.*, 466 So. 2d 1130 (Fla. 3d Dist. Ct. App. 1985) (trial court properly struck and dismissed counterclaim as discovery sanction); *Weck v. Weck*, 464 So. 2d 619 (Fla. 4th Dist. Ct. App. 1985) (trial court properly struck defenses under Rule 1.380(b)(2)(C)).

204. See *Tubero v. Ellis*, 472 So. 2d 548 (Fla. 4th Dist. Ct. App. 1985) (contempt citation inappropriate where element of intent not shown and defendant technically complied with order of post-judgment discovery in aid of execution by deposition); *Sun-Crete, Inc. v. Sun Deck Prods., Inc.*, 473 So. 2d 755 (Fla. 4th Dist. Ct. App. 1985) (evidence too speculative to support amount of compensatory fine for contempt relating to discovery order).

205. 470 So. 2d 732 (Fla. 5th Dist. Ct. App. 1985).

206. *Id.* at 734; see *Rashard v. Cappiali*, 171 So. 2d 581 (Fla. 3d Dist. Ct. App. 1965); *Reliance Builders v. City of Coral Springs*, 373 So. 2d 410 (Fla. 4th Dist. Ct. App. 1979).

207. FLA. R. CIV. P. 1.500(a); see *Building Inspection Servs. v. Olemberg*, 476 So. 2d 774, 774 (Fla. 3d Dist. Ct. App. 1985) (holding that "a letter filed in a cause by an officer of a defendant corporation, advising the court that the corporation is attempting to engage an attorney to represent it, constitutes a 'paper' under Rule 1.500(a)"); FLA. R. CIV. P. 1.500(b); *Fernandez v. Colson*, 472 So. 2d 868 (Fla. 3d Dist. Ct. App. 1985) ("stipulation of counsel for respective parties agreeing to a mutual restraining order which was filed as part of the record constituted a 'paper' within the meaning of" Rule 1.500(b)); *Reichenbach v. Southeast Bank*, 462 So. 2d 611 (Fla. 3d Dist. Ct. App. 1985) (letter confirming agreement to extend time before foreclosure constituted a paper served).

the party "shall be served with notice of the application for default."²⁰⁸ Relief from a default judgment may be obtained under Rule 1.540(b). Florida courts espouse a liberal policy in favor of setting aside defaults and deciding causes on their merits.²⁰⁹

Reasonable doubt about whether a default should be vacated should be resolved in favor of vacation.²¹⁰ On review of an order disposing of a motion to set aside a default, an appellant must show a gross abuse of discretion.²¹¹ A movant for vacation of default must show "a meritorious defense and . . . a legal excuse for failure to comply with the rule."²¹² Grounds for relief include excusable neglect and meritorious defense,²¹³ mistake,²¹⁴ due diligence,²¹⁵ inappropriate sanction,²¹⁶

208. FLA. R. CIV. P. 1.500(b); *see* Connecticut Gen. Dev. Corp. v. Guson, 477 So. 2d 665 (Fla. 5th Dist. Ct. App. 1985) (parties whose answers were stricken with leave to amend were entitled to service and hearing on motion for default); Bloom v. Palmetto Fed. Savs. and Loan Ass'n, 477 So. 2d 48 (Fla. 4th Dist. Ct. App. 1985) (error to enter default without adequate notice); Fernandez v. Colson, 472 So. 2d 868 (Fla. 3d Dist. Ct. App. 1985) (unnecessary to show excusable neglect or meritorious defense in motion to set aside and vacate where notice of application for default not given); Austin v. Papol, 464 So. 2d 1338 (Fla. 2d Dist. Ct. App. 1985) (summary judgment on counterclaim imposed as sanction for failure to appear at depositions improper without hearing on whether failure to appear was willful or in bad faith).

209. Reicheinbach v. Southeast Bank, 462 So. 2d 611, 612 (Fla. 3d Dist. Ct. App. 1985).

The court in Locklear v. Sampson, 478 So. 2d 1113 (Fla. 1st Dist. Ct. App. 1985), held that a trial court erred in denying a motion to set aside a default judgment which established paternity. The court stated that because of unknown collateral consequences flowing from an adjudication of paternity, such a judgment "should not be entered solely upon the basis of unadmitted and unproven allegations of paternity . . . ; rather, it should be based upon some competent, substantial evidence." *Id.* at 1115. The court in Hobbs v. Florida First Nat'l Bank, 480 So. 2d 153 (Fla. 1st Dist. Ct. App. 1985), decided that a party whose demand for trial was untimely because it was made after default was nevertheless entitled to a jury trial on the issue of damages because her coparties had made a timely demand.

210. Kindle Trucking Co. v. Marmar Corp., 468 So. 2d 502 (Fla. 5th Dist. Ct. App. 1985).

211. *Id.* at 504.

212. *Id.*

213. *See* Marine Outlet v. Miner, 469 So. 2d 251, 252 (Fla. 2d Dist. Ct. App. 1985) ("[t]o justify setting aside a default, the defaulted party must show both excusable neglect and a meritorious defense"; excusable neglect shown where telephone conversation with secretary to plaintiffs' attorney lead defendant to believe plaintiffs would not seek default if answer not filed within 20 days); La Nacion Newspaper, Inc. v. Santos Rivero, 478 So. 2d 451 (Fla. 3d Dist. Ct. App. 1985) (trial court erred in refusing to set aside default where court clerk erred in filing answer after default when Rule 1.500(c) required return of papers, no engagement in dilatory tactics evident,

timely motion to set aside default and affidavit stating basis for excusable neglect filed, and answer showed meritorious defense) (subdivision (c) has been amended, effective Jan. 1, 1985, and now provides that the clerk shall file papers submitted after default and notify the party that a default has been entered); *Kindle Trucking*, 468 So. 2d at 502 (delay in answer caused by language in summons which was ambiguous about whether a party was served in his capacity as individual or as corporate representative constituted excusable neglect where followed by prompt motion to set aside clerk's default); *Kuehne & Nagel, Inc. v. Esser Int'l, Inc.*, 467 So. 2d 457 (Fla. 3d Dist. Ct. App. 1985) (excusable neglect caused by office clerk's mistaken removal and storage of complaint and summons which had been on lawyer's desk); *but see Doane v. O'Donnell*, 467 So. 2d 424, 425 (Fla. 4th Dist. Ct. App. 1985) (Judge Letts, in dissent, criticizes treatment of clerical error as excusable neglect and chastens majority for equating "simple negligence with excusable neglect"); *Fratius v. Fratius*, 467 So. 2d 484, 485 (Fla. 5th Dist. Ct. App. 1985) (failure of "man of little business or legal experience" to respond to papers served pursuant to long-arm statute constituted excusable neglect). *Cf. Newkirk v. Florida Ins. Guar. Ass'n*, 464 So. 2d 1256 (Fla. 3d Dist. Ct. App. 1985) (error to set aside default where allegations of excusable neglect and meritorious defense insufficient, and no supporting affidavit or sworn statement filed); *Rhines v. Rhines*, 483 So. 2d 4 (Fla. 2d Dist. Ct. App. 1985) (no excusable neglect in disregarding summons).

214. *See Savela v. Fisher*, 464 So. 2d 240 (Fla. 2d Dist. Ct. App. 1985) (excusable neglect found where attorneys who represented multiple defendants in same case inadvertently failed to perceive that date summonses were served on two defendants differed from date of service on another defendant); *Zwickel v. KLC, Inc.*, 464 So. 2d 1280 (Fla. 3d Dist. Ct. App. 1985) (attorney's failure to timely file responsive pleading caused by confusion over interrelationship between a pending case and a settled companion case was excusable neglect).

215. In deciding whether an incidence of neglect is excusable, the trial court may consider as a factor the "diligence demonstrated by the movants upon learning of the default." *Kindle Trucking*, 468 So. 2d at 504. *See Bayview Tower Condominium Ass'n v. Schweizer*, 475 So. 2d 982 (Fla. 3d Dist. Ct. App. 1985) (motion to vacate insufficient for failure to show excusable neglect on part of defendant but rather of insurer in losing file; lack of due diligence found because insurer took five months to find file after learning defendant was required to file answer).

216. In a dissolution of marriage action, the court in *Whiteside v. Whiteside*, 468 So. 2d 407 (Fla. 4th Dist. Ct. App. 1985), held that default is an inappropriate sanction for contempt. The court stated that default is authorized only under Rules 1.380(b)(2)(C) (failure to comply with a discovery order), 1.200(b) (failure to attend a pretrial conference), and 1.500(b) (failure to plead or otherwise defend the action), and expressed concern that due process rights might be violated by a default judgment. *See also Pey v. Turnberry*, 474 So. 2d 1279 (Fla. 3d Dist. Ct. App. 1985) (default as sanction for untimely filing of answers too harsh where answers were due on November 1, were air expressed from Germany on October 29 and filed on November 5); *Campaigna Constr. Co. v. Riverview Condominium Corp.*, 467 So. 2d 807 (Fla. 3d Dist. Ct. App. 1985) (default as sanction for "continued and willful violations of orders of the court regarding discovery proceedings" affirmed).

lack of jurisdiction,²¹⁷ and misrepresentation.²¹⁸

VII. Dismissal

A. Generally

A motion to dismiss tests whether the plaintiff's complaint is sufficient to state a cause of action.²¹⁹ The court must consider only the allegations within the four corners of the complaint.²²⁰ The complaint must contain sufficient allegations of ultimate facts which, if proven, would entitle the plaintiff to relief.²²¹ The allegations are taken as true²²² and considered in a light most favorable to the nonmoving

217. *Metropolitan Drywall Sys. v. Dudley*, 472 So. 2d 1345 (Fla. 2d Dist. Ct. App. 1985) (circuit court lacked subject matter jurisdiction to enter final default judgment because claim did not exceed \$5,000); *Gonzalez v. Totalbank*, 472 So. 2d 861 (Fla. 3d Dist. Ct. App. 1985) (final default judgment void for lack of jurisdiction over the person).

218. *See Marine Outlet v. Miner*, 469 So. 2d 251 (Fla. 2d Dist. Ct. App. 1985) (failure to timely file answer constituted excusable neglect where conversations with plaintiffs' counsel lead insurance adjuster to believe extension of time would be permitted); *cf. Moore v. Powell*, 480 So. 2d 137 (Fla. 4th Dist. Ct. App. 1985) (neglect inexcusable where no reasonable basis for belief that third party's insurance carrier would handle defense).

219. *Abrams v. General Ins. Co.*, 460 So. 2d 572 (Fla. 3d Dist. Ct. App. 1985).

220. *Id.* at 572; *Home Savs. Ass'n v. Attorney's Title Ins. Fund*, 479 So. 2d 191 (Fla. 3d Dist. Ct. App. 1985); *Kupperman v. Levine*, 462 So. 2d 90 (Fla. 4th Dist. Ct. App. 1985).

221. *See Feagle v. Florida Power & Light Co.*, 464 So. 2d 1247 (Fla. 1st Dist. Ct. App. 1985) (claim for punitive damages properly dismissed for failure to allege ultimate facts); *Nicholson v. Kellin*, 481 So. 2d 931 (Fla. 5th Dist. Ct. App. 1985) (allegations sufficient to state cause of action in fraudulent conspiracy); *Technicable Video Sys. v. Americable of Greater Miami, Ltd.*, 479 So. 2d 810 (Fla. 3d Dist. Ct. App. 1985) (allegations sufficient to state cause of action on third party beneficiary theory); *Auto World Body & Paint, Inc. v. Sun Elec. Corp.*, 471 So. 2d 212 (Fla. 1st Dist. Ct. App. 1985) ("bare bones" factual allegations in counterclaims would provide basis for at least partial relief from claims of plaintiff); *Kupperman*, 462 So. 2d at 90 (sufficient allegations of dangerous condition in slip and fall case); *Frugoli v. Winn-Dixie Stores, Inc.*, 464 So. 2d 1292 (Fla. 1st Dist. Ct. App. 1985) (allegations sufficient to withdraw motion to dismiss but not sufficient to permit defendant to adequately respond; on remand, plaintiff permitted to amend under Rule 1.190); *cf. Rishel v. Eastern Airlines, Inc.*, 466 So. 2d 1136 (Fla. 3d Dist. Ct. App. 1985) (dismissal of negligence action proper for failure to allege willful and wanton misconduct so as to overcome presumption of nonliability for injuries suffered by police officers and firemen in discharge of duties).

222. *Gilbert v. Oil Conservationists, Inc.*, 471 So. 2d 650 (Fla. 4th Dist. Ct. App.

party.²²³ Any ground upon which a cause of action is stated is sufficient to preclude dismissal for failure to state a cause of action.²²⁴

Leave to amend a deficient complaint should be given unless the privilege of amendment has been abused or the face of the complaint shows the deficiency is incurable.²²⁵ Pleadings may be amended in accordance with Rule 1.190. Failure to allege a specific statutory basis for suit does not in itself subject a complaint to summary judgment of dismissal, because the basis for the action may be clarified by amendment.²²⁶

Failure to substitute a personal representative within the ninety day time limit of Rule 1.260(a) may not be fatal to a claim. The Fourth District Court of Appeal in *Stroh v. Dudley*²²⁷ held that the rule "does not require mandatory, nondiscretionary dismissal even in light of the terminology 'shall be dismissed as to the deceased party.'"²²⁸ The court reversed an order of dismissal, stating that the rule should be liberally construed to permit substitution of parties after ninety days where mistake, inadvertance, or excusable neglect is shown.²²⁹ In a dissenting opinion, Judge Downey criticized the majority's invocation of Rule 1.540(b)(1) to override an otherwise mandatory dismissal for failure to substitute because on the facts of the case the majority's decision was "tantamount to a holding that ignorance of the law is excusable neglect."²³⁰

The trial court must not resolve issues of fact,²³¹ weigh evi-

1985); *Nicholson v. Kellin*, 481 So. 2d 931 (Fla. 5th Dist. Ct. App. 1985).

223. *Delves v. Kingdom Voice Publications, Inc.*, 464 So. 2d 1327, 1328 (Fla. 1st Dist. Ct. App. 1985).

224. *Nicholson v. Kellin*, 481 So. 2d 931 (Fla. 5th Dist. Ct. App. 1985).

225. *Unitech Corp. v. Atlantic Nat'l Bank*, 472 So. 2d 817 (Fla. 3d Dist. Ct. App. 1985) (trial court not divested of jurisdiction to vacate order denying rehearing on order dismissing original complaint with prejudice); *Thompson v. McNeill Co.*, 464 So. 2d 444 (Fla. 1st Dist. Ct. App. 1985) (error to dismiss with prejudice where complaint had been amended only once and no showing privilege had been abused or that complaint was clearly unamendable).

226. *Williams v. Bay Hosp., Inc.*, 471 So. 2d 626 (Fla. 1st Dist. Ct. App. 1985).

227. 476 So. 2d 230 (Fla. 4th Dist. Ct. App. 1985).

228. *Id.* at 231.

229. *Id.*

230. *Id.* at 232 (Downey, J., dissenting).

231. *L.M. Duncan & Sons v. City of Clearwater*, 466 So. 2d 1116 (Fla. 1985) (in workers' compensation case, dismissal of third party complaint alleging right of indemnity premature where factual issue whether city was at fault unresolved).

dence,²³² or consider affirmative defenses²³³ in ruling on the motion.²³⁴

Although a court in its discretion may use dismissal as a sanction for failure to attend a pretrial conference²³⁵ or for failure to abide by a legitimate order of the court,²³⁶ such a drastic remedy should be invoked only in extreme circumstances because it punishes the litigant for his lawyer's shortcomings.²³⁷

232. *Christie v. General Elec. Corp.*, 462 So. 2d 866 (Fla. 4th Dist. Ct. App. 1985) (defendant's motion for involuntary dismissal under Rule 1.420(b) granted at close of plaintiff's evidence reversed as premature where plaintiff established prima facie case).

233. *N.E. at West Palm Beach, Inc. v. Horowitz*, 471 So. 2d 570 (Fla. 3d Dist. Ct. App. 1985) (court may not consider affirmative defenses or sufficiency of evidence plaintiff may produce); *Thomas v. Soper*, 464 So. 2d 255 (Fla. 4th Dist. Ct. App. 1985) (defenses of laches, statute of limitations, and subsequent assignments improper grounds for dismissal of contract action); *cf. Kulpinski v. City of Tarpon Springs*, 473 So. 2d 813 (Fla. 2d Dist. Ct. App. 1985) (court may consider defense of statute of limitations on motion to dismiss where facts constituting defense are affirmatively stated on face of complaint); *City of Clearwater v. United States Steel Corp.*, 462 So. 2d 1171 (Fla. 2d Dist. Ct. App. 1985) (defense of res judicata properly considered on motion to dismiss where stipulation permitted court to judicially notice other proceedings between parties).

234. *Home Savs. Ass'n v. Attorneys' Title Ins. Fund*, 479 So. 2d 191 (Fla. 3d Dist. Ct. App. 1985) (trial court properly considered provisions of contract in granting motion to dismiss) (on motion for rehearing); *Kulpinski*, 473 So. 2d at 814 (although statute of limitations should be raised as affirmative defense, it may be raised on motion to dismiss "only if the facts constituting the defense appear affirmatively on the face of the complaint."); *City of Clearwater v. United States Steel Corp.*, 462 So. 2d at 1171 (although res judicata should be raised as affirmative defense, it was properly considered on motion to dismiss where parties stipulated that court should consider and take judicial notice of all other proceedings between them); *Huszar v. Gross*, 468 So. 2d 512 (Fla. 1st Dist. Ct. App. 1985) (in libel action, court on motion to dismiss properly decided issue whether privilege applied).

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

236. FLA. R. CIV. P. 1.380(b), 1.420(b); *Livingston v. Department of Corrections*, 481 So. 2d 2 (Fla. 1st Dist. Ct. App. 1985).

237. *Id.* The court in *Livingston* reversed a dismissal predicated on the failure of a lawyer to comply with the terms of a pretrial order. *See also Austin v. Papol*, 464 So. 2d 1338 (Fla. 3d Dist. Ct. App. 1985) (dismissal with prejudice without hearing on failure to appear at deposition reversed as too severe); *Jackson v. Layne*, 464 So. 2d 1242 (Fla. 3d Dist. Ct. App. 1985) (dismissal with prejudice of paternity and child support action for plaintiff's failure to comply with pretrial order requiring parties to take blood tests where plaintiff not given additional opportunity to comply reversed as too severe); *cf. Wallraf v. T.G.I. Friday's, Inc.*, 470 So. 2d 732 (Fla. 5th Dist. Ct. App. 1985) (dismissal with prejudice as sanction under Rule 1.380(d) and 1.380(b)(2)(C) for discovery violation affirmed; court certified conflict with decision in *Rashard v. Cap-*

When an action is dismissed under Rule 1.420, costs are awarded against the party who sought relief.²³⁸ When a party voluntarily dismisses a claim under Rule 1.420(a)(1)(i) and subsequently commences another action based on the same claim against the same party, the court shall tax the costs of the claim previously dismissed against the party seeking affirmative relief pursuant to Rule 1.420(d).²³⁹

In a case of first impression, the Third District in *MacArthur Dairy, Inc. v. Guillen*²⁴⁰ held that a plaintiff who voluntarily dismisses a claim, pays costs to the defendant upon recommencement of an action on the claim, and prevails in the second action may recover costs paid which the defendant would have expended had the claim not been previously dismissed.²⁴¹ The court reasoned that the purpose of Rule 1.420(d) is to discourage the use of voluntary dismissals to abuse defendants and that the new rule would not disserve that purpose.²⁴² The law in the Third District now accords the practice of federal courts of awarding expenses and costs as one of the terms and conditions of voluntary dismissal under Rule 41(a)(2).²⁴³

There is conflict among the districts over whether and to what extent a trial court may grant relief from judgment under Rule 1.540(b) following voluntary dismissal under Rule 1.420(a)(1)(i). The courts have lent disparate interpretations to *Randle-Eastern Ambulance Service, Inc. v. Vasta*,²⁴⁴ in which the Florida Supreme Court ruled that "voluntary dismissal under Rule 1.420(a)(1)(i) divests the trial court of jurisdiction to relieve the plaintiff of the dismissal."²⁴⁵ The First and Second Districts appear to have taken this language at face value,

piali, 171 So. 2d 581 (Fla. 3d Dist. Ct. App. 1965), interpreting predecessor of the rule to preclude use of the sanction against plaintiff).

238. FLA. R. CIV. P. 1.420(d).

239. *But see* Douglas v. Wilson, 472 So. 2d 876 (Fla. 1st Dist. Ct. App. 1985) (error to render joint judgment for costs on one count of a complaint which was basis of previously dismissed action but which had been brought in behalf of only one of the parties).

240. 470 So. 2d 747 (Fla. 3d Dist. Ct. App. 1985).

241. *Id.* at 748.

242. *Id.*

243. FED. R. CIV. P. 41(a)(2); *see* McLaughlin v. Cheshire, 676 F.2d 855 (D.C. Cir. 1982). It should be noted, however, that the court in *MacArthur Dairy* modeled its analysis on a federal court's interpretation of proper practice under Rule 41(a)(2), rather than on any case interpreting Rule 41(d), the federal counterpart to Florida's Rule 1.420(d).

244. 360 So. 2d 68 (Fla. 1978).

245. *Id.* at 69.

while the Third, Fourth, and Fifth Districts have distinguished *Randle-Eastern* and granted limited relief under Rule 1.540(b) after voluntary dismissal. The cases distinguishing *Randle-Eastern* indicate that some courts will consider granting any relief from voluntary dismissal obtainable by way of Rule 1.540(b)(3) short of reinstatement of an action.²⁴⁶

Where an action is dismissed by a court sua sponte because of a clerical error in processing a court's internal documents, the action may be reinstated pursuant to Rule 1.540(a).²⁴⁷

246. See *Piper Aircraft Corp. v. Prescott*, 445 So. 2d 591 (Fla. 1st Dist. Ct. App. 1984) (plaintiff not entitled to reinstatement of action after voluntary dismissal where second suit would be time-barred by statute of limitations); see also *id.* at 594-96 (Ervin, C.J., specially concurring) (general discussion of divergencies in post-*Randle-Eastern* case law and proposal that a question be certified to the Florida Supreme Court: "Whether a voluntary dismissal divests a trial court of jurisdiction to relieve a plaintiff of such dismissal when it is alleged, pursuant to Rule 1.540(b)(3), that the dismissal was caused by the fraud, misrepresentation or other misconduct of an adverse party?" *Id.* at 596); *South Florida Nursing Servs. v. Palm Beach Business Servs.*, 474 So. 2d 1289 (Fla. 4th Dist. Ct. App. 1985) (citing *Randle-Eastern* in finding trial court erred in reinstating action even where fraud and misrepresentation were alleged); see *Anderson v. Watson*, 475 So. 2d 1315 (Fla. 2d Dist. Ct. App. 1985) (error to grant plaintiffs' motion under Rule 1.540(b) to expunge words "with prejudice" from notice of voluntary dismissal); *Miller v. Fortune Ins. Co.*, 453 So. 2d 489 (Fla. 2d Dist. Ct. App. 1984) (plaintiff not entitled to relief from effect of voluntary dismissal where filing of notice "with prejudice" resulted from secretarial error or excusable neglect); cf. *Shampaigne Indus., Inc. v. South Broward Hosp. Dist.*, 411 So. 2d 64 (Fla. 4th Dist. Ct. App. 1982) (permitting relief from words "with prejudice," distinguishing *Randle-Eastern* as prohibiting reinstatement of action through Rule 1.540(b)(3) but not prohibiting other relief). The court in *Shampaigne Industries* certified the following question, which the supreme court has as yet not answered: "May Florida Rule of Civil Procedure 1.540(b) be used to afford relief if a party can demonstrate that a voluntary dismissal was filed as the result of secretarial error, mistake, inadvertence or excusable neglect?" 411 So. 2d at 367. See *Bender v. First Fidelity Savs. & Loan Ass'n*, 463 So. 2d 445 (Fla. 4th Dist. Ct. App. 1985) (following *Shampaigne Industries* on similar facts); *Atlantic Assocs. v. Laduzinski*, 428 So. 2d 767 (Fla. 3d Dist. Ct. App. 1983) (same); *Siler v. Lumbermens Mut. Casualty Co.*, 420 So. 2d 357, 358 n.2 (Fla. 5th Dist. Ct. App. 1982) (error to deny relief from effect of "voluntary dismissal with prejudice" on basis of *Randle-Eastern* because that case does not apply to dismissal of a party but only of action itself; suggesting that *Randle-Eastern* does "not hold that proper grounds for relief under Rule 1.540 from a notice of voluntary dismissal can never be alleged."); *Commerce & Indus. Ins. Co. v. Wellenreiter*, 475 So. 2d 1302 (Fla. 5th Dist. Ct. App. 1985) (citing *Randle-Eastern* in finding trial court erred in reinstating action after voluntary dismissal where plaintiff failed to present evidence of damages on cross-claim and moved to dismiss to avoid adverse ruling on defendant's motion for directed verdict).

247. *Underwriters at Lloyd's of London v. Rolly Marine Serv., Inc.*, 475 So. 2d

The Second District in *Laursen v. Filardo*²⁴⁸ held that where the wrong person is named defendant in a tort action timely commenced, and the parties stipulate to dismissal with prejudice as to that party and that the plaintiff would be permitted to file an amended complaint naming others as defendants, the trial court erred in dismissing the action for lack of jurisdiction based on the running of the statute of limitations where the order of dismissal stated that the amended complaint was deemed filed at the time of dismissal. The district court found the amended complaint was properly filed with the court under Rule 1.080(e).²⁴⁹ The First District in *Corcoran v. Federal Land Bank*²⁵⁰ found error when a trial court dismissed a counter cross-claim where the same claim was pending in an action in federal court. The district court noted that a stay or abatement of a case in one court is the appropriate remedy in instances of concurrent jurisdiction pending determination of the claim in the court where jurisdiction first attached.

B. Failure to Prosecute

Rule 1.420(e) provides that an action shall be involuntarily dismissed for failure to prosecute when there has been no record activity for a period of one year.²⁵¹ The one-year period is computed by excluding the day of the last record activity and including the day the motion to dismiss is filed. Thus, in *Zentmeyer v. Ford Motor Co.*,²⁵² the Fifth District found that where the last record activity was an order filed

265 (Fla. 4th Dist. Ct. App. 1985) (wrong form used indicating case was settled rather than transferred; court to which case was transferred erroneously dismissed, believing case had been settled in former court).

248. 468 So. 2d 251 (Fla. 2d Dist. Ct. App. 1985).

249. *Id.* at 252.

250. 470 So. 2d 54 (Fla. 1st Dist. Ct. App. 1985).

251. FLA. R. CIV. P. 1.420(e) provides:

All actions in which it appears on the face of the record that no activity by filing of pleadings, order of court or otherwise has occurred for a period of one year shall be dismissed by the court on its own motion or on the motion of any interested person, whether a party to the action or not, after reasonable notice to the parties, unless a stipulation staying the action is approved by the court or a stay order has been filed or a party shows good cause in writing at least five days before the hearing on the motion why the action should remain pending. Mere inaction for a period of less than one year shall not be sufficient cause for dismissal for failure to prosecute.

252. 464 So. 2d 673 (Fla. 5th Dist. Ct. App. 1985).

October 6, 1982, the one year period began to run on October 7, 1982, and a motion to dismiss for failure to prosecute filed on October 6, 1983, was one day premature.

The record activity must be calculated to move the cause toward conclusion,²⁵³ although "[w]here activity is facially sufficient, as opposed to merely passive, e.g., a name change . . . [or] substitution of counsel, . . . a court cannot inquire further as to how well the activity advances the cause."²⁵⁴

Record activity sufficient to preclude a dismissal under Rule 1.420(e) includes notice of deposition, although the deposition was never taken;²⁵⁵ a two-question interrogatory propounded to the defendant;²⁵⁶ settlement with one of the plaintiffs;²⁵⁷ a notice to produce;²⁵⁸ and filing a notice of hearing.²⁵⁹

Before granting a motion to dismiss under Rule 1.420(e), the trial court must hold an evidentiary hearing to determine whether good cause is shown so that the action should remain pending.²⁶⁰ The standard applied to determination of good cause on the issue of failure to prosecute is more strict than that of excusable neglect on the issue of whether a default judgment should be vacated.²⁶¹ Good cause "must include a showing of contact with the opposing party during the one-year period and some form of excusable conduct or happening other than negligence or inattention to deadlines."²⁶² The First District Court of Appeal in *Paedae v. Voltaggio*²⁶³ catalogued several examples of cir-

253. See *Grooms v. Garcia*, 482 So. 2d 407, 408 (Fla. 2d Dist. Ct. App. 1985); *Hunter v. Cal-Maine Foods, Inc.*, 477 So. 2d 642 (Fla. 5th Dist. Ct. App. 1985) (dismissal reversed although arguable the act of discovery would not move matter toward trial posture; benefit of doubt given to nonmovant); *Phillips v. Marshall Berwick Chevrolet, Inc.*, 467 So. 2d 1068 (Fla. 4th Dist. Ct. App. 1985) (record activity must move cause toward resolution and not merely represent effort to keep cause on docket).

254. *Marshall Berwick Chevrolet*, 467 So. 2d at 1069-70.

255. *Orange Elec. Co. v. Hughes Supply, Inc.*, 467 So. 2d 479 (Fla. 5th Dist. Ct. App. 1985).

256. *Marshall Berwick Chevrolet*, 467 So. 2d at 1068.

257. *Koenig v. Deloitte Haskins & Sells*, 474 So. 2d 305 (Fla. 3d Dist. Ct. App. 1985).

258. *Hunter*, 477 So. 2d at 642.

259. *Grooms*, 482 So. 2d at 407.

260. *Withers v. Flagship Peoples Bank*, 473 So. 2d 789, 790 (Fla. 1st Dist. Ct. App. 1985).

261. *Paedae v. Voltaggio*, 472 So. 2d 768, 769 (Fla. 1st Dist. Ct. App. 1985).

262. *Withers*, 473 So. 2d at 790.

263. 472 So. 2d at 768.

cumstances where good cause was not shown.²⁶⁴ Abatement and removal of a case from the active case docket by order of the court is good cause.²⁶⁵ When an action is stayed as to one of the defendants by federal bankruptcy law, the action may not be dismissed as to any of the defendants for failure to prosecute.²⁶⁶ The trial court may not dismiss for lack of prosecution where the plaintiff gives notice of readiness for trial and then takes no further action during a one-year period, because it is the trial court's responsibility to enter an order setting the trial date.²⁶⁷ However, a plaintiff's failure to file any pleading in response to a trial court's notice preceeding order of dismissal justifies an order of dismissal.²⁶⁸

VIII. Summary Judgment

Rule 1.510(c) provides that a party may upon motion be granted a summary judgment if the record "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."²⁶⁹

The Florida Supreme Court in *Moore v. Morris*²⁷⁰ summarized the gloss it has placed on the rule:

[A] party moving for summary judgment must show conclusively the absence of any genuine issue of material fact and the court must draw every possible inference in favor of the party against whom a summary judgment is sought A summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law

If the evidence raises any issue of material fact, if it is conflicting, if it will permit different reasonable inferences, or if it tends to prove the issues, it should be submitted to the jury as a question of fact to be determined by it²⁷¹

264. *See id.* at 769.

265. *Rudolph v. Chase*, 468 So. 2d 494 (Fla. 5th Dist. Ct. App. 1985).

266. *List v. St. Petersburg Hotel Ass'n*, 466 So. 2d 1258 (Fla. 2d Dist. Ct. App. 1985).

267. *Mikos v. Sarasota Cattle Co.*, 453 So. 2d 402, 403 (Fla. 1984).

268. *Govayra v. Straubel*, 466 So. 2d 1065, 1066 (Fla. 1985).

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

270. 475 So. 2d 666 (Fla. 1st Dist. Ct. App. 1985).

271. *Id.* at 668 (citations omitted). The supreme court in *Moore* overturned a summary judgment for the defendants in a medical malpractice case where a factual issue remained about when the applicable statute of limitations began to run. *Id.* at

The standard of review is less deferential to the trial court on a summary judgment, which is based only a written record, than it is when the court has heard witnesses or reached a decision after weighing conflicting evidence.²⁷²

The burden is on the movant to demonstrate an absence of genuine issue of material fact and his entitlement to judgment as a matter of law.²⁷³ Once the movant has shown that no issue of material fact exists, the burden shifts to the opposing party to produce counterevidence which reveals a genuine issue of material fact.²⁷⁴ Trial courts should give a strict reading to the movant's filed papers, and a liberal reading to those of the opposing party.²⁷⁵

Where affirmative defenses are raised, a plaintiff seeking summary judgment must overcome the defenses by presenting evidence which disproves the facts alleged or establishes that the defenses are legally insufficient.²⁷⁶

Parties may submit affidavits, depositions, and answers to interro-

668-70; *see also* *Celotex Corp. v. Copeland*, 471 So. 2d 533, 539 (Fla. 1985) (question of when the "creeping-disease" of asbestosis manifested itself for purposes of statute of limitations is question of fact which may not be resolved by summary judgment).

272. *Savage-Hawk v. Premier Outdoor Prods., Inc.*, 474 So. 2d 1242 (Fla. 2d Dist. Ct. App. 1985).

273. *City of Live Oak v. Arnold*, 468 So. 2d 410 (Fla. 1st Dist. Ct. App. 1985).

274. *Golden Hills Golf & Turf Club, Inc. v. Spitzer*, 475 So. 2d 254 (Fla. 5th Dist. Ct. App. 1985) (citing *Landers v. Milton*, 370 So. 2d 368 (Fla. 1979)); *Jackson v. State Farm Fire & Casualty Co.*, 469 So. 2d 191 (Fla. 2d Dist. Ct. App. 1985) (summary judgment for defendant insurer affirmed, as plaintiff had presented no evidence to rebut defendant's evidence of written rejection of uninsured motorist coverage); *Williams v. Hunt Bros. Constr. Co.*, 475 So. 2d 738 (Fla. 2d Dist. Ct. App. 1985) (summary judgment for defendant affirmed in malicious prosecution action where plaintiff failed to rebut conclusive presumption created by magistrate's finding of probable cause to issue warrant through record evidence of fraud or corrupt means used by one who initiated prosecution); *Burns v. GCC Beverages, Inc.*, 469 So. 2d 806 (Fla. 1st Dist. Ct. App. 1985) (same); *Blits v. Blits*, 468 So. 2d 320 (Fla. 3d Dist. Ct. App. 1985) (in will contest, summary judgment for defendant affirmed on issue of proper execution where plaintiff failed to rebut prima facie case of formal execution by proving facts sufficient to support revocation).

275. *Swift Indep. Packing Co. v. Basic Food Int'l, Inc.*, 461 So. 2d 1017 (Fla. 4th Dist. Ct. App. 1985).

276. *O'Neal v. Brady*, 476 So. 2d 294 (Fla. 3d Dist. Ct. App. 1985); *Fischer v. Rodriguez-Capriles*, 472 So. 2d 1315 (Fla. 3d Dist. Ct. App. 1985); *Home Health Servs. v. McQuay-Garrot, Sullivan & Co.*, 462 So. 2d 605 (Fla. 2d Dist. Ct. App. 1985); *International Commercial Properties, Inc. v. O'Donnell*, 462 So. 2d 95, 96 (Fla. 2d Dist. Ct. App. 1985).

atories in support of their relative positions on a motion for summary judgment.²⁷⁷ In *Cary v. Keene Corp.*,²⁷⁸ the First District reversed a summary judgment after finding that the trial court should not have excluded the plaintiff's affidavit, which contradicted his earlier deposition testimony. The court noted the rule that a party may not create an issue of fact by repudiating or contradicting his own deposition testimony by affidavit.²⁷⁹ However, the court found that this case fit under an exception to that rule providing that an affidavit which presents a credible explanation for the discrepancy may be sufficient to establish that a factual issue is before the court.²⁸⁰ The First District in *Marlar v. Quincy State Bank*²⁸¹ reversed a summary judgment where the trial court erroneously relied on an affidavit which was not served and filed by the movant at least twenty days before the hearing, as required by Rule 1.510(c). The rule is designed to provide the opposing party an opportunity to prepare a challenge to the factual basis of the motion.²⁸² The court found the affidavit was not authorized by Rule 1.510(e), holding that, under the rule, "a movant may file supplemental affidavits less than twenty days prior to the summary judgment hearing only upon written stipulation and agreement by the adverse party affected or upon leave of court granted by written order after written application, notice to the adverse party, and the opportunity for a hearing."²⁸³

If the provisions of a contract are susceptible of different inferences, summary judgment is inappropriate where the inferences must be resolved by determination of fact.²⁸⁴ Summary judgment is appro-

277. FLA. R. CIV. P. 1.510(a), (b), (e); *see* *Montejo Invs., N.V. v. Green Companies, Inc.*, 471 So. 2d 158 (Fla. 3d Dist. Ct. App. 1985) (supporting affidavit insufficient for failure to comply with Rule 1.510(e)); *Testa v. Pfaff*, 464 So. 2d 220 (Fla. 1st Dist. Ct. App. 1985) (affidavits insufficient because based on ultimate facts or conclusions of fact without stating facts which would support such conclusions); *Evens v. Eastern Air Lines, Inc.*, 468 So. 2d 1111 (Fla. 1st Dist. Ct. App. 1985) (summary judgment for defendant affirmed where uncontroverted affidavits negated existence of element of tort).

278. 472 So. 2d 851 (Fla. 1st Dist. Ct. App. 1985).

279. *Id.* at 853.

280. *Id.*; *accord* *R & W Farm Equip. Co. v. Fiat Credit Corp.*, 466 So. 2d 407 (Fla. 1st Dist. Ct. App. 1985).

281. 463 So. 2d 1233 (Fla. 1st Dist. Ct. App. 1985).

282. *Id.* at 1233.

283. *Id.*

284. *See* *Baughner v. Banker's Life Co.*, 471 So. 2d 675 (Fla. 2d Dist. Ct. App. 1985) (summary judgment for insurer reversed where different inferences could be drawn from provisions of life insurance contract and amount of death benefits payable);

priate where "no interpretation of the undisputed material facts would support a finding of liability."²⁸⁵

IX. Directed Verdict

A motion for directed verdict must be made at the close of all the evidence or the opportunity is waived.²⁸⁶ An exception is made where there is a total lack of evidence to support the verdict.²⁸⁷ When there is evidence in the record about which reasonable people could differ, a jury issue of liability or damages is raised and the motion may not properly be granted.²⁸⁸ The evidence must be considered in a light most

Miranda v. Julian, 463 So. 2d 327 (Fla. 5th Dist. Ct. App. 1985) (summary judgment reversed where contract contained latent ambiguity); *Master Antenna Syss. v. Number One Condominium Ass'n*, 466 So. 2d 426 (Fla. 4th Dist. Ct. App. 1985) (ambiguity in master television system contracts precluded summary judgment); *cf. Tampa Port Auth. v. Tampa Barge Servs., Inc.*, 463 So. 2d 557 (Fla. 2d Dist. Ct. App. 1985) ("[m]ere contractual ambiguity does not necessarily preclude summary judgment"; summary judgment affirmed where evidence showed parties had given same interpretation to an ambiguity).

285. *Clark v. Lumbermans Mut. Ins. Co.*, 465 So. 2d 552 (Fla. 1st Dist. Ct. App. 1985) (summary judgment for defendant affirmed on negligence suit arising from diving accident on canoe trip; defendant sustained its burden of showing there was no evidence to indicate a breach of duty causing injury); *Brown v. Winn-Dixie Montgomery, Inc.*, 469 So. 2d 155 (Fla. 1st Dist. Ct. App. 1985) (summary judgment for employer proper where Worker's Compensation Act provided exclusive remedy precluding suit alleging battery and intentional infliction of mental distress where male supervisor was alleged to have grabbed employee's breast); *cf. Robbins v. Department of Natural Resources*, 468 So. 2d 1041 (Fla. 1st Dist. Ct. App. 1985) (summary judgment for defendant DNR in diving accident case improper where DNR failed to conclusively establish facts going to element of defense of assumption of risk and failed to demonstrate it was not negligent or that plaintiff was solely responsible for his own injuries); *see also Allstate Ins. Co. v. Weathers Bros.*, 453 So. 2d 117 (Fla. 1st Dist. Ct. App. 1985) (summary judgment for defendant affirmed where plaintiff failed to introduce bill of lading upon which issue of liability was predicated); *Reina v. Gingerale Corp.*, 472 So. 2d 530 (Fla. 3d Dist. Ct. App. 1985) (summary judgment for defendant affirmed where complaint failed to allege factual predicate upon which liability could be based).

286. The court in *Waltman v. Prime Motor Inns, Inc.*, 480 So. 2d 88, 90 (Fla. 1985), articulated the general rule that "one who submits his cause to the trier of fact without first moving for directed verdict at the end of all evidence has waived the right to make that motion."

287. *Sundale Assocs. v. Southeast Bank*, 471 So. 2d 100, 102 (Fla. 3d Dist. Ct. App. 1985).

288. *See Fayden v. Guerrero*, 474 So. 2d 320 (Fla. 3d Dist. Ct. App. 1985) (conflicting evidence about liability); *R.A. Jones & Sons v. Holman*, 470 So. 2d 60

favorable to the nonmovant.²⁸⁹ A directed verdict is improper if any record evidence would support a jury verdict.²⁹⁰ A directed verdict is proper where the record does not support a jury issue,²⁹¹ as where the evidence and all reasonable inferences which might be drawn from it point to but one possible conclusion.²⁹² A directed verdict is proper where there is no evidence to support a party's position,²⁹³ no rebuttal of a legal presumption,²⁹⁴ no recognized legal theory upon which liabil-

(Fla. 3d Dist. Ct. App. 1985) (in contract action, factual issues about breaches of warranties presented); *Curran v. Cedars of Lebanon Hosp. Corp.*, 469 So. 2d 872 (Fla. 3d Dist. Ct. App. 1985) (factual issue about hospital's participation in and control over construction project precluded directed verdict on ground of immunity conferred by workers' compensation law); *Sistrunk v. Douglas*, 468 So. 2d 1059 (Fla. 1st Dist. Ct. App. 1985) (in negligence action, issue whether defendant acted reasonably under the circumstances); *Wills v. Snapper Creek Nursing Home*, 465 So. 2d 562 (Fla. 3d Dist. Ct. App. 1985) (issue whether husband suffered loss of consortium).

289. *E.g.*, *Urling v. Helms Exterminators, Inc.*, 468 So. 2d 451, 453 (Fla. 1st Dist. Ct. App. 1985).

290. *See id.*

291. *Roshkind v. Fay*, 474 So. 2d 1 (Fla. 4th Dist. Ct. App. 1985) (issue of tortious interference with business relationship not supported in record); *Kalivas v. Miller*, 473 So. 2d 41 (Fla. 3d Dist. Ct. App. 1985) (uncontradicted evidence established claim to liability for assault); *Schimmel v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 464 So. 2d 602 (Fla. 3d Dist. Ct. App. 1985) (uncontradicted evidence proved liability for amount overdrawn from account).

292. *See Trend Realty, Inc. v. Bullard*, 461 So. 2d 298 (Fla. 1st Dist. Ct. App. 1985); *Williams v. Meyer*, 474 So. 2d 1214 (Fla. 5th Dist. Ct. App. 1985).

293. *See Nationwide Mut. Fire Ins. Co. v. Vosburgh*, 480 So. 2d 140 (Fla. 4th Dist. Ct. App. 1985) (no evidence of comparative negligence); *Williams v. Meyer*, 474 So. 2d 1214 (Fla. 5th Dist. Ct. App. 1985) (in wrongful death action, no evidence driver of car could have avoided hitting child); *Tri-County Truss Co. v. Leonard*, 467 So. 2d 370 (Fla. 4th Dist. Ct. App. 1985) (no evidence to support comparative negligence defense to strict liability claim); *Sussman v. City of Daytona Beach*, 462 So. 2d 595 (Fla. 5th Dist. Ct. App. 1985) (in action for false arrest, false imprisonment, and malicious prosecution, no evidence of facts relied upon by police to find probable cause); *cf. Hartford Accident and Indem. Co. v. Parker*, 472 So. 2d 1338 (Fla. 4th Dist. Ct. App. 1985) (although plaintiff did not introduce signed parental consent form which would by statute establish liability for minor child's automobile accident, directed verdict improper where evidence of routine practice of licensing agency created factual issue of whether parents signed); *Ray-Mar Beauty College, Inc. v. Ellis Rubin Law Offices, P.A.*, 475 So. 2d 718 (Fla. 3d Dist. Ct. App. 1985) (evidence supported punitive damages claim); *Liberty Mut. Ins. Co. v. Kimmel*, 465 So. 2d 606 (Fla. 3d Dist. Ct. App. 1985) (evidence walkway was built contrary to building code supported claim of negligence).

294. *Tozier v. Jarvis*, 469 So. 2d 884 (Fla. 4th Dist. Ct. App. 1985) (presumption of negligence which attaches to driver of rear vehicle in rear-end collision not

ity could be predicated,²⁹⁵ where the defendant's conduct was not the legal cause of injury,²⁹⁶ or where the minimum legal standard of culpability was not met.²⁹⁷

X. Res Judicata

The doctrine of res judicata is invoked as an affirmative defense²⁹⁸ to bar a suit where substantially the same claim or cause of action has

rebutted).

295. *NN Investors Life Ins. Co. v. Professional Group, Inc.*, 468 So. 2d 532 (Fla. 3d Dist. Ct. App. 1985) (Florida does not recognize tort of economic duress).

296. *See Florida Power and Light Co. v. Lively*, 465 So. 2d 1270 (Fla. 3d Dist. Ct. App. 1985) (no duty or breach of duty on part of utility where airplane collided with electrical lines, as accident was not foreseeable); *Caranna v. Eades*, 466 So. 2d 259 (Fla. 2d Dist. Ct. App. 1985) (no duty of city to inspect vertical openings in balcony railings through which child fell).

In *Snow v. Nelson*, 475 So. 2d 225 (Fla. 1985), the supreme court decided that a directed verdict was proper where the evidence would not support a finding of parental liability for a child's tortious conduct under the restrictive rule of *Gissen v. Goodwill*, 80 So. 2d 701 (Fla. 1955). *See generally* Note, *Liability of Parents for Negligent Supervision of Their Minor Children*, 12 FLA. ST. U.L. REV. 935 (1985); Note, *Parental Liability for the Torts of Their Minor Children: Limits, Logic & Legality*, 9 NOVA L.J. 205 (1984).

297. The supreme court in *Como Oil Co., v. O'Loughlin*, 466 So. 2d 1061 (Fla. 1985), held that a directed verdict was proper on a claim for punitive damages where the trial court found the evidence showed only gross negligence of the defendant. The court stated that "the degree of negligence necessary for punitive damages is willful and wanton misconduct equivalent to criminal manslaughter." *Id.* at 1062. In a separate opinion, Justice Shaw, joined by Justice Ehrlich, stated that the lines drawn between the relative degrees of negligence are indistinct and are matters of public policy. These justices thought the evidence was sufficient in that case to preclude a directed verdict. *Id.* at 1063.

The court in *Winn-Dixie Stores, Inc. v. Robinson*, 472 So. 2d 722 (Fla. 1985), held that a directed verdict on the issue of punitive damages was improper on the evidence presented in a malicious prosecution action. The court decided that the higher standard of negligence necessary to support a finding of vicarious liability for punitive damages under *Mercury Motors Express, Inc. v. Smith*, 393 So. 2d 545 (Fla. 1981), was inapplicable because the allegations, proof, and jury verdict were predicated on a theory that the corporate defendant, rather than an agent, "acted with malice, moral turpitude, wantonness, willfulness or reckless indifference to the rights of others" *Id.* at 723.

298. *City of Clearwater v. United States Steel Corp.*, 469 So. 2d 915 (Fla. 2d Dist. Ct. App. 1985) (defense of res judicata properly raised in motion to dismiss where parties stipulated that court should take judicial notice of earlier proceedings between them).

been finally adjudicated in a prior proceeding.²⁹⁹ The doctrine is applicable only where the suits involve overlapping identities of “the thing sued for . . . , the causes of action . . . , [the] persons and parties . . . , [and] the quality or capacity of the persons for or against whom the claim is made.”³⁰⁰ The prior adjudication must have been final.³⁰¹

The First District Court of Appeal in *Thomson v. Petherbridge*³⁰² ruled that the doctrine operated to bar a suit where an earlier action to reform and enforce payment on a note was dismissed with prejudice for lack of consideration, although the subsequent action was brought to enforce the underlying debt rather than the note itself. The court stated that the doctrine applies where the causes of action are “substantially the same,” and that the “[i]dentity of causes of action is defined by similarity of the facts essential to the maintenance of both actions.”³⁰³ The court found that both actions involved identical facts because the suit on the debt was necessarily predicated on the same debt contract adjudicated unenforceable in the earlier action.³⁰⁴

Because “a partnership is not a legal entity apart from the members composing it,”³⁰⁵ a summary final judgment for the partners in their capacity as individuals may operate through the doctrine of res judicata to bar a subsequent suit designating those individuals as partners in a partnership.³⁰⁶

A party may be estopped from pleading res judicata upon taking

299. *Thomson v. Petherbridge*, 472 So. 2d 773, 774 (Fla. 1st Dist. Ct. App. 1985).

300. *Husky Indus., Inc. v. Griffith*, 422 So. 2d 996, 999 (Fla. 5th Dist. Ct. App. 1982), quoted in *Thomson*, 472 So. 2d at 775.

301. *Thomson*, 472 So. 2d at 774.

302. See *id.* at 773; *State v. LaPlante*, 470 So. 2d 832, 834 (Fla. 2d Dist. Ct. App. 1985) (doctrine inapplicable where “no clear cut former adjudication”); *Falkner v. Amerifirst Fed. Savs. and Loan Assoc.*, 467 So. 2d 746 (Fla. 3d Dist. Ct. App. 1985) (trial court correctly entered judgment of dismissal on ground of res judicata where no rehearing or appeal was timely sought from earlier order of dismissal).

303. *Thomson*, 472 So. 2d at 775 (quoting *Pumo v. Pumo*, 405 So. 2d 224, 226 (Fla. 3d Dist. Ct. App. 1981)).

304. *Id.* at 775.

305. *Ohio Casualty Ins. Co. v. Fike*, 304 So. 2d 136, 137 (Fla. 4th Dist. Ct. App. 1974).

306. See *Olympian West Condominium Ass'n v. B.K., Inc.*, 467 So. 2d 413 (Fla. 3d Dist. Ct. App. 1985). Thus, the absence of the fourth “identity” under the test of *Thomson*, 472 So. 2d at 775, does not prevent application of the doctrine at least in the context of a partnership although the suits name the same persons in different capacities.

inconsistent positions in separate suits where the opposing party would be injured.³⁰⁷ The Fifth District in *Wooten v. Rhodus*³⁰⁸ decided that it would be unfair to give *res judicata* effect to a dissolution judgment so as to bar a subsequent suit brought by Wooten to determine his interest in real property owned as tenants in common at the time of dissolution. In the dissolution action, Rhodus had moved to dismiss Wooten's counterclaim through which Wooten had sought to have his rights in the property adjudicated. Rhodus asserted that the court lacked jurisdiction to determine the interests in the property and that the determination should be made in a subsequent partition suit. Wooten acquiesced by dropping his counterclaim. When Wooten later brought a partition suit, Rhodus raised the defense of *res judicata*, arguing that the interests were adjudicated by the dissolution judgment. Finding that Rhodus' contrary positions in court would operate unfairly to deny Wooten his day in court, the district court disallowed the defense and ordered the case tried on its merits.

Where a "motion merely renews the allegations upon which relief was previously denied, the doctrine of *res judicata* precludes relitigation of the issue presented."³⁰⁹

The doctrine of *res judicata* operates to bar relief from final judgment under Rule 1.540(b) even where there is a change in the controlling rule of law in a later unrelated case.³¹⁰

Where the verdict for a plaintiff in a personal injury suit does not apportion responsibility for damages among joint tortfeasors, the doctrine operates to bar a subsequent suit against one jointly liable.³¹¹ Thus, the Second District Court of Appeal in *Roberts v. Rockwell International Corp.*³¹² affirmed a summary judgment for the manufacturer of a saw which injured the plaintiff's hand, where the plaintiff had earlier recovered in a negligence action against the county whose ambulance transporting the plaintiff had broken down enroute to the hospital. The plaintiff had "affirmatively argued to the jury that apportionment was not possible."³¹³ Because the plaintiff failed to obtain a

307. *Wooten v. Rhodus*, 470 So. 2d 844, 847 (Fla. 5th Dist. Ct. App. 1985).

308. 470 So. 2d 844 (Fla. 5th Dist. Ct. App. 1985).

309. *Streater v. Stamper*, 466 So. 2d 397, 398 (Fla. 1st Dist. Ct. App. 1985).

310. *Theisen v. Old Republic Ins. Co.*, 468 So. 2d 434 (Fla. 3d Dist. Ct. App. 1985).

311. *See Roberts v. Rockwell Int'l Corp.*, 462 So. 2d 502 (Fla. 2d Dist. Ct. App. 1985).

312. *Id.*

313. *Id.* at 506.

special verdict finding the damages apportionable, the court reasoned that the defendants were joint tortfeasors, and the adjudication of the liability of one precluded a subsequent adjudication as to the other who was not named in the earlier suit.

XI. Stays and Injunctions

A. Stays

Removal of a civil action to federal district court is governed by federal statute.³¹⁴ Claims over which federal courts have original jurisdiction are removable. Nonremovable claims joined with removable claims may be decided by a federal court through its pendent jurisdiction.³¹⁵ The plaintiffs in *Sunshine State Service Corp. v. Dove Investments*³¹⁶ filed suit in state court on a claim over which the federal courts did not have concurrent jurisdiction. Defendants filed counterclaims and also filed claims in federal district court predicated on federal statutes. Not all the defendants in the state action were named in the federal action. Defendants invoked the pendent jurisdiction of the federal court by joining the counterclaims. The defendants then moved to stay the proceedings in the state court. The motion was granted and the Fifth District reversed. The district court extrapolated a rule from an opinion of the Florida Supreme Court³¹⁷ providing that "a stay of a subsequently filed action in a court of concurrent jurisdiction involving the same parties and same subject matter is appropriate."³¹⁸ The district court applied the rule even though the courts did not have concurrent jurisdiction and found that the conditions of the rule were not met because the parties were not identical. The court further found that the stay should not have been granted because, as a general rule in matters of concurrent jurisdiction, the court whose jurisdiction is first invoked has exclusive jurisdiction over the cause.

The court in *Cole v. Douglas*³¹⁹ quashed a trial court's order staying part of a complaint first filed in state court and five years later filed in federal court. The court characterized the filing in federal court as a

314. See 28 U.S.C. § 1441 (1982).

315. 28 U.S.C. § 1441(c).

316. 468 So. 2d 281 (Fla. 5th Dist. Ct. App.), *petition for review denied*, 478 So. 2d 53 (Fla. 1985).

317. *Wade v. Clower*, 114 So. 548 (Fla. 1927).

318. *Sunshine State*, 468 So. 2d at 283 (emphasis in original deleted).

319. 464 So. 2d 229 (Fla. 4th Dist. Ct. App. 1985).

dilatory tactic³²⁰ and said that “stays should be rare, and the circumstances of each case should be scrutinized carefully to preclude manipulation of the state and federal court systems.”³²¹

In *Robinson v. Royal Bank of Canada*,³²² the Fourth District reached an opposite conclusion in a case in which a Canadian court had prior and concurrent jurisdiction over an essentially identical action. The trial court should have “decline[d] jurisdiction as a matter of comity.”³²³

B. Injunctions

The Second District Court of Appeal in *Lingelbach's Bavarian Restaurants, Inc. v. Del Bello*³²⁴ analyzed the procedure for obtaining a temporary injunction under Rule 1.610(a) and decided that the remedy is appropriately sought through a verified motion for preliminary injunction. The nonmovant argued that under *Deanza Corp. v. Vono Flororio*³²⁵ injunctive relief must be sought by “pleading” rather than “motion.”³²⁶ The court concluded that an amendment³²⁷ had harmonized Florida’s rule with its counterpart, Federal Rule of Civil Procedure 65(a)(2), which provides that injunctive relief is sought by “application for a preliminary injunction.” The district court reasoned that under Florida Rule 1.100(b), an application for relief is made by motion; therefore, a motion, rather than a pleading, is the proper mechanism for seeking temporary injunctive relief under Rule 1.610. The court went on to find that the motion itself did not contain the allegations customarily required to gain injunctive relief, and that the motion, notice, and hearing combined to make the procedure by which relief was granted fair.

320. *Id.* at 231.

321. *Id.*

322. 462 So. 2d 101 (Fla. 4th Dist. Ct. App. 1985).

323. *Id.* at 102.

324. 467 So. 2d 476 (Fla. 2d Dist. Ct. App.), *petition for review denied*, 476 So. 2d 674 (Fla. 1985).

325. 393 So. 2d 1146 (Fla. 4th Dist. Ct. App. 1981).

326. *Id.* at 1146-47.

327. *In re* Rules of Civil Procedure, 391 So. 2d 165 (Fla. 1980).

XII. Costs and Interest

A. Costs

1. Generally

Section 57.041 of the Florida Statutes provides that “[t]he party recovering judgment shall recover all his legal costs and charges which shall be included in the judgment”³²⁸ Nevertheless, a trial court has discretion whether to award costs after judgment.³²⁹ The party against whom costs are to be taxed must be given opportunity to challenge the items claimed as costs by presenting argument and evidence.³³⁰ Parties need not specifically plead costs, as they do not constitute part of the relief sought from damages claimed.³³¹ Courts take a liberal view of the time when a motion for trial costs may be filed.³³²

Costs incurred in an *appeal* “shall be taxed in favor of the prevailing party unless the court orders otherwise.”³³³ A motion for appellate costs must be filed within thirty days after the appellate court’s mandate issues.³³⁴ The standard of review of a trial court’s ruling on a motion to tax costs is one of a clear showing of abuse of discretion.³³⁵

Costs of depositions may be taxed against a losing party if the depositions “serve a useful purpose, even though not introduced into evidence.”³³⁶ Where the terms of a settlement agreement between parties to the original action require the parties to pay their own costs, a third party defendant who also asserts a derivative claim as a counter-

328. FLA. STAT. § 57.041 (1985).

329. *Goslin v. Racal Data Communications, Inc.*, 468 So. 2d 390 (Fla. 3d Dist. Ct. App.), *petition for review denied*, 479 So. 2d 117 (Fla. 1985).

330. *Morgan v. Plantation-Sysco*, 471 So. 2d 207 (Fla. 5th Dist. Ct. App. 1985).

331. *City of Palm Bay v. Bauman*, 475 So. 2d 1322, 1327 (Fla. 5th Dist. Ct. App. 1985).

332. “[A] motion to tax costs may be filed at various times, before or after judgment, and even after an appeal of the judgment has been taken, so long as the motion is filed within a reasonable time after the appeal is concluded.” *Id.* (attorney’s fees taxable as costs pursuant to federal statute although motion for fees made after entry of final judgment and no prayer for fees was stated in complaint).

333. FLA. R. APP. P. 9.400(a).

334. *Id.*; see *Thornburg v. Pursell*, 476 So. 2d 323, 324 (Fla. 2d Dist. Ct. App. 1985).

335. *Goslin*, 468 So. 2d at 392 (no abuse of discretion in denying motion to tax costs of trial transcript).

336. *Winn-Dixie Stores, Inc. v. Vote*, 463 So. 2d 459, 460 (Fla. 2d Dist. Ct. App. 1985).

claim may not be taxed with costs which are required to be paid under the agreement.³³⁷ Costs paid by a plaintiff upon recommencement of an action voluntarily dismissed may be recovered to the extent of the costs the defendant would have expended had the claim not been previously dismissed.³³⁸

Rule 1.442 provides that where the amount recovered by a successful plaintiff does not exceed the amount of a properly served offer of judgment, the plaintiff must pay the costs incurred by the defendant after the offer was made.³³⁹ Separate offers from multiple defendants may not be aggregated; rather, the rule applies only when the plaintiff fails to recover an amount greater than the highest single offer.³⁴⁰

The First District in *Douglas v. Wilson*³⁴¹ decided that the trial court erred in awarding a joint judgment for costs under Rule 1.420(d) to the extent of costs incurred in preparing to defend one count which stated a cause of action by only one of the plaintiffs.³⁴² The Second District in *American Bank of Lakeland v. Hoover*³⁴³ found that a trial court erred in taxing as costs the defendant's attorney's fees and travel expenses as a sanction against the plaintiff for misconduct of its attorney. The trial court found the objectionable conduct directly resulted in a mistrial, at substantial cost to the opposing parties. The district court reasoned that such a sanction is improper where the attorney is not accused or found guilty of contempt.

2. *Expert Witnesses*

The supreme court in *Travieso v. Travieso*³⁴⁴ held that "pursuant to Section 92.231, expert witness fees, at the discretion of the trial court, may be taxed as costs for a lawyer who testifies as an expert as

337. *Caranna v. Eades*, 466 So. 2d 259, 267 (Fla. 2d Dist. Ct. App. 1985).

338. *See MacArthur Dairy, Inc. v. Guillen*, 470 So. 2d 747 (Fla. 3d Dist. Ct. App. 1985); *see also supra* notes 238-43 and accompanying text.

339. FLA. R. CIV. P. 1.442.

340. *Thornburg*, 476 So. 2d at 324.

341. 472 So. 2d 876 (Fla. 1st Dist. Ct. App. 1985).

342. *See also Okuboye v. Hubert Rutland Hosp.*, 466 So. 2d 342 (Fla. 2d Dist. Ct. App.), *petition for review denied*, 476 So. 2d 674 (Fla. 1985) (physician who successfully defended malpractice suit not entitled to indemnity from joint tortfeasor hospital for attorney's fees and costs where record showed plaintiff attempted to prove active rather than passive negligence).

343. 471 So. 2d 657 (Fla. 2d Dist. Ct. App. 1985).

344. 474 So. 2d 1184 (Fla. 1985).

to reasonable attorney's fees."³⁴⁵ The court expressed its preference that attorneys so testify as a courtesy and expect compensation only "where the time required for preparation and testifying is burdensome."³⁴⁶ In a separate opinion, Justice Ehrlich noted the mandatory language "*shall* be allowed a witness fee"³⁴⁷ and disagreed with the majority's treatment of that provision as permissive.³⁴⁸ He nevertheless agreed with the majority that a lawyer called to testify about fees generally should do so without charge as a courtesy. Justice Overton, in dissent, would have modified the principle that a court must hear expert testimony before awarding attorney's fees. He suggested that the determination whether testimony was needed might be left to the attorneys and trial court. The Justice reasoned that testimony about the value of other experts' services is not required, and that testimony about attorney's fees may unnecessarily add to the cost of litigation.³⁴⁹

The *Travieso* decision served as the basis for the decision by the Second District in *Straus v. Morton F. Plant Hospital Foundation, Inc.*³⁵⁰ The district court added its gloss by construing the holding in *Travieso* as making the "award of such expert fees discretionary only where the testifying attorney expert does not expect to be compensated for that testimony."³⁵¹ Thus, if an attorney testifies as an expert with the expectation of compensation, the trial court must tax her fee as a cost.

The First District in *Digital Systems of Florida, Inc. v. Committee*³⁵² affirmed a denial of the plaintiff's motion for costs where the expert fees were not broken down in such a manner that any charges not properly includable as costs would be revealed.³⁵³ The same court

345. *Id.* at 1185 (emphasis added).

346. *Id.* at 1186.

347. FLA. STAT. § 92.231 (1983) (emphasis added).

348. *Travieso*, 474 So. 2d at 1187 (Ehrlich, J., concurring in part and dissenting in part).

349. *Id.* at 1188 (Overton, J., dissenting).

350. 478 So. 2d 472 (Fla. 2d Dist. Ct. App. 1985).

351. *Id.* at 473.

352. 472 So. 2d 533 (Fla. 1st Dist. Ct. App. 1985), *petition for review denied*, 482 So. 2d 348 (Fla. 1986).

353. In an administrative order, the Florida Supreme Court has issued guidelines for taxation of costs in civil actions. The guidelines address taxation of costs of expert witnesses and comment on whether certain of those costs should be taxable. See *Statewide Uniform Guidelines for Taxation of Costs in Civil Actions in Reeser v. Boats Unlimited, Inc.*, 432 So. 2d 1346, 1349 n.2 (Fla. 4th Dist. Ct. App. 1983), *reprinted in* FLORIDA RULES OF COURT 559 (West 1986).

in *Thursby v. Reynolds Metal Co.*³⁵⁴ found no abuse of discretion in the trial court's order taxing expert witness costs, although no evidence was presented showing the time the experts actually spent in preparation of their testimony. The court reasoned that the trial court's knowledge of the length and the nature of the testimony given enabled it to determine a reasonable fee. Also, the fees taxed did not appear grossly excessive to the appellate court.³⁵⁵

B. Interest

1. Prejudgment Interest on Pecuniary Losses

Prejudgment interest is an element of pecuniary damage³⁵⁶ which, when properly pled,³⁵⁷ is awarded as a matter of right in actions for damages to property.³⁵⁸ The policy behind awarding prejudgment interest is to encourage settlement of claims.³⁵⁹ "[P]rejudgment interest is not recoverable on awards for personal injury."³⁶⁰

The supreme court in *Argonaut Insurance Co. v. May Plumbing Co.*³⁶¹ held that "when a verdict liquidates damages on a plaintiff's out-of-pocket, pecuniary losses, plaintiff is entitled, as a matter of law, to prejudgment interest at the statutory rate from the date of that loss."³⁶² The court thus resolved a conflict among the districts over whether prejudgment interest should be awarded on unliquidated claims for damages. The Fourth District had held that prejudgment

354. 466 So. 2d 245 (Fla. 1st Dist. Ct. App.), *petition for review denied*, 476 So. 2d 676 (Fla. 1985).

355. *Id.* at 252.

356. *A.R.A. Servs., Inc. v. Pan American World Airways, Inc.*, 474 So. 2d 396 (Fla. 3d Dist. Ct. App. 1985).

357. *See Harry E. Robbins Assocs. v. Sudbury*, 467 So. 2d 343, 344 (Fla. 2d Dist. Ct. App. 1985).

358. *See Argonaut Ins. Co. v. May Plumbing Co.*, 474 So. 2d 212, 215 (Fla. 1985); *Zorn v. Britton*, 120 Fla. 304, 162 So. 879 (1935), *cited in A.R.A. Servs.*, 474 So. 2d at 396 n.1.

359. *A.R.A. Services*, 474 So. 2d at 396 n.1.

360. *Argonaut*, 474 So. 2d at 214 n.1. The court in *Argonaut* implied that it might permit an award of prejudgment interest in a personal injury action. The court noted that the rule of *Zorn* stemmed from a trial court's failure to apportion property loss and personal injury damages. *Id.* The court may thus be indicating a willingness to extend the scope of permissible awards of prejudgment interest to include such awards on personal injury damages.

361. *Id.* at 212.

362. *Id.* at 215.

interest could not be awarded where the presence of a comparative negligence claim created uncertainty about the award of damages.³⁶³ The claim was viewed as unliquidated and therefore incapable of supporting an award of interest. The First District had adopted a "better rule" providing that "for the purpose of assessing prejudgment interest, a claim becomes liquidated and susceptible of prejudgment interest when a verdict has the effect of fixing damages as of a prior date."³⁶⁴

The supreme court approved the view of the First District and quashed the decision of the Fourth District, but decided the case on the basis of two nineteenth-century decisions from which the court had not receded.³⁶⁵ In reannouncing the law of prejudgment interest, the supreme court removed from the province of the jury any consideration of interest in finding the amount of damages. Rather, "[o]nce a verdict has liquidated damages as of a date certain,"³⁶⁶ the trial judge or clerk is to do the mathematical computation of interest according to section 687.01 of the Florida Statutes. The rule of *Argonaut Insurance* has since been applied by the district courts.³⁶⁷

2. Interest on Interpleaded Funds

Generally, no interest is allowable on funds deposited with a court.³⁶⁸ However, interest is allowable on disputed funds which a court has ordered deposited in an interest-bearing account.³⁶⁹ "[I]nterest earned on interpleaded and deposited funds follows the principal and

363. *Id.* at 213-14; see *Chicago Ins. Co. v. Argonaut Ins. Co.*, 451 So. 2d 876 (Fla. 4th Dist. Ct. App. 1985).

364. *Bergen Brunswick Corp. v. Department of Health and Rehabilitative Servs.*, 415 So. 2d 765, 767 (Fla. 1st Dist. Ct. App. 1982), *petition for review denied*, 426 So. 2d 25 (Fla. 1983).

365. See *Argonaut*, 474 So. 2d at 214-15.

366. *Id.* at 215.

367. See *Morcyll Distrib. Co. v. Farrelly*, 477 So. 2d 617 (Fla. 5th Dist. Ct. App. 1985), *petition for review denied*, 486 So. 2d 595 (Fla. 1986) (awarding prejudgment interest on damages arising from breach of subdistributorship agreement); *Hurley v. Slingerland*, 461 So. 2d 282 (Fla. 4th Dist. Ct. App. 1985) (affirming award of prejudgment interest on damages sustained by limited partner arising from general partner's self-dealing); *A.R.A. Servs., Inc. v. Pan American World Airways, Inc.*, 474 So. 2d 396 (Fla. 3d Dist. Ct. App. 1985) (awarding prejudgment interest on damages to airplane).

368. *Burnett v. Brito*, 478 So. 2d 845 (Fla. 3d Dist. Ct. App. 1985).

369. *Id.* at 849.

shall be allocated to whomever is found entitled to the principal."³⁷⁰ Thus, the Third District in *Burnett v. Brito*³⁷¹ decided that a defendant real estate broker was liable to a prevailing plaintiff for interest on money advanced to the broker where the broker delayed in complying with a court order to deposit the money in an interest-bearing account.

XIII. Relief from Judgment

Rule 1.540 provides for relief from judgments, decrees, or orders on bases which include clerical mistakes, mistakes, inadvertence, excusable neglect,³⁷² newly discovered evidence,³⁷³ fraud,³⁷⁴ voidness,³⁷⁵ sat-

370. *Id.*

371. 478 So. 2d 845 (Fla. 3d Dist. Ct. App. 1985).

372. *Williams v. Roundtree*, 464 So. 2d 1293 (Fla. 1st Dist. Ct. App. 1985) (relief granted from effect of failure to timely file notice of appeal on bases of clerical error and excusable neglect where judicial assistant gave erroneous information about date decision was rendered; trial court would be permitted to set aside judgment and re-enter at later date to permit timely perfection of appeal).

373. *Kline v. Belco, Ltd.*, 480 So. 2d 126 (Fla. 3d Dist. Ct. App. 1985), *petition for review denied*, 491 So. 2d 278 (Fla. 1986) (new trial ordered on basis of new evidence of tax records which controverted false testimony of adverse witness whose testimony had damaged plaintiff's credibility).

374. *See generally DeClaire v. Yohanen*, 453 So. 2d 375 (Fla. 1984); Comment, *Rule 1.540(b), Florida Rules of Civil Procedure: In Search of an Equitable Standard for Relief from Fraud*, 12 FLA. ST. U.L. REV. 851 (1985); *see Gomez v. Espinosa*, 466 So. 2d 1201 (Fla. 3d Dist. Ct. App. 1985) (error to grant relief under rule on basis of extrinsic fraud upon the court by misrepresentation where unsuccessful party not prevented from participating in action, or on intrinsic fraud where alleged fraudulent conduct in the proceeding did not pertain to the issues tried; Rule 1.540 may not be used as substitute for appeal to attack ruling on jurisdiction); *Streater v. Stampes*, 466 So. 2d 397 (Fla. 1st Dist. Ct. App. 1985) (motion to vacate adjudication of paternity based on intrinsic fraud — perjury — must be brought within one year; under Rule 1.540(b) relief predicated on intrinsic fraud may not be obtained after one year through provision of rule authorizing independent action; however, extrinsic fraud may be raised under rule later than one year); *Weitzman v. F.I.F. Consultants, Inc.*, 468 So. 2d 1085, 1087 n.3 (Fla. 3d Dist. Ct. App.), *petition for review denied*, 479 So. 2d 117 (Fla. 1985) (discussing time for bringing motion under Rule 1.540(b) for relief from intrinsic and extrinsic fraud).

375. *See generally DeClaire*, 453 So. 2d at 375; *Whigham v. Whigham*, 464 So. 2d 674 (Fla. 5th Dist. Ct. App.), *petition for review denied*, 475 So. 2d 696 (Fla. 1985) (void judgment may be attacked at any time under Rule 1.540(b)); *Kuehne & Nagel, Inc. v. Esser Int'l, Inc.*, 467 So. 2d 457 (Fla. 3d Dist. Ct. App. 1985) (error to deny motion to vacate default under Rules 1.500(d) and 1.540(b) on evidence which showed one day delay in filing answer was caused by excusable neglect when lawyer's clerk mishandled complaint and summons); *Palmer v. Palmer*, 479 So. 2d 221 (Fla. 5th Dist.

isfaction,³⁷⁶ or inequity of prospective application.³⁷⁷

Clerical mistakes "may be corrected by the court at any time on its own initiative or on the motion of any party . . ."³⁷⁸ The characterization given an error is determinative of the proper mode of relief. "Clerical" errors may be remedied at any time under Rule 1.540(a). Where a written order does not accurately reflect the terms of a settlement agreement announced in open court, the error is clerical and may be remedied under that rule.³⁷⁹ Errors of "inadvertance," which result from a court's failure to order something it meant to order, may be remedied through timely motion under Rule 1.540(b).³⁸⁰ "Judicial" errors arise when a court intentionally orders something which is legally erroneous. This kind of error must be remedied through direct appeal.³⁸¹ The Fourth District Court of Appeal in *In re Estate of Beeman*³⁸² announced a test for distinguishing clerical from judicial error as "whether or not the court reached a decision in the intentional or purposeful exercise of its judicial function. If the pronouncement reflects a deliberate choice on the part of the court, the act is judicial; errors of this nature are to be cured by appeal."³⁸³

A related question arises in the consideration of what error may be remedied through Rule 1.540. Some courts have ruled that substantive change in a judgment may not be effected through the rule. This conclusion is reached by equating the labels "substantive error" and "judi-

Ct. App. 1985) (error to grant motion for relief under Rule 1.540(b) on basis judgment was void for lack of jurisdiction where judgment was not void but voidable).

376. See *Security Ins. Co. v. Commercial Credit Equip. Corp.*, 471 So. 2d 1302 (Fla. 3d Dist. Ct. App. 1985) (satisfaction of judgment extinguishes any remaining rights in the judgment).

377. See *Weitzman*, 468 So.2d at 1085 (on motion for relief under Rule 1.540(b)(5), district court remanded for cancellation of record of judgment obtained through stock fraud scheme, where perpetrator of fraud purchased and was assigned the judgment and sought to enforce it against defrauded party).

378. FLA. R. CIV. P. 1.540(a).

379. See *Marks v. Wertalka*, 475 So. 2d 273, 274 n.2 (Fla. 3d Dist. Ct. App. 1985).

380. See *Mills v. Mills*, 353 So. 2d 954 (Fla. 1st Dist. Ct. App. 1978) (trial court's failure to rule on attorney's fees remediable upon timely motion under Rule 1.540(b)).

381. See *Marks*, 475 So. 2d at 274 n.2.

382. 391 So. 2d 276 (Fla. 4th Dist. Ct. App. 1980).

383. *Id.* at 281, quoted in *Pompano Atlantis Condominium Assoc. v. Marlino*, 415 So. 2d 153, 154 (Fla. 4th Dist. Ct. App. 1982) (tardy motion for clarification under Rule 1.540 could not be treated as motion for relief under Rule 1.540 because the error attempted to be remedied was judicial and not clerical or inadvertent).

cial error." Thus the Second District Court of Appeal in *Clearwater Oaks Bank v. Plumtree*³⁸⁴ decided that a nunc pro tunc judgment amending an order relating to fees was void because the trial court was without jurisdiction. The district court stated that a substantive change in a judgment must be pursued under Rule 1.530(g), and not under Rule 1.540; the court followed with a statement that "[t]he remedies permitted through Rule 1.540 do not apply to judicial errors."³⁸⁵ While the latter statement is generally accepted as true, it does not follow that all substantive inaccuracies in a judgment stem from judicial error. Further, such an approach introduces definitional problems into the equation, for after a court decides that the criteria in Rule 1.540(b) are met, it must determine whether a proposed change would alter the substance of the judgment. Because *any* change to a judgment may be viewed as substantive, the reach of Rule 1.540(b) would thus be so severely circumscribed as to render it of no practical use. Rule 1.530(g) expressly provides that it "does not affect the remedies in Rule 1.540(b)." Where a party meets the restrictive criteria for relief under Rule 1.540(b), a court's ability to fashion a remedy should not be further affected by a limiting notion of substance.

The Fourth District Court of Appeal in *Peters v. Peters*³⁸⁶ has taken the better view by stating that errors in the substance of an order may not be corrected through Rule 1.540(a), but may be corrected upon timely motion under Rule 1.540(b). The court indicated that it would have permitted correction of a contempt order to change the amount of child support arrearages had a motion under the latter rule been timely filed.³⁸⁷ A need for relief in that case arose because the judgment was predicated on incorrect financial information given by a governmental agency.

The court must, of course, have jurisdiction to grant relief. Thus, where a motion for relief is not brought under Rule 1.540(b)(1)-(3) within "one year after the judgment, decree, order or proceeding was entered or taken," the court is without jurisdiction to grant relief under the rule.³⁸⁸ Although Rule 1.540(b) provides that motions under sub-

384. 477 So. 2d 1023 (Fla. 2d Dist. Ct. App. 1985).

385. *Id.* at 1025.

386. 479 So. 2d 840 (Fla. 1st Dist. Ct. App. 1985).

387. *Id.* at 841.

388. *See Marks*, 475 So. 2d at 274 (where a judgment debtor went bankrupt several years after a settlement and agreed final judgment was entered, and plaintiff moved to "correct and amend" judgment to add other names as judgment debtors, relief could not be obtained under Rule 1.540(b) because motion was untimely); *cf.*

section (b)(1), (2), and (3) must be made within one year, motions under subsection (b)(4) and (5) must be made "within a reasonable time." The requirement of reasonableness of time may no longer be applicable to motions alleging voidness for lack of jurisdiction. The Fifth District in *Whigham v. Whigham*³⁸⁹ explained that "a void judgment may be attacked 'at any time' because such judgment creates no binding obligation upon the parties, is legally ineffective, and is a nullity."³⁹⁰ Relief from judgment obtained through fraud upon a court may be sought later than one year by an independent action.³⁹¹

The applicable standard of review of a grant or denial of relief under the rule is one of gross abuse of discretion.³⁹² An order setting aside a judgment must be supported by a basis in the record.³⁹³ Under Rule 1.540, relief may be sought from a settlement,³⁹⁴ offer of judgment,³⁹⁵ or summary judgment.³⁹⁶ Relief may not be obtained merely because of a change in an applicable rule of law.³⁹⁷

Chang v. Chang, 469 So. 2d 829 (Fla. 5th Dist. Ct. App. 1985) (divorce judgment entered in 1969 could be attacked by motion filed in 1982 alleging voidness for lack of jurisdiction because of ineffective service of process).

389. 464 So. 2d 674 (Fla. 5th Dist. Ct. App.), *petition for review denied*, 476 So. 2d 696 (Fla. 1985).

390. *Id.* at 676.

391. FLA. R. CIV. P. 1.540(b).

392. Rhines v. Rhines, 483 So. 2d 4 (Fla. 2d Dist. Ct. App. 1985), *petition for review denied*, 488 So. 2d 68 (Fla. 1986).

393. Citibank v. Data Lease Fin. Corp., 478 So. 2d 76 (Fla. 4th Dist. Ct. App. 1985).

394. See *Vantage Broadcasting Co. v. WINT Radio, Inc.*, 476 So. 2d 796 (Fla. 1st Dist. Ct. App. 1985) (error to deny defendant relief under Rule 1.540(b) where evidence failed to establish that his attorney had authority to settle claim); *Mortgage Corp. of America v. Inland Constr. Co.*, 463 So. 2d 1196 (Fla. 3d Dist. Ct. App.), *petition for review denied*, 475 So. 2d 694 (Fla. 1985) (error to deny motion to vacate judgment made during pendency of appeal where parties reached settlement).

395. See *BMW of North America, Inc. v. Volkswagen South, Inc.*, 471 So. 2d 585 (Fla. 4th Dist. Ct. App. 1985), *petition for review denied*, 484 So. 2d 7 (Fla. 1986) (no error in denial of relief from offered judgment which contained unilateral mistake as result of inexcusable lack of due care).

396. See *Ratner v. Garson*, 475 So. 2d 1294 (Fla. 3d Dist. Ct. App. 1985) (motion for relief from final summary judgment modifying indemnity agreement proper under 1.540(b)(5); however, no genuine issue of fact shown).

397. *Theisen v. Old Republic Ins. Co.*, 468 So. 2d 434 (Fla. 5th Dist. Ct. App. 1985).