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Civil Procedure: 1992 Survey of Florida Law

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Abstract

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KEYWORDS: pleadings, discovery, dismissal

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I. INTRODUCTION

Florida Civil Procedure continues to change and develop, adapting to the demands of an increasingly dynamic environment. The latest reflection of that dynamic environment occurred when the Florida Supreme Court amended rule 1.080 to allow service of pleadings and paper by facsimile (fax).[1]

While most decisions were not quite so "high-tech," a quick review of the decisions generated by the Florida courts over the last eighteen months demonstrates that Florida Civil Procedure is far from stagnant. The rules and statutes, and the judicial interpretation given them, continue to be as dynamic as the world requiring them.

The state's highest court repealed rule 1.442, and adopted the legislature's approach[2] to govern all future offers of judgment where the cause of action accrued after October 1, 1990.[3] The decision enables litigants to focus their collective efforts under one statute[4] if their offer was unreasonably rejected; including defendants receiving a judgment of no liability.[5]

Settling some differences between the state district courts, the Florida Supreme Court adopted the Second District Court of Appeal's approach for determining a dismissal of an action for failure to prosecute.[6] The two-step "middle ground approach" requires the defendant to show there has been no activity for the year preceding the motion and gives the plaintiff an opportunity to establish good cause why the action should not be dismissed.[7]

Regarding motions for summary judgment, the Florida Supreme Court clarified that the notice requirement of twenty days in rule 1.510(c) applies only to the motion, not the notice of hearing.[8] For directed verdicts, the court stated that the "law in Florida is clear" that an appellate court must take into account all the facts adduced both before and after an initial

1. *In re* AMENDMENTS TO THE FLORIDA RULES OF CIVIL PROCEDURE, 604 So. 2d 1110 (Fla. 1992).
2. *See* FLA. STAT. §.768.79 (1990).
3. Timmons v. Combs, 17 Fla. L. Weekly S443 (July 9, 1992).
4. FLA. STAT. § 768.79 (1990) (for causes of action accruing after October 1, 1990).
5. *Id.*
6. Del Duca v. Anthony, 587 So. 2d 1306 (Fla. 1991).
7. *Id.*
8. Titusville Assocs., Ltd. v. Barnett Banks Trust Co., 591 So. 2d 609, 610 (Fla. 1991).

motion for directed verdict.[9]

Prejudgment interest, unlike attorney's fees and costs, has been found to be an element of damages that must be part of the final judgment.[10] By reserving jurisdiction to address the issue of prejudgment interest a trial court cannot dispose of all material issues in controversy and a money judgment would be improper.[11] Attorneys' fees continue to be unrecoverable in the absence of a statute or contractual agreement authorizing their recovery;[12] and all claims for such fees must be pled to be recovered.[13]

The legislature changed the county court jurisdictional amount of controversy, increasing the amount from $10,000 to $15,000, exclusive of interest, costs, and attorney's fees.[14] A discussion of this change in subject matter jurisdiction, as well as other developments in the area of civil procedure, follow in more detail below.

II. Jurisdiction Over the Subject Matter: Changes in County Court Jurisdiction

Effective July 1, 1992, the amount of controversy over which the county court may statutorily take jurisdiction was increased from $10,000 to $15,000, exclusive of interest, costs, and attorney's fees.[15] Under amendments to the Florida Statute section 34.01, the jurisdiction of the county court extends to include equitable matters arising from the same transaction of the case, and within the jurisdictional amount of the county court, unless the State Constitution or laws would otherwise restrict such jurisdiction on other grounds.[16]

Except as noted, few major substantive changes occurred in the area of subject matter jurisdiction in the last year. A sampling of cases will be provided in different areas to give the reader a flavor of the direction the courts are moving.

In *Wright v. State*,[17] the court held that county courts may not retain

9. McCain v. Florida Power Corp., 593 So. 2d 500, 502 (Fla. 1992) (citing Gulf Heating & Refrigeration Co. v. Iowa Mut. Ins. Co., 193 So. 2d 4 (Fla. 1966)).
10. McGurn v. Scott, 596 So. 2d 1042, 1045 (Fla. 1992).
11. *Id.*
12. Bidon v. Department of Professional Regulation, 596 So. 2d 450, 452 (Fla. 1992).
13. Sandoval v. Banco De Comercio, 585 So. 2d 934 (Fla. 1991).
14. 1991 Fla. Laws 269 (to be codified at FLA. STAT. § 34.01(1)(c)(4) (1991)).
15. *Id.*
16. *Id.* (to be codified at FLA. STAT. § 34.01(4) (1991)).
17. 583 So. 2d 398, 399 (Fla. 1st Dist. Ct. App. 1991).

jurisdiction over a marital dissolution matter in order to "redetermine property rights that have been established in a final judgment of dissolution."

The policy frequently reiterated in appellate cases throughout the state is that appellate review is restricted to final orders, and only those final orders actually appealed may be set aside.[18] Where a party has received notice of a specific claim, the court has no subject matter jurisdiction to rule.[19] In *Grand Couloir Corp. v. Consolidated Bank*,[20] the appellate court reversed the holding of the lower court and remanded, based on lack of subject matter jurisdiction, where the trial court had ruled on matters beyond the issues for which defendant had been noticed. Failure of a plaintiff to comply with a statutory pre-trial notice to litigate does not deprive the trial court of subject matter jurisdiction so long as the statute of limitations has not expired.[21]

The Second District Court of Appeal clarified the conceptual difference between jurisdiction and venue by defining "jurisdiction" as "the power to act; the authority to adjudicate the subject matter," while defining "venue" as the "privilege of being accountable to a court in a particular location."[22]

In *Saffan v. Saffan*,[23] the Third District Court of Appeal found that an inter vivos trust had its situs in Florida, where the creator of the trust had residence when the trust was executed, administered and/or amended, even though she re-located and then died out of state. Where the trust was executed, administered, and amended in Florida, jurisdiction may remain with Florida.

In *Steffens v. Steffens*,[24] a suit for dissolution, where in rem jurisdiction of a party's property was used without establishing personal jurisdiction over the party, the court held that no proper jurisdiction existed to award

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18. City of Plantation v. Vermut, 583 So. 2d 393 (Fla. 4th Dist. Ct. App. 1991); Breslof v. The Pines of Delray North Assoc., Inc., 583 So. 2d 810, 811 (Fla. 2d Dist. Ct. App. 1991).

19. Grand Couloir Corp. v. Consolidated Bank, 596 So. 2d 697 (Fla. 2d Dist. Ct. App. 1992).

20. 596 So. 2d 697 (Fla. 2d Dist. Ct. App. 1992).

21. Hospital Corp. of Am. v. Lindberg, 571 So. 2d 446, 447 (Fla. 1990); Southern Neurosurgical v. Fine, 591 So. 2d 252, 255 (Fla. 4th Dist. Ct. App. 1992).

22. State Dep't of Hwy. Safety v. Scott, 583 So. 2d 785, 787 (Fla. 2d Dist. Ct. App. 1991) (where a nonresident has their license suspended under § 322.2615(1)(b)3 of the Florida Stautes for refusing a chemical breath analysis during a DUI arrest, the circuit court has jurisdiction to hear an appeal following an administrative hearing, with the proper venue lying in the county where the administrative hearing was conducted).

23. 588 So. 2d 684 (Fla. 3d Dist. Ct. App. 1991).

24. 593 So. 2d 1156 (Fla. 2d Dist. Ct. App. 1992).

business in the state.[31] Non-resident individuals who do not own land in the state and are not engaged in business within the state can subject themselves to the jurisdiction of the state by committing a tortious act within the state,[32] "maintaining a matrimonial domicile" within the state when an alimony, child support, or division of property proceeding is commenced,[33] by breach of contract,[34] or by sexual intercourse resulting in conception in a proceeding for paternity.[35] The minimum contacts required for long-arm jurisdiction over an individual or corporation where there is a question as to whether business has been conducted in the state,[36] is to be interpreted in light of "traditional notions of fair play and substantial justice."[37] Minimum contacts require more than just correspondence, a one-time visit for conferencing purposes or telephone calls.[38]

Personal jurisdiction may be acquired by the court where there is a voluntary submission to the court or a personal appearance; such appearance or submission need not necessarily be direct.[39] In *Georgia Insurers*

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31. Hatcher v. Hatcher, 598 So. 2d 214 (Fla. 5th Dist. Ct. App. 1992) (where Alaskan resident made an oral contract to pay proceeds of an insurance policy to his decedent son's spouse while attending son's funeral in Florida, the Fifth District Court of Appeal found that his presence in the state and mere failure to pay money were not enough minimum contacts to obtain personal jurisdiction under traditional notions of fair play and substantial justice).

32. FLA. STAT. § 48.193(1)(b) (1991).

33. *Id.*

34. Section 48.193(1)(g) of the Florida Statutes states: "Breaching a contract in this state by failing to perform acts required by the contract to be performed in this state." *Id.*

35. Section 48.193(1)(h) of the Florida Statutes states: "With respect to a proceeding for paternity, engaging in the act of sexual intercourse within this state with respect to which a child may have been conceived." *Id.*

36. *See generally id.* §§ 48.011-.31.

37. International Shoe Co. v. Washington, 325 U.S. 310 (1945); *see also Venetian Salami Co.*, 554 So. 2d at 500.

38. Intercontinental Corp. v. Orlando Regional Medical Ctr., Inc., 586 So. 2d 1191 (Fla. 5th Dist. Ct. App. 1991) (where an Indiana corporation was contracted to review medical bills submitted to a subsidiary corporation in Kentucky by foreign nationals for purposes of determining reasonableness of payments. When the Plaintiff hospital sued for tortious business interference, the Fifth District Court of Appeal held that letters requesting the hospital to accept reduced payment, phone calls, and a visit from the subsidiary's attorney did not constitute "doing business" within the state such that the defendant should expect to be haled into court in Florida.); *see also* Jasper v. Zara, 595 So. 2d 1075 (Fla. 2d Dist. Ct. App. 1992) (where financial advisors in New York were solicited by a Florida resident and communicated by phone or mail, minimum contacts were not established under § 48.193 of the Florida Statutes).

39. Grand Couloir Corp. v. Consolidated Bank, 596 So. 2d 697 (Fla. 2d Dist. Ct. App. 1992) (where non-resident parent corporation had entered into a stipulated option to purchase with its subsidiary, and the stipulation was filed in court, personal jurisdiction over the parent

Insolvency Pool v. Brewer,[40] where a non-resident re-insurer contracted to step into the shoes of an insolvent insurer who had business contacts with Florida, the First District Court of Appeal found jurisdiction over the re-insurer based on the concept that "jurisdiction is co-extensive" with the insurer.[41] Using a "shifting" rationale, the First District Court of Appeal found that the re-insurer had contractually stepped into the shoes of the insurer's jurisdiction.[42]

Similarly, under agency and partnership principles, non-resident partners who have co-partners doing business in Florida are considered to have sufficient minimum contacts with Florida for the court to find personal jurisdiction.[43] Partners are mutually bound to each other and act as mutual agents, especially when the non-resident partner receives economic benefit from the co-partner's Florida business and/or knew that business was conducted in Florida prior to becoming a partner.[44]

Personal jurisdiction will be acquired or found to be lacking based on the whether adequate notice or service of process has been given. Defective notice may occur through untimely service of process,[45] through service

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was found via voluntary submission based on the option being contained within the stipulation). Had the option been a separate document, the court would not have had personal jurisdiction.

40. 583 So. 2d 377 (Fla. 1st Dist. Ct. App. 1991).

41. *Id.* While the court affirmed the addition of the re-insurer as a defendant on a third party beneficiary claim, using the "shifting jurisdiction" rationale, it is important to note that the First District Court Appeal ultimately certified the question of whether minimum contacts by an insolvent insurer in Florida may be shifted so as to subject to liability an insolvency pool in the state of Georgia.

42. *Id.* at 379.

43. Kelly v. State Dep't of Ins., 597 So. 2d 900 (Fla. 3d Dist. Ct. App. 1992) (where three non-resident partners of national accounting firm, Touche Ross, were found subject to personal jurisdiction in Florida and liable for the negligent acts of co-partners doing business in Florida).

44. *Id.*

45. Estate of Shafer v. Shafer, 582 So. 2d 121 (Fla. 3d Dist. Ct. App. 1991) (where service was perfected after the 120 days mandated in rule 1.070(j) of the Florida Rules of Civil Procedure, but before entry of a default at hearing, the court held that service was proper anytime before the hearing and order of dismissal under analogous rule found in rule 1.500(c) of the Florida Rules of Civil Procedure); *see also* Berdeaux v. Eagle-Picher Indus., Inc., 575 So. 2d 1295 (Fla. 3d Dist. Ct. App. 1990); Hernandez v. Page, 580 So. 2d 793 (Fla. 3d Dist. Ct. App. 1991). *But see* Morales v. Sperry Rand Corp., 578 So. 2d 1143 (Fla. 4th Dist. Ct. App. 1991) (where defendant did not show diligence and/or good cause for untimely service of process, complaint was properly dismissed with prejudice).

on the wrong person or wrong address,[46] or through no notice or service of process.[47] A correct reading of the calendar is always helpful in this regard.[48]

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

In *White v. Pepsico, Inc.*,[49] the Florida Supreme Court held that no connexity, i.e. connecting relationship, is required between the cause of action and the defendant corporation's activities in Florida under the Florida long-arm statutes.[50] Traditionally, under principles of federal due process, states were within their authority to subject a foreign corporation to general in personam jurisdiction with no relationship to the cause of action, where a resident agent had been appointed for service of process.[51]

Service within the state, served upon an appointed resident agent of a foreign corporation, is virtually tantamount to personally serving a foreign

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46. Stein v. Stein, 598 So. 2d 92 (Fla. 2d Dist. Ct. App. 1992) (where former Florida resident had moved out of state and rented out her house in Tampa, service on the renter, and mailing copy of hearing notices to an erroneous address in Ohio less than 30 days before the hearing, did not constitute notice sufficient enough to acquire personal jurisdiction. The default judgment, rendered in her absence from the hearing, was reversed by the Second District Court of Appeal and the case remanded).

47. Carter v. Kingsley Bank, 587 So. 2d 567 (Fla. 1st Dist. Ct. App. 1991) (deficiency judgments and a judgment awarding costs plus attorneys fees were reversed by the First District Court Appeal where it was shown that the bank had not adequately served process of the complaint, and subsequent notices of hearings were not given to the Carters. Since there was defective notice, the lower court lacked personal jurisdiction over the Carters sufficient to award deficiency judgments or costs and fees following a real property foreclosure over which the court had in rem jurisdiction only.).

48. Rite-Way Painting & Plastering v. Tetor, 582 So. 2d 15 (Fla. 2d Dist. Ct. App. 1991) (where plaintiff had 45 days to perfect service and the 45th day fell on Saturday, December 31, with Sunday and Monday both being legal holidays, the 48th day was acceptable for service due to rule 1.090 of the Florida Rules of Civil Procedure).

49. 568 So. 2d 886 (Fla. 1990), as certified by the Eleventh Circuit via the following question:

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

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

50. *Id.* at 890.

51. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 441 (1952).

citizen while he is physically in the state. In *Burnham v. Superior Court*,[52] the United States Supreme Court re-affirmed the power of the state to take jurisdiction over a transient non-resident, notwithstanding that the actions of the transient were unrelated to the cause of action asserted, if service of process was effected while the transient was physically within the state.[53]

Specific versus general jurisdiction is a source of some confusion for many courts. In *White*, the Florida Supreme Court adopted the distinction used by the United States Supreme Court in *Helicopteros Nacionales de Colombia, S.A. v. Hall*:[54]

> When a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the State has been said to be exercising 'general jurisdiction' over the defendant. General jurisdiction is to be distinguished from 'specific jurisdiction,' which occurs 'when a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum.[55]

While the Florida Supreme Court cited to both *Helicopteros*[56] and *Perkins v. Benguet Consolidated Mining Co.*,[57] it is important to note that, unlike *White*,[58] the corporations in *Perkins* and *Helicopteros* had not appointed a resident agent for service of process and were not licensed to do business within the forum state.[59]

In *Perkins*, the United States Supreme Court held that where a foreign corporation was generally and systematically carrying on business activities within a state [Ohio], federal due process would not bar the state courts from exercising jurisdiction over the foreign corporation, even though the cause of action was related to an incident which had occurred in the Philippines.[60]

In *Helicopteros*, the United States Supreme Court refused to extend general jurisdiction when it held that the "general and systematic activities" found in *Perkins* did not exist, even though the foreign entities had

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52. 110 S. Ct. 2105 (1990).
53. *Id.* at 2111.
54. 466 U.S. 408 (1984).
55. *White*, 568 So. 2d at 888 n.3 (citations omitted).
56. 466 U.S. 408 (1984).
57. 342 U.S. 437 (1952).
58. 568 So. 2d 886 (1990).
59. *Helicopteros*, 466 U.S. at 437.
60. 342 U.S. 487 (1951).

conducted more than a million dollars worth of business activities in Texas.[61] The plaintiffs in *Helicopteros* did not argue "specific" jurisdiction, in the alternative to a finding of general jurisdiction by the Court.[62] The plaintiffs might have prevailed under a specific jurisdiction argument, in light of having purchased a helicopter with spare parts, and training for its pilots, all in Texas, and all materially related to the cause of action for wrongful death, which occurred when the helicoptor crashed in Peru.

In *International Shoe Co. v. Washington*,[63] the United States Supreme Court determined whether a foreign corporation's activities in the forum state were extensive enough to form the basis for a cause of action.[64] The Court's "traditional notions of fair play and substantial justice" test was created, providing flexibility in jurisdictional questions.[65] Conversely, the Court took a more narrow view in *Hanson v. Denckla*,[66] where a power of appointment had been executed in Florida in order to probate the non-resident decedent's will in Florida, the Court did not find the activities in Florida to be consensual minimum contacts.[67] The Court determined that the legal question turned on whether the Delaware trust authorized appointment through the exercise of a will.[68]

In a more recent case, *Carnival Cruise Lines, Inc. v. Shute*,[69] the United States Supreme Court reversed the Ninth Circuit decision upholding specific jurisdiction where a resident of Washington had purchased a cruise ticket through a travel agent in Washington for a cruise off the coast of Mexico.[70] Carnival Cruise Lines operates its base of business in Florida and publishes a forum selection clause on each ticket it issues.[71] The Ninth Circuit found that the cruise line's solicitation of passengers in Washington to be sufficient minimum contacts for specific jurisdiction, that the Florida forum was not freely bargained for, and that the injured plaintiff would be denied her day in court if she had to bring suit in Florida.[72] In reversing, the Supreme Court found the forum clause to be a reasonable

61. 466 U.S. at 416.
62. *Id.*
63. 326 U.S. 310 (1945).
64. *Id.* at 311.
65. *Id.* at 316.
66. 357 U.S. 235 (1958).
67. *Id.* at 251-53.
68. *Id.* at 253.
69. 111 S. Ct. 1522 (1991).
70. *Id.* at 1529.
71. *Id.* at 1524.
72. *Id.* at 1525.

business practice for a business serving persons from all over the world.[73] The Court determined that bad faith had not been the motivation behind the forum selection clause, i.e. Carnival was not using it to discourage cruise passengers from pursuing legitimate claims for relief.[74] Finally, the Court found that adequate notice of the forum selection was given, even though the clause itself was couched in fine print on the back of the ticket.[75] The average passenger is presumed to be reading the fine print and to have "retained the option of rejecting the contract with immunity."[76]

C. *Waiver by Appearance; Collateral Attack; Child Support and Custody*

The defense of lack of personal jurisdiction is not waived if filed with alternative defenses, as long as it is properly raised at the first opportunity as required by rule 1.140(b).[77] In *Carter v. Kingsley*,[78] one party collaterally attacked a deficiency judgment for costs and attorneys fees following a mortgage foreclosure on real property.[79] The First District Court of Appeal held the defense of lack of personal jurisdiction is not waived by a party's mere appearance at a hearing if the party does not take some additional action that would be consistent with "the hypothesis that the court has jurisdiction over her person," such as filing documents, having an attorney present at the hearing, or speaking out on behalf of her own interests.[80]

In *Yon v. Fleming*,[81] a child custody case, the Fourth District Court of Appeal gave full faith and credit on the issue of jurisdiction to a New York court granting the mother custody when the father defaulted by failing to appear at a hearing with the child as ordered by both New York and Florida courts.[82] The hearing was initially scheduled to determine if New

73. *Id.* at 1527.
74. *Carnival Cruise Lines*, 111 S. Ct. at 1528.
75. *Id.*
76. *Id.*
77. M.T.B. Banking Corp. v. Bergamo Da Silva, 592 So. 2d 1215 (Fla. 3d Dist. Ct. App. 1992); FLA. R. CIV. P. 1.140(b).
78. Carter v. Kingsely Bank, 587 So. 2d 567 (Fla. 1st Dist. Ct. App. 1991).
79. *Carter*, 587 So. 2d at 570.
80. *Id.*
81. 595 So. 2d 573 (Fla. 4th Dist. Ct. App. 1992).
82. *Id.* at 574.

York would be the correct forum for custody litigation.[83]

More generally, rule 1.491 of the Florida Rules of Civil Procedure, may be invoked at the discretion of the Chief Justice of the Supreme Court of Florida to confer jurisdiction on any county or circuit court to appoint support enforcement hearing officers in both Title IV-D and non-Title IV-D child support cases.[84] Once rule 1.491 is invoked, the consent of the parties is not required if a hearing is court ordered.[85]

IV. VENUE

Section 47.011 of the Florida Statutes outlines three venue options for Florida residents: 1) the defendant's county of residence; 2) the county where the cause of action accrued; or 3) the county containing the property in litigation.[86] For purposes of marital dissolution, regardless of whether child custody or visitation concerns are involved, venue accrues in whatever county both parties last lived "with the common intent to remain married."[87]

The courts will perform a step-by-step analysis of each of these options before making a determination of proper venue. An example of this is seen in *Ryan v. Mobile Communications Enterprises*,[88] (MCE) where a resident of Brevard County failed to pay certain sums of money due under contract to MCE in Sarasota County.[89] The court held that proper venue would be found either in the county where the defendant lived or where the breach of contract had occurred, since no real property was involved.[90] The court reasoned that MCE had fulfilled its contracted performance of service but the defendant had not; i.e. the performance of payment for services rendered.[91] Since payment was contracted to be paid to Lakewood, New

83. *Id.*; *see also* Uniform Child Custody Jurisdiction Act, FLA. STAT. §§ 61.1302(3)-.1348, and the provisions of 28 U.S.C. § 1788A (1988).

84. *In re* Florida Rules of Civil Procedure (Amendment to Rules 1.490 & 1.611), 503 So. 2d 894 (Fla. 1987).

85. Heilman v. Heilman, 596 So. 2d 1046 (Fla. 1992) (where rule 1.491 was invoked and applicable to all proceedings in the Fifteenth Judicial Circuit that dealt with establishment, enforcement or modification of child support, the enforcement hearing officer was empowered to conduct proceedings without the prior consent of both parties).

86. FLA. STAT. § 47.011 (1991).

87. *Id.*

88. 594 So. 2d 845 (Fla. 2d Dist. Ct. App. 1992).

89. *Id.*

90. *Id.* at 845-46.

91. *Id.* at 846.

Jersey, the only remaining county *in Florida* with proper venue would be the defendant's residence, Brevard County.[92]

In supplementary proceedings, venue is proper in the county where the underlying action was tried.[93] In *Patterson v. Venne*,[94] the court found that where the supplementary proceeding, with venue in Dade County, requires discovery from the impleaded defendant who resides in Clay County and who seeks no affirmative relief, appearance [for discovery purposes] in Dade County cannot be mandated; discovery should be obtained in Clay County.[95]

If a forum clause is included in a contract, the court will look very carefully at the language of the contract and the apparent intention of the parties. Where the language may be ambiguously construed in favor of either party, as seen in *Dataline Corp. v. L.D. Mullins Lumber Co.*,[96] "it should generally be construed against the drafter where there is a dispute as to its meaning."[97] The burden of proof will be on the moving party to show that the forum clause cannot reasonably be interpreted two ways.[98]

Courts sometimes confuse the concepts of venue and jurisdiction. In *State Department of Highway Safety and Motor Vehicles v. Scott*,[99] the court clarifies and defines jurisdiction as "the power to act; the authority to adjudicate the subject matter."[100] The court goes on to distinguish venue as "the privilege of being accountable to a court in a particular location."[101] In *Scott*, where a nonresident pursued an administrative hearing regarding the validity of license suspension after refusing to take a chemical breath test following an arrest for DUI, the court held that he had voluntarily submitted to the jurisdiction where the agency hearing was held and proper venue would lie in that county for judicial review purposes.[102]

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92. *Id.*
93. FLA. STAT. § 56.29 (1991).
94. 594 So. 2d 331 (Fla. 3d Dist. Ct. App. 1992); Urban v. Venne, 595 So. 2d 1108 (Fla. 3d Dist. Ct. App. 1992); Coral Contractors, Inc. v. Paul, 387 So. 2d 554 (Fla. 5th Dist. Ct. App. 1980).
95. *Patterson*, 594 So. 2d at 332.
96. 588 So. 2d 1078 (Fla. 4th Dist. Ct. App. 1991).
97. *Id.* at 1079 (citing Granado Quinones v. Swiss Bank Corp., 509 So. 2d 273, 275, (citing Zapata Marine Services v. O/Y Finnlines, Ltd., 571 F.2d 208, 209 (5th Cir. 1978))).
98. *Dataline*, 588 So. 2d at 1080.
99. 583 So. 2d 785 (Fla. 2d Dist. Ct. App. 1992).
100. *Id.* at 787.
101. *Id.*
102. *Id.*

Improper joinder of parties cannot be used to establish venue. In *Jacobs & Goodman, P.A. v. McLin, Burnsed, Morrison, Johnson & Robuck, P.A.*,[103] an associate left a Seminole County law firm to work with a Lake County law firm. The associate allegedly entered an employment contract with the Seminole County firm for a percentage of any contingent fees related to clients of that firm. The Lake County firm petitioned for a Declaratory Statement on the issue of the contingent fees and joined the associate/employee as a defendant. The court rejected the joinder and reiterated the traditional rule that a party cannot be joined for the purpose of establishing dual venue.[104] Dual venue requires the joinder of a bona fide codefendant.[105] The associate/employee had interests most closely aligned with his employer and should have been joined as a plaintiff. The only correct venue was where the cause of action accrued or the county where the contract for employment was initially entered, both being Seminole County.

Finally, where the State of Florida is one of the parties, venue belongs where the state agency has its principle headquarters, unless there is a valid waiver or an exception shown in a civil action.[106] The state "venue privilege" is exemplified in *Department of Labor v. Summit Consulting, Inc.*,[107] where the Second District Court of Appeal reversed and granted the State's Motion to Dismiss on the grounds of improper venue. Summit failed to show good cause for a waiver of the venue privilege on the grounds that it would suffer an "imminent deprivation of [its] constitutional rights" if the venue privilege was honored.[108]

V. DISQUALIFICATION OF JUDGES

Section 38.10 of the Florida Statutes states: "Whenever a party . . . files an affidavit stating that he fears he will not receive a fair trial . . . on account of the prejudice of the judge . . . the judge shall proceed no further, but another judge shall be designated . . . ."[109] A sufficient motion for disqualification must demonstrate that the "facts set forth would place a

103. 582 So. 2d 98 (Fla. 5th Dist. Ct. App. 1991).
104. *Id.* at 100.
105. *Id.*
106. Department of Labor v. Summit Consulting, 594 So. 2d 862 (Fla. 2d Dist. Ct. App. 1992).
107. *Id.* at 862.
108. *Id.*
109. FLA. STAT. § 38.10 (1991).

reasonably prudent person in fear of not receiving a fair and impartial trial."[110] Merely pleading prejudice based on adverse rulings is not a "well-founded" basis for recusal.[111] Motions must be timely filed,[112] or show good cause why there was an inordinate delay in filing.[113] Furthermore, judges are not permitted to respond to disqualification motions with a rebuttal or any comment addressing the truth or falsity of the facts petitioner alleges.[114]

When a disqualification is granted, the newly assigned judge is only disqualified if he enters an order admitting "that he does not stand fair and impartial between the parties."[115] A party's bare allegation of prejudice on the part of a judge in favor of licensed attorneys, and against pro se appearances, is not enough to warrant a trial judge granting the motion to recuse under section 38.10 of the Florida Statutes.[116]

If a trial judge refuses disqualification in the face of a sufficiently pled motion, a writ of prohibition is the proper petition for appeal purposes.[117] Frequently, petitioners improperly file an appeal when a trial judge refuses disqualification. Such a refusal is not a final appealable judgment. However, the court of appeal may, at its discretion, treat the appeal as a petition for writ of prohibition.[118] Moreover, when a motion to disqualify is filed, the

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110. Diamond R. Fertilizer v. Hurt, 582 So. 2d 137 (Fla. 1st Dist. Ct. App. 1991) (citing MacKenzie v. Super Kids Bargain Store, Inc., 565 So. 2d 1332, 1335 (Fla. 1990)).

111. Gilliam v. State, 582 So. 2d 610, 611 (Fla. 1991).

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

113. Stewart v. Douglas, 597 So. 2d 381 (Fla. 2d Dist. Ct. App. 1992) (where the judge found a delay in filing of one year after the reported inappropriate event, upon which the petition was based, to be untimely. The First District Court of Appeal agreed but ordered the judge disqualified on the grounds that he had ruled [improperly] on the truth of the allegations).

114. *Id.*; *see also* CH2M Hill Southeast, Inc. v. Pinellas County, 598 So. 2d 85 (Fla. 2d Dist. Ct. App. 1992); Orr v. Schack, 582 So. 2d 137 (Fla. 4th Dist. Ct. App. 1991).

115. Radin v. Radin, 593 So. 2d 1233 (Fla. 3d Dist. Ct. App. 1991) (quoting FLA. STAT. § 38.10 (1989)); *see also* Brown v. St. George Island, Ltd., 561 So. 2d 253 (Fla. 1990).

116. Rodriguez Diaz v. Abate, 598 So. 2d 197 (Fla. 3d Dist. Ct. App. 1992) (where plaintiff was bringing suit against defendants for allegedly making false statements to the police in order to cause injury to the plaintiff's reputation and delay his admission to the bar, plaintiff had motioned for recusal of the second judge assigned to his case).

117. *See* Olszewska v. Ferro, 590 So. 2d 11 (Fla. 3d Dist. Ct. App. 1991) (Where the Third District Court of Appeal granted the writ after the trial judge had made "base vernacular" statements to the litigant in open court); *see also* FLA. BAR CODE JUD. CONDUCT, Canon 3(A)(3) (1991).

118. Radin v. Radin, 593 So. 2d 1233 (Fla. 3d Dist. Ct. App. 1991); Kowalski v. Boyles, 557 So. 2d 885 (Fla. 5th Dist. Ct. App. 1990).

judge must take no further substantive action in the case until the motion has been acted on.[119]

Recusal was the central theme in *Town Centre v. Overby*,[120] where a law firm alleged it was unable to get fair and impartial judgments from a particular trial court judge due to an impending law suit to challenge the local rule requiring that motions be filed with an accompanying notice of hearing attached.[121] When the judge refused to recuse himself in three new cases after having recused in nineteen previous cases, a writ of prohibition was filed.[122] The Third District Court of Appeal granted disqualification in two of the three cases.[123] In the third case, the law firm had accepted the case with prior knowledge of who had been assigned to adjudicate the case and the firm was estopped from later moving to disqualify the judge.[124] For a well developed treatise on disqualification law in Florida, read Judge Baskin's dissent in *Nateman v. Greenbaum*.[125]

VI. PLEADINGS

The biggest change in the area of Pleadings occurred in a substantive revision of rule 1.080(b) and (f) by the Florida Supreme Court, effective at midnight on January 1, 1993,[126] which will allow the use of facsimile (fax) for service of pleadings and papers.[127] A highlight of the cases which appeared at the appellate level provides a taste of the fundamentals of pleadings black letter law.

When a complaint is filed, it must state a basis for jurisdiction and a cause of action. In *Pluess-Staufer Industries, Inc. v. Rollason Engineering & Manufacturing, Inc.*,[128] the appellate court found the complaint failed to make a sufficient allegation of jurisdiction. The court further opined that,

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119. Airborne Cable Television, Inc. v. Storer Cable TV of Florida, Inc., 596 So. 2d 117 (Fla. 2d Dist. Ct. App. 1992); Diamond R. Fertilizer v. Hurt, 582 So. 2d 137 (Fla. 4th Dist. Ct. App. 1991).

120. 592 So. 2d 774 (Fla. 3d Dist. Ct. App. 1992).

121. *Id.* at 775.

122. *Id.*

123. *Id.* at 776,

124. *Id.* at 776 (citing Brown v. Dugger, 547 So. 2d 1281 (Fla. 3d Dist. Ct. App. 1989)).

125. 582 So. 2d 643, 645-48 (Fla. 3d Dist. Ct. App.), *reh'g denied*, 582 So. 2d at 649 (1991) (*reh'g en banc denied*).

126. *In re* AMENDMENTS TO THE FLORIDA RULES OF CIVIL PROCEDURE, 17 Fla. L. Weekly 477 (1992).

127. *Id.*

128. 597 So. 2d 957 (Fla. 5th Dist. Ct. App. 1992).

"[w]ithout a basis for jurisdiction appearing in the complaint and any attachments, service of long-arm process is void and any judgment obtained is also void."[129]

It is improper for the court to address issues outside the pleadings filed for consideration by the court.[130] In *Miami Electronics Center, Inc. v. Saporta*,[131] the court held that when an affirmative defense was not raised and tried in the court below, the defense is waived and may not be raised on appeal.[132]

A motion for judgment based on the pleadings is proper when the plaintiff has failed to state a cause of action in the complaint or the defendant has failed to state a defense or offer issues of disputed fact.[133] Similarly, in *Jaramillo v. Dubow*,[134] the appellate court held that it was error for the trial court to grant a summary judgment on the affirmative defense of res judicata where there had been no reply to the answer.

In *Wilcox v. Lang Equities, Inc.*,[135] the appellate court reiterated established principles that "well-pleaded material allegations of the opposing party are to be taken as true, and all allegations of the moving party which have been denied are taken as false."[136]

In *Bouldin v. Okaloosa County*,[137] the First District Court of Appeal held that failure to state a cause of action alone, without an abuse of the amendment privilege, was not grounds to dismiss with prejudice. Under rule 1.420(b) of the Florida Rules of Civil Procedure as interpreted by the Third

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129. *Id.* at 958 (citing Plummer v. Hoover, 519 So. 2d 1158 (Fla. 5th Dist. Ct. App. 1988)); Diminio v. Farina, 572 So. 2d 552 (Fla. 4th Dist. Ct. App. 1990); Kennedy v. Reed, 533 So. 2d 1200 (Fla. 2d Dist. Ct. App. 1988); International Harvester Co. v. Mann, 460 So. 2d 580 (Fla. 1st Dist. Ct. App. 1984).

130. Radin v. Radin, 593 So. 2d 1231 (Fla. 3d Dist. Ct. App. 1991) (where the pleadings in an alimony case were addressed to a June 1, 1991 payment, paid at trial, while July 1, 1991 payment had become in arrears. In error, the court held the defendant in contempt for the non-payment of the July 1st payment, even though not addressed in the pleadings).

131. 597 So. 2d 903 (Fla. 3d Dist. Ct. App. 1991).

132. *Id.* at 904 (citing FLA. R. CIV. P. 1.110(d), 1.140(h) & 1.190(b)).

133. *See* Wilcox v. Lang Equities, Inc., 588 So. 2d 318 (Fla. 3d Dist. Ct. App. 1991).

134. 588 So. 2d 677 (Fla. 3d Dist. Ct. App. 1991).

135. 588 So. 2d at 318.

136. *Id.* at 319.

137. 580 So. 2d 205 (Fla. 1st Dist. Ct. App. 1991) (where the trial court dismissed the case with prejudice when it felt an amended complaint did not state a cause of action, and the appellate court did not find an abuse of the amendment privilege in the record, failure to state a cause of action alone did not justify dismissal with prejudice).

District Court of Appeal in *Sekot Laboratories, Inc. v. Gleason*,[138] the court may grant leave to amend, but may not "mandate" the amendment without separate notice of a hearing on the motion to dismiss with prejudice or notice that failure to amend will result in dismissal without further notice. If a plaintiff's complaint is legally insufficient to state a cause of action because an ambiguity is shown in the facts or in the contract upon which a cause of action is based, the may court properly enter a final judgment based on the pleadings. [139]

Original pleadings are superseded by each respective subsequent amended pleading. This can be fatal if not recognized, as seen in *Arthur v. Hillsborough County Board of Criminal Justice*, where an inmate's civil rights violation suit alleged a theory of respondeat superior in the original complaint but then failed to reallege that theory in subsequent amended pleadings.[140] The appellate court considered the theory to have been "abandoned" when indications of an intention to pursue the respondeat superior claim failed to appear in subsequent amended pleadings filed by the inmate.[141]

Rule 1.190 states that when a party requests to amend their complaint, "leave of court shall be given freely when justice so requires."[142] Florida courts have liberally interpreted "given freely" to allow the amendment privilege unless it would clearly prejudice the opposing party, amount to abuse, or equate to a futile attempt to state a cause of action.[143] In *Hatcher v. Chandler*,[144] the appellant amended his paternity complaint twice, alleging incorrect dates of conception and once misrepresenting the marital status of the appellant when the child was born. The First District Court of Appeal held that, "given the liberal policy in favor of amendment,"

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138. 585 So. 2d 286 (Fla. 3d Dist. Ct. App. 1991) (where the court ordered the plaintiff twenty days to amend his complaint and then dismissed with prejudice when the plaintiff failed to comply with the court order).

139. Squires III, Inc. v. National Union Fire Ins. Co., 593 So. 2d 272 (Fla. 5th Dist. Ct. App. 1992).

140. 588 So. 2d 236 (Fla. 2d Dist. Ct. App. 1991).

141. *Id.* at 237.

142. FLA. R. CIV. P. 1.190.

143. Bill Williams Air Conditioning & Heaing, Inc. v. Haymarket Coop. Bank, 592 So. 2d 302 (Fla. 1st Dist. Ct. App. 1991); *see also* New River Yachting Ctr., Inc. v. Bacchiocchi, 407 So. 2d 607 (Fla. 4th Dist. Ct. App. 1981), *review denied*, 415 So. 2d 1360 (Fla. 1982); Tolbert v. CSX Transp., 590 So. 2d 543 (Fla. 2d Dist. Ct. App. 1991).

144. 589 So. 2d 429 (Fla. 1st Dist. Ct. App. 1991).

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the benefit of the doubt should be given to the appellant through the privilege of amendment.[145]

In *Bill Williams Air Conditioning & Heating, Inc. v. Haymarket Cooperative Bank*,[146] several of the counterclaims appellant sought to file in a third amended answer arose from the same "transaction or occurrence,"[147] and were therefore compulsory. The court noted that under rule 1.170(f) of the Florida Rules of Civil Procedure the privilege to amend lies within the discretion of the court where a pleader fails to set up a counterclaim "through oversight, inadvertence, or excusable neglect or when justice requires," and it was an abuse of discretion, therefore, to deny the appellants' request for leave to amend.[148]

In *Fireman's Insurance Co. v. Vento*,[149] by granting summary judgment in error, the trial court had rescinded an underlying securities contract without joinder of an indispensable party to the contract. The appellate court found that Fireman's Insurance Company should have been allowed to amend its pleadings to set forth a defense, and to establish whether it may have been a seller of the securities through acts of agency, an issue to which facts were in dispute.[150]

A petition to show cause must plainly allege the grounds for jurisdiction and the facts showing that the pleader is entitled to relief pursuant to rule 1.110(b) of the Florida Rules of Civil Procedure. In *FDLE v. Lazzara*,[151] the appellate court held that an attached affidavit is an appropriate mechanism to support detailed proof alleged in the pleadings.

If an attorney fee award will be sought at the conclusion of the action, based on a statute or contract, the petition for attorney fees must appear in the pleadings.[152] Post-judgment petitions for attorney fees are untimely.[153]

A sham pleading is one which "is palpably or inherently false, and from the plain or conceded facts in the case, must have been known to the party interposing it to be untrue."[154] Where evidence is presented that a

145. *Id.* at 429.
146. 592 So. 2d 302 (Fla. 1st Dist. Ct. App. 1991).
147. Yost v. American Nat'l Bank, 570 So. 2d 350 (Fla. 1st Dist. Ct. App. 1990).
148. *Bill Williams Air Conditioning & Heating, Inc.*, 592 So. 2d at 302.
149. 586 So. 2d 89 (Fla. 3d Dist. Ct. App. 1991).
150. *Id.* at 90.
151. 580 So. 2d 855 (Fla. 2d Dist. Ct. App. 1991).
152. Department of HRS v. Smith, 592 So. 2d 1277 (Fla. 5th Dist. Ct. App. 1992).
153. *Id.*
154. Sargent, Repka, Covert, Steen, & Zimmet, P.A. v. HAMC Indus., Inc., 597 So. 2d 427 (Fla. 2d Dist. Ct. App. 1992) (citing Rhea v. Hackney, 157 So. 2d 190, 193 (Fla. 1934)).

dispute exists, the court cannot strike the pleading simply because one party alleges the facts to be false.[155]

In *Montero v. Duval Federal Savings & Loan Ass'n*,[156] the appellant joined her motion to quash service of process in a foreclosure proceeding with a motion to vacate the default judgment. The court held it was error for the trial court to rule that the appellant had submitted herself to the jurisdiction of the court by joining her motion to quash with another motion.[157] The court relied on rule 1.140(b), which says in pertinent part: "No defense or objection is waived by being joined with other defenses or objections in a responsive pleading or motion."[158] The court also found that service of process was insufficient where it was served in substitution on one spouse while the other spouse did not currently reside at the same address.[159]

In *Matey v. Reinman*,[160] where the appellant did not pay any portion of a judgment rendered against him, pending suit against his attorney for malpractice, the appellate court held that a third party claimant must first allege a claim for subrogation, indemnification, or contribution before asserting other claims against a third party defendant. The court noted, however, that appellant could bring an independent action against his attorney for the alleged malpractice.

Ingersoll v. Hoffman,[161] was a dental malpractice suit involving a defendant who had not been served with statutory notice of intent to initiate litigation and whose response had contained only a general denial that the precedent conditions had been met prior to filing the suit.[162] The Third District Court of Appeal certified the question of whether subject matter jurisdiction was dependent on compliance with the statutory notice requirements of Florida Statute section 768.57, and whether failure to comply could be excused by a showing of waiver or estoppel.[163] The supreme court found that the statutory compliance was not jurisdictionally fatal,[164] and that failure to comply may be excused by a showing of waiver

155. *Id.* at 429.
156. 581 So. 2d 938 (Fla. 4th Dist. Ct. App. 1991).
157. *Id.* at 939.
158. FLA. R. CIV. P. 1.140(b).
159. *Montero*, 581 So. 2d at 939.
160. 599 So. 2d 201 (Fla. 2d Dist. Ct. App. 1992) (relying on Leggierre v. Merrill Lynch Realty/Fla., Inc., 544 So. 2d 240 (Fla. 2d Dist. Ct. App. 1989)).
161. 589 So. 2d 223 (Fla. 1991).
162. *Id.*
163. *Id.*
164. *Id.* at 224 (citing Hospital Corp. of Am. v. Lindberg, 571 So. 2d 446 (Fla. 1990)).

or estoppel.[165] The court noted that rule 1.120(c), of the Florida Rules of Civil Procedure, requires that the defendant state with specificity and particularity a denial of the occurrence or performance of a condition precedent.[166]

Fraud claims must be pled with particularity.[167] In *Batlemento v. Dove Fountain, Inc.*,[168] the court determined that "particularity" requires identification of the false representation of fact and how the representation is false.[169] Motions to set aside judgments which were procured by fraudulent facts, must be filed within one year from the entry of the court's order of judgment.[170]

The trial judge has discretion to strike a party's pleadings and may enter a default sanction against that party for noncompliance with an order of the court which requires the party to secure counsel. Such court order, per *Global Recreation v. Arco Shows*,[171] must contain an "explicit finding of willful or deliberate noncompliance with the court's authority."[172]

While mandatory severance of compulsory counterclaims, under section 702.01, Florida Statutes, was declared unconstitutional in *Haven Federal Savings & Loan Ass'n v. Kirian*,[173] rule 1.270(b) of the Florida Rules of Civil Procedure permits the severance of compulsory counterclaims for purposes of judicial economy.[174]

VII. DISCOVERY

When a subpoena *duces tecum* is issued and countered with an objection on the grounds that the production would be burdensome, of great

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165. *Id.* at 225 (citing Solimando v. International Medical Ctrs., 544 So. 2d 1031 (Fla. 2d Dist. Ct. App.), *review dismissed*, 549 So. 2d 1013 (Fla. 1989)).

166. *Ingersoll*, 589 So. 2d at 224. The court found the defendant's failure to specifically plead noncompliance constituted a waiver of the issue. *Id.* at 224-25.

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

168. 593 So. 2d 234 (Fla. 5th Dist. Ct. App. 1991).

169. *Id.* at 238 (citing Gordon v. Etue, Wardlaw & Co., P.A., 511 So. 2d 384 (Fla. 1st Dist. Ct. App. 1987)).

170. Parker v. Parker, 585 So. 2d 328 (Fla. 4th Dist. Ct. App. 1991) (citing FLA. R. CIV. P. 1.540(b), and affirming the trial court's grant of defendant wife's motion to strike plaintiff husband's complaint to set aside the dissolution of marriage order of eight years prior based on alleged fraud).

171. 585 So. 2d 455 (Fla. 2d Dist. Ct. App. 1991).

172. *Id.* at 456 (citing Commonwealth Fed. Sav. & Loan Ass'n v. Tubero, 569 So. 2d 1271 (Fla. 1990)).

173. 579 So. 2d 730 (Fla. 1991).

174. Pearlman v. National Bank, 600 So. 2d 5 (Fla. 4th Dist. Ct. App. 1992).

expense, and excessively time consuming to meet, the objection should be properly met with a rebuttal affidavit or a revision of the request for similar materials in a different form. In *Dollar General, Inc. v. Deangelis*,[175] the appellate court quashed a trial court order demanding production of the defendant's expert medical witness, where the plaintiff had not responded to the expert's objection and supporting affidavit. The court remanded to the trial court for the plaintiffs to make an appropriate production demand for the medical records.[176]

When production is requested, the party subpoenaed to produce may refuse if the act of producing would require the party to violate his or her Fifth Amendment right against self-incrimination. In *Mertens v. Division of Consumer Services*,[177] the appellant was under agency investigation for consumer fraud which might also result in criminal charges. While the appellant's business records were not privileged, the act of producing them could not be compelled in violation of Merten's Fifth Amendment rights.[178] Similarly, in *J.R. Brooks & Son, Inc. v. Donovan*,[179] the court held that two nonparty witnesses could not be compelled to answer questions regarding the shooting of one of the defendants if the testimony might tend to be self-incriminating.[180] The Fifth Amendment applies to "all types of proceedings wherein testimony is given and applies alike to a witness as well as a party who is accused."[181]

In *La Villarena, Inc. v. Acosta*,[182] a videotape of an allegedly permanent hand injury was made using surveillance conducted during the days of the plaintiff's case in chief. When the plaintiff rested his case, defense counsel then disclosed the videotape to plaintiff's counsel and the court.[183] When defense counsel subsequently attempted to introduce the tape into

175. 590 So. 2d 555 (Fla. 3d Dist. Ct. App. 1991).

176. *Id.* at 556; *see also* McAdoo v. Ogden, 573 So. 2d 1084 (Fla. 4th Dist. Ct. App. 1991); Wood v. Tallahassee Memorial Regional Medical Ctr., 593 So. 2d 1140, 1142 (Fla. 1st Dist. Ct. App. 1992) (holding that where information would reflect the number of times a physician had rendered expert testimony and for whom, the "relevance of the information contained in the documents sought must be weighed against the burdensomeness of production of those documents").

177. 596 So. 2d 89 (Fla. 1st Dist. Ct. App. 1992).

178. *Id.* at 91.

179. 592 So. 2d 795 (Fla. 3d Dist. Ct. App. 1992).

180. *Id.* at 796 (citing Rainerman v. Eagle Nat'l Bank, 541 So. 2d 740, 741 (Fla. 3d Dist. Ct. App. 1989)).

181. *Id.* (citing State *ex rel.* Mitchell v. Kelly, 71 So. 2d 887 (Fla. 1954)).

182. 597 So. 2d 336 (Fla. 3d Dist. Ct. App. 1992).

183. *Id.* at 337.

evidence, the court denied admission. The court found that the defendant was unable to explain why it could not have conducted such surveillance prior to trial and without violation of the pretrial order to disclose all evidence which would be presented at trial. The appellate court affirmed the trial court's decision to deny admission, holding that all evidence is subject to discovery *before* trial, "unless the trial court finds that the failure to disclose was not wilful and either that no prejudice will result or that any existing prejudice may be overcome by allowing a continuance of discovery during a trial recess."[184]

When a claim of trade secrets is raised in opposition to a discovery request, the court must first determine if the information sought actually constitutes a trade secret.[185] If it is found to be a trade secret, the party requesting discovery must demonstrate that obtaining the information is reasonably necessary to its case.[186] When a blanket unconditional privilege is not available, protection for specific documents which could be damaging may be sought on a document-by-document basis.[187]

Some conflict now exists between the districts on the issue of whether an individual becomes a "party" prior to establishing jurisdiction. In *F. Hoffmann LaRoche & Co., v. Felix*,[188] the Third District Court of Appeal held that a defendant does not become a party until jurisdictional issues are settled.[189] Conversely, in *Gleneagle Ship Management Co. v. Leondakos*,[190] the Second District Court of Appeal adopted the federal rule that "jurisdictional discovery" is allowed while jurisdictional issues are pending.[191]

The discovery process is intended to assist parties in obtaining information necessary to building their cases. Through the use of either statutory methods or the Rules of Civil Procedure, parties may obtain information which would otherwise be confidential. In *Johnston v. Donnelly*,[192] the defendant did not issue a discovery request for the

184. *Id.* at 338 (quoting Dodson v. Persell, 390 So. 2d 704, 708 (Fla. 1980)).

185. FLA. R. CIV. P. 1.280(c)(7) allows protection of trade secrets, confidential research, development, or commercial information by prohibiting or restricting disclosure. *See* Kavanaugh v. Stump, 592 So. 2d 1231 (Fla. 5th Dist. Ct. App. 1992).

186. Scientific Games, Inc. v. Dittler Bros., Inc., 586 So. 2d 1128 (Fla. 1st Dist. Ct. App. 1991).

187. Showa Denko Am., Inc. v. Hopkins, 586 So. 2d 65 (Fla. 2d Dist. Ct. App. 1991).

188. 512 So. 2d 997 (Fla. 3d Dist. Ct. App. 1987).

189. *Id.*

190. 581 So. 2d 222 (Fla. 2d Dist. Ct. App. 1991).

191. *Id.* at 223.

192. 581 So. 2d 909 (Fla. 2d Dist. Ct. App. 1991).

production of plaintiffs' medical records. Bypassing the discovery process, the defendant went directly to the trial court and obtained an order compelling the plaintiffs to sign blanket medical release statements for their Canadian medical records. The appellate court quashed the trial court's order, finding "a departure from the essential requirements of law."[193]

The confidential nature of certain records, such as medical records dealing with the treatment of alcoholism,[194] should not be used to hinder the discovery of other relevant medical information which would otherwise not be privileged. In *Service Merchandise Co. v. Larsen*,[195] the appellate court held that it was an abuse of discretion for the lower court to prohibit discovery of medical opinions regarding the appellee's arthritis condition, as contained within medical records at the hospital where the appellee was treated for alcoholism two weeks after a slip and fall accident.[196] The court noted that even confidential records "may be ordered disclosed, if the trial judge determines that good cause has been shown."[197]

Certain records are statutorily "protected" from discovery. *Crugar v. Love*[198] held that sections 766.101(5) and 395.011(9) of the Florida Statutes, provide privileged protection to any documents used or "considered" by a medical review committee or hospital board whose function is to establish or regulate staff privileges. Such documents would include those created by the hospital or by the individual making application. In *Crugar*, the petitioner wanted a physician's application for staff privileges. The Florida Supreme Court did not authorize discovery of the desired documents, but indicated that the petitioner was not foreclosed from obtaining the same information from other sources.[199] Similarly, in *Health America, Inc. v. Smith*,[200] the petitioner wanted a hospital's personnel files on two staff physicians. The appellate court responded negatively, citing to *Crugar* as controlling caselaw.[201]

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193. *Id.* at 910.
194. Privileged under 42 U.S.C. § 290dd-3 (1989); FLA. STAT. § 389.112 (1989).
195. 599 So. 2d 749 (Fla. 4th Dist. Ct. App. 1992).
196. *Id.* at 750-51.
197. *Id.* at 750 (citing Hall v. Spencer, 472 So. 2d 1205 (Fla. 4th Dist. Ct. App.), *review denied*, 479 So. 2d 118 (Fla. 1985)).
198. 599 So. 2d 111 (Fla. 1992).
199. *Id.* at 115.
200. 599 So. 2d 783 (Fla. 1st Dist. Ct. App. 1992).
201. It is interesting to note the tenor of the First District Court of Appeal opinion in *Smith*, in that *Crugar* overruled Jacksonville Medical Ctr., Inc. v. Akers, 560 So. 2d 1313 (Fla. 1st Dist. Ct. App. 1990), to the extent that it conflicted with *Crugar*.

Documents that are protected under the attorney-client privilege or attorney workproduct privilege cannot be discovered unless there are "specific allegations of need and inability to fulfill that need without undue hardship."[202] In *State Farm Mutual Life Insurance Co. v. LaForet*,[203] the court held that a party attempting to overcome privilege under rule 1.280(b)(2) must include within its written request more than just a "bare assertion" of undue hardship or need. A showing of need and inability to obtain the same information from other sources without undue hardship requires "specific explanations and reasons."[204]

When attempting to get discovery from nonparties, rule 1.451 of the Florida Rules of Civil Procedure allow a party to request production unless any other party to the suit files an objection within ten days of service of the notice. The court in *ABC Liquors v. Berkey*,[205] noted that as soon as an objection is served, regardless of the sufficiency of the objection, and until the objection has been resolved, production of the objectionable discovery request is no longer required. Other means, such as deposition of the nonparty, would be required to obtain the desired information.[206]

When taking depositions, adequate notice must be given to all other parties to the suit. Once taken, if one party files the transcript with the court, notice and a copy of the transcript must be given to each party.[207] In *Thomas v. Thomas*,[208] the appellee's attorney took a deposition and filed it with the court, without giving appellant notice of either occurrence. The trial court subsequently relied on the deposition in formulating its determination. The appellate court reversed and remanded for rehearing. The court instructed that if the deposition was needed, a new one could be held if adequate notice is provided to allow the appellant the "opportunity to be present and to confront the witness."[209]

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202. *See also* North Broward Hosp. Dist. v. Button, 592 So. 2d 367 (Fla. 4th Dist. Ct. App. 1992) (appellate court held that where hospital incident reports were discoverable only by overcoming privilege through showing of need and inability to obtain without undue hardship, an unsworn assertion by plaintiff's counsel was not sufficient).

203. State Farm Mutual Life Ins. Co. v. LaForet, 591 So. 2d 1143 (Fla. 4th Dist. Ct. App. 1992).

204. *Id.* at 1144.

205. 589 So. 2d 457 (Fla. 5th Dist. Ct. App. 1991).

206. *Id.* at 458; *see also* Jones v. Jones, 463 So. 2d 564 (Fla. 1st Dist. Ct. App. 1985).

207. FLA. R. CIV. P. 1.310.

208. 589 So. 2d 944 (1st Dist. Ct. App. 1991).

209. *Id.* at 947.

Inadequate notice can result in a new trial, as seen in *Office Depot, Inc. v. Miller*,[210] where an expert witness for the defense changed his medical opinion without pre-trial notice to the plaintiff. The appellate court found such an opinion reversal to be consistent with the "trial by ambush" tactics discussed by the Supreme Court in *Binger v. King Pest Control*.[211] The court affirmed the order for a new trial, reasoning that "while judicial economy may have been served . . . justice is ultimately better served" by holding a new trial.[212]

When the court orders arbitration, all proceedings on issues subject to the arbitration must cease.[213] In *Greenstein v. Baxasa Howell Mobley, Inc.*,[214] the appellate court quashed subpoenas that were sent out for depositions after the court had ordered arbitration. The court noted that, while depositions are permissible in arbitration, depositions are to be used only when a witness is unable to attend the arbitration hearing or cannot be subpoenaed and then, only under the supervision of the arbitrator.[215]

In *Palmer v. W.D.I. Systems, Inc.*,[216] the Fifth District Court of Appeal refused certiorari where the trial court had denied discovery production of certain documents.[217] Certiorari is "the appropriate vehicle for testing the correctness of an order governing discovery."[218] The court stated that certiorari "is not normally available to review a denial of discovery by the trial court," except in "rare" cases. Plenary appeal is the appropriate systemic remedy for a denial of discovery.[219]

VIII. DEFAULT

Under rule 1.500(a) of the Florida Rules of Civil Procedure, the clerk of the court may enter a default judgment against a party when they fail to

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210. 584 So. 2d 587 (Fla. 4th Dist. Ct. App. 1991)

211. *Id.* at 589 (citing Binger v. King Pest Control, 401 So. 2d 1310 (Fla. 1981); *see also* Metropolitan Dade County v. Sperling, 599 So. 2d 209 (Fla. 3d Dist. Ct. App. 1992)).

212. *Office Depot*, 584 So. 2d at 591.

213. FLA. STAT. § 682.03(3) (1989); Ocala Breeders' Sales Co. v. Brunetti, 567 So. 2d 490 (Fla. 3d Dist. Ct. App.), *review denied*, 576 So. 2d 285 (Fla. 1990).

214. 583 So. 2d 402 (Fla. 3d Dist. Ct. App. 1991).

215. *Id.* at 403; FLA. STAT. § 682.08(2) (1989).

216. 588 So. 2d 1087 (Fla. 5th Dist. Ct. App. 1991).

217. *Id.* at 1088.

218. *Id.* (quoting Allstate Ins. Co. v. Walker, 583 So. 2d 356 (Fla. 4th Dist. Ct. App. 1991)).

"file or serve any paper in the action." The defaulting party may plead or raise defenses at any time before entry of a default judgment.[220] No notice of default is expressly required. Once entered, if a party attempts to plead or defend, the clerk is to notify that party that the judgment has been entered.[221] The court may also enter a default judgment for failure to plead, but if "any paper" has been filed, the defaulting party shall be notified that an application for default has been filed.[222]

Several cases reaching the appellate level recently indicate a general confusion over the meaning of "any paper" at the trial court level. In *Beztak Construction Co. v. Kesling Carpets, Inc.*,[223] a notice of appearance and motion to extend time was filed the same day the clerk entered a default judgment. The appellate court found the trial court erred in not vacating the default because "any paper" had been filed. A letter asking the court to extend the time allowed for response may satisfy the "any paper" requirement.[224] If a defendant has filed "any paper" with the clerk, the court will presume the defendant intends to defend.

Once a paper has been filed, notice of application for default must be served on the defendant prior to entry of a judgment by the court.[225] In *Clark v. Perlman*, even though the defendant filed an incorrect response, the appellate court said she was entitled to notice of the application for default and an opportunity to present any defenses as to why she failed to make a timely response.[226]

Once a default judgment has been entered, the defendant's motion to vacate must either demonstrate excusable neglect,[227] assert a meritorious defense,[228] or demonstrate that the defendant acted with due diligence by taking action to defend and contest immediately upon notification of

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220. FLA. R. CIV. P. 1.500(c).
221. *Id.*
222. *Id.* 1.500(b).
223. 596 So. 2d 1297 (Fla. 2d Dist. Ct. App. 1992).
224. Ziff v. Stuber, 596 So. 2d 754 (Fla. 4th Dist. Ct. App. 1992).
225. Clark v. Perlman, 599 So. 2d 710, 712 (Fla. 1st Dist. Ct. App. 1992).
226. *Id.* at 712.
227. Hialeah, Inc. v. Adams, 566 So. 2d 350 (Fla. 3d Dist. Ct. App.), *review denied*, 576 So. 2d 284 (Fla. 1990).; Okeechobee Imports, Inc. v. American Sav. & Loan Ass'n, 558 So. 2d 506 (Fla. 3d Dist. Ct. App. 1990).
228. Latin Am. Property & Casualty Ins. Co. v. Italian Palace, Inc., 596 So. 2d 1174 (Fla. 4th Dist. Ct. App. 1992); Mitrany v. Chase Fed. Sav. & Loan Ass'n, 590 So. 2d 509 (Fla. 4th Dist. Ct. App. 1991); Atlantic Asphalt & Equip. Co. v. Mairena, 578 So. 2d 292 (Fla. 3d Dist. Ct. App. 1991); Fortune Ins. Co. v. Sanchez, 490 So. 2d 249 (Fla. 3d Dist. Ct. App. 1986).

default.[229] The court may exercise more latitude in vacating a clerk's entry of default, such as finding "confusion" to be a meritorious defense.[230] In *Cinkat Transportation v. Maryland Casualty Co.*,[231] the court found that the defendant presented all three requirements for vacating a default judgment and therefore his motion to vacate should have been granted. The court reasoned that "a strong preference exists in the law for cases to be determined on their merits."[232]

In *Quintero-Chadid Corp. v. Gersten*,[233] the court clarified confusion regarding when an amended complaint must have formal service of process. Relying on rule 1.080(a) of the Florida Rules of Civil Procedure, the court held that it was not improper service to mail an amended complaint unless a default judgment had been previously entered. It is "the entry of default, not the failure to make an appearance in the suit . . . which triggers the requirement of new service of process."[234]

Default judgment is also permitted, at the discretion of the court, when a court finds it necessary to sanction one party for failure to comply with discovery orders. In such a case, the court's order must contain an express finding that the party's failure to respond demonstrated a "wilfulness or deliberate disregard."[235] While giving the negligent party a second chance is often "repugnant" to the court, as stated in *Neder v. Greyhound Financial Corp.*,[236] the party is entitled to a hearing to determine if the failure to respond to discovery orders was so wilful and deliberate as to justify the sanction of a default judgment.[237]

Rule 1.140 of the Florida Rules of Civil Procedure provides the time limitations within which a party may file defenses and toll the time to file a response.[238] A statutory time limitation which conflicts with the rules

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229. *Atlantic Asphalt & Equip. Co.*, 578 So. 2d at 293.
230. Hunt Exterminating Co. v. Crum, 598 So. 2d 113 (Fla. 2d Dist. Ct. App. 1992).
231. 596 So. 2d 746 (Fla. 3d Dist. Ct. App. 1992).
232. *Id.* at 747 (citing North Shore Hosp., Inc. v. Barber, 143 So. 2d 849 (Fla. 1962); Marshall Davis, Inc. v. Incapco, Inc., 558 So. 2d 206, 207 (Fla. 2d Dist. Ct. App. 1990).
233. 582 So. 2d 685 (Fla. 3d Dist. Ct. App. 1991).
234. *Id.* at 687.
235. Reed v. Albright, 593 So. 2d 1207, 1208 (Fla. 5th Dist. Ct. App. 1992); Commonwealth Fed. Sav. & Loan Ass'n v. Tubero, 596 So. 2d 1271 (Fla. 1990).
236. 592 So. 2d 1218 (Fla. 1st Dist. Ct. App. 1992).
237. *Id.* at 1219.
238. Section 1.140(a)(2) of the Florida Rules of Civil Procedure states in part: "The service of a motion under this rule . . . alters these periods of time so that if the court denies the motion or postpones its disposition . . . the responsive pleadings shall be served within 10 days after notice of the court's action . . . ." FLA. R. CIV. P. 1.140(a)(2).

of civil procedure will control unless the Supreme Court has expressly enacted a rule providing otherwise.[239] An example of this conflict is seen in *Crocker v. Diland Corp.*,[240] a landlord/tenant action under Florida Statute section 51.011, mandating that the defendant make all defenses in his response filed within five days of service of process. The court found the statute to be controlling where the defendant filed a "Motion to Dismiss Amended Counterclaim" in an attempt to toll the time for response.[241] The court clarified that the statute requires "responsive pleadings, not motion practice."[242] While defenses motions may be raised under section 51.011 of the Florida Statutes, they are meant to be procedural, and filed in addition to the responsive pleadings.[243]

IX. DISMISSAL

In general terms, a dismissal is an order for the termination of a case without a trial of any of its issues.[244] It signifies the final ending of a suit; an end to the proceeding.[245] When considering a motion to dismiss the trial court must take all material allegations of the complaint as true and must confine itself strictly to the allegations within the four corners of the complaint.[246] Consequently, Florida trial courts "may not grant a motion for involuntary dismissal once a *prima facie* case is presented."[247] Rule 1.420 governs the termination of actions by dismissal and provides for both voluntary and involuntary dismissals.[248]

A party may voluntarily dismiss the same action without prejudice only once.[249] Subsequent voluntary dismissals operate "as an adjudication upon the merits when served by the plaintiff who has once dismissed in any court

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239. Gonzalez v. Badcock's Home Furnishings Ctr., 343 So. 2d 7, 8 (Fla. 1977).
240. 593 So. 2d 1096 (Fla. 5th Dist. Ct. App. 1992).
241. *Id.* at 1097.
242. *Id.* at 1099 (citing Aetna Life Ins. Co. v. County Casuals, Inc., 5 Fla. Supp. 2d 107 (Orange County Ct. 1983)).
243. *Id.* at 1100.
244. 1 FLA. JUR. 2d 330.
245. *Id.* at 331.
246. Crawford v. Safeco Title Ins. Co. 585 So. 2d 952, 954 (Fla. 1st Dist. Ct. App. 1991); *cf.* Tanner v. Hartog, 593 So. 2d 249 (Fla. 2d Dist. Ct. App. 1992) (affirming trial court's granting motion to dismiss where motion to dismiss asserted statute of limitations in medical malpractice case).
247. Barnett Bank v. Cibula, 592 So. 2d 1252 (Fla. 4th Dist. Ct. App. 1992).
248. FLA. R. CIV. P. 1.420.
249. *Id.*

an action based on or including the same claim."[250] Even if a plaintiff advances different theories for recovery based on the same underlying claim, he will barred by his dismissal in the previous action.[251]

Involuntary dismissal may be awarded through a variety of methods. Rule 1.070(j) provides for dismissal without prejudice if service of initial process and pleading is not made upon a defendant within 120 days after filing of the initial pleading without showing good cause[252] for not making the service.[253] Noting the rule's strict procedural nature, Florida Third District Chief Judge Schwartz wryly observed that the rule is a "successful attempt to elevate the demands of speed and efficiency in the administration of justice over the substantive rights of the parties which the system is in business only to serve."[254]

More generally, to award an involuntary dismissal Florida trial courts must take all material allegations of the complaint as true and must confine themselves strictly to the allegations within the four corners of the complaint.[255] The trial court may also dismiss the action for "wilful or flagrant or persistent disobedience" of a court order.[256]

Rule 1.420(e) also 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 . . .[257]

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250. United Technologies Communications Co. v. Carlson Construction Co., 583 So. 2d 1110, 1111 (Fla. 3d Dist. Ct. App. 1991) (citing FLA. R. CIV. P. 1.420).

251. *Id.*

252. Hernandez v. Page, 580 So. 2d 793, 794-95 (Fla. 3d Dist. Ct. App. 1991) (citing Winters v. Teledyne Movable Offshore, Inc., 776 F.2d 1304, 1306 (5th Cir. 1985) (construing the meaning of "good cause," applied the federal standard of requiring "at least as much as would be required to show excusable neglect, as to which simple inadvertence or mistake of counsel or ignorance of the rules usually does not suffice, and some showing of 'good faith on the part of the party seeking an enlargement and some reasonable basis for noncompliance within the time specified' . . . .").

253. FLA. R. CIV. P. 1.070(j).

254. *Hernandez*, 580 So. 2d at 795.

255. *Crawford*, 585 So. 2d at 954.

256. Anthony v. Schmitt, 557 So. 2d 656, 662 (Fla. 2d Dist. Ct. App. 1990), *approved sub nom.*, Del Duca v. Anthony, 587 So. 2d 1306 (Fla. 1991).

257. FLA. R. CIV. P. 1420(e).

Historically, dismissal for "failure to prosecute"[258] has caused much confusion and litigation. To address the disparate district court approaches for determining the dismissal of an action for "failure to prosecute," the Florida Supreme Court adopted the Second District Court's two-step process.[259] "First, the defendant is required to show there has been no record activity for the year preceding the motion. Second, if there has been no record activity, the plaintiff has an opportunity to establish good cause why the action should not be dismissed."[260]

In *Del Duca v. Anthony*, a wrongful death action, the defendant moved to dismiss the action for failure to prosecute after more than a year without any record activity.[261] The trial court found good cause for the action to remain pending because the plaintiff became terminally ill and died during the inactive period.[262] Three hundred sixty-four days later the new plaintiff filed a request to produce and a notice of service of interrogatories and the defendants again moved to dismiss the action for failure to prosecute.[263] After the plaintiff's counsel failed to appear at a subsequent status conference, and although the case was scheduled to be heard in less than three months, the trial court heard the motion to dismiss and determined that the previous discovery requests did not constitute sufficient activity and dismissed the case for lack of prosecution.[264]

The Florida Supreme Court approved the decision of the Second District to reverse the trial court, and adopted the district court's "middle ground approach which allows the trial judge to dismiss the cause if the discovery is in bad faith and is also without any design to move the case forward toward a conclusion on the merits."[265]

While the court has identified the appropriate approach for determining a motion to dismiss for failure to prosecute, what particular actions by the parties constitute record activity or "good cause" sufficient to survive such a motion is still ambiguous. Each case turns on the specific facts before the court.

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258. *Id.*
259. Del Duca v. Anthony, 587 So. 2d 1306 (Fla. 1991).
260. *Id.* at 1308-09.
261. *Id.* at 1306.
262. *Id.* at 1308.
263. *Id.*
264. *Del Duca*, 587 So. 2d at 1308.
265. *Id.* at 1309 (citing Anthony v. Schmitt, 557 So. 2d 656, 662 (Fla. 2d Dist. Ct. App. 1990) (quoting Barnett Bank v. Fleming, 508 So. 2d 718, 720 (Fla. 1987) (internal quotation marks omitted).

X. OFFER OF JUDGMENT

A. *History*

Offer of judgment procedures are designed to encourage the settlement of litigation whenever possible by imposing a sanction against a party who fails to accept a timely offer that is more favorable than the offeree's ultimate recovery.[266] The first offer of judgment procedure enacted in Florida was Florida Rule of Civil Procedure 1.442; modelled after Federal Rule of Procedure 68, and adopted by the Florida Supreme Court in 1972.[267] The Florida Legislature passed its own offer of judgment statutes; section 768.585 of the Florida Statutes, its replacement section 768.79, and a separate "offers of settlement" statute, section 45.061.[268]

These materially different procedures gave rise to substantial confusion, inducing many lawyers to make simultaneous demands under all possible procedures and leaving the court with the problem of sorting it all out.[269]

To address the problem, the Florida Supreme Court adopted "New Rule" 1.442; incorporated selected provisions from sections 768.79 and 45.061 of the Florida Statutes, and provided for sanctions based on both costs and attorney's fees.[270] Unfortunately, lawyers continued to make offers under both the statutes and the new rule, because the new rule did not clearly reconcile the remaining conflicts between Florida Statutes sections 768.79, 45.061 and rule 1.442 of the Florida Rules of Civil Procedure.[271]

Accordingly, the legislature repealed section 45.061 of the Florida Statutes with respect to causes of action accruing after October 1, 1990.[272] The legislature also amended Florida Statute section 768.79[273] to make clear that a defendant may collect under that statute if his or her offer was

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266. Bruce J. Berman & Jamie A. Cole, *The New Offer of Judgment Rule in Florida: What Does One Do Now?*, 64 FLA. B.J. 38 (Jan. 1990).

267. *Id.* at 38 (citing *In re* The Florida Bar: Rules of Civil Procedure, 265 So. 2d 21, 40-41 (Fla. 1972) (enacting rule 1.442, effective Jan. 1, 1973)).

268. *Id.*

269. *Id.*

270. *The Supreme Court of Florida Increases the Risks of Refusing Reasonable Settlement Offers - In re Rules of Civil Procedure, Rule 1.442 (Offer of Judgment)*, 17 FLA. ST. U. L. REV. 843, 856 (1990) (citing *In re* Rules of Civil Procedure, Rule 1.442 (Offer of Judgment), 550 So. 2d 442 (Fla. 1989)).

271. Berman & Cole, *supra* note 269, at 38; Scott Distasio, *Offers of Judgment—The Confusion Continues*, 64 FLA. B.J. 20 (Dec 1990).

272. 1990 Fla. Laws ch. 90-119, § 22.

273. FLA. STAT. § 768.79 (1990).

unreasonably rejected and the judgment is "one of no liability."[274] Most recently, the Florida Supreme Court has repealed rule 1.442 and "adopt[ed] the procedural portion of section 768.79 as a rule of this court effective [July 9, 1992].[275]

The net effect of all these changes is that for causes of action accruing after October 1, 1990, the rule governing offers of judgment is Florida Statute section 768.79.[276]

B. *New Questions*

While repealing section 45.061 and amending section 768.79, the legislature had the benefit of the Florida Supreme Court's declaration that "[t]o the extent the procedural aspects of new rule 1.442 are inconsistent with sections 768.79 and 45.061, the rule shall supersede the statutes."[277] Written in apparent deference to rule 1.442, the amended section 768.79 makes no reference to the appropriate time for making offer or demands for judgment.[278] Additionally, the law applies to "any action for damages filed in the courts of this state."[279]

Now that rule 1.442 has been repealed[280] there are, apparently, no specific constraints on either 1) the time for making or accepting offers, or 2) the type of civil action that Florida Statute section 768.79 applies to.[281]

C. *The $1 Strategy*

Because the rules now allow for a prevailing defendant to recover his attorneys fees and costs from a plaintiff who recovers at least twenty-five percent less than the defendant's good faith offer,[282] a defendant may consider making a nominal offer relying on the possibility of receiving a favorable judgement.[283] Because the defendant's offer will most likely be

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274. 1990 Fla. Laws ch. 90-119, § 48.

275. *See* Timmons v. Combs, 17 Fla. L. Weekly S443 (Fla. 1992).

276. *Id.*

277. *In re* Rules of Civil Procedure, Rule 1.442 (Offer of Judgment), 550 So. 2d 442 (Fla. 1989).

278. FLA. STAT. § 768.79 (1990); *cf.* FLA. STAT. § 768.79 (1)(b) (1989) (providing that offers "shall not be make until 60 days after the filing of the suit, and may not be accepted later than 10 days before the date of the trial").

279. *Id.*

280. Timmons v. Combs, 17 Fla. L. Weekly S443 (Fla. 1992).

281. FLA. STAT. § 768.79 (1990).

282. *Id.*

283. O'Neil v. Wal-Mart Stores, Inc., 602 So. 2d 1342 (Fla. 5th Dist. Ct. App. 1992).

rejected, the offer is merely a maneuver to prepare for collecting attorneys fees and costs if a favorable defense verdict is returned. The result is an apparent no-lose tactic for most defendants; and a potentially compromising dilemma for most uncertain plaintiffs (and perhaps plaintiff's attorneys).

Even though the Florida Supreme Court stated, "[w]e do have some concerns as to whether a one dollar offer of settlement is a bona fide offer,"[284] the Fifth District Court of Appeal specifically stated (in an appeal of awarding attorneys' fees to a defendant under section 45.061) that a one dollar offer of judgment could be "unreasonably rejected."[285]

> An offer by a defendant of one dollar is concededly not likely to produce an early settlement of the case, which is the ostensible purpose of the offers of settlement. On the other hand, if a plaintiff's weak case has not improved prior to trial or if a plaintiff's strong case has been undermined in the course of litigation, avoidance of paying the adverse party's fees might properly impel the plaintiff to accept such an offer. In addition, where a defendant is convinced of its lack of liability, the defendant should not be required to offer a substantial settlement in order to obtain the benefit of the statute. Finally, a holding that a $1.00 offer is never bona fide or unreasonably rejected would simply engender a line of "$2.00", $10.00" or "$100.00" cases seeking still higher thresholds. It should be noted in this regard that the offer in this case was $1.00 plus taxable costs. Even (or perhaps, especially) in a small case like this one, such costs as filing fees, service of process and court reporter expenses are not insignificant sums. A plaintiff who realizes he has a losing case on liability or no provable damages has a real incentive to salvage those expenditures (and to avoid exposure to the defendant) by timely acceptance of such an offer.[286]

Assuming the supreme court agrees with the Fifth District, and finds an equivalent between "good faith" (section 768.79) and "unreasonably rejected" (section 45.061) offers, the One Dollar Strategy appears to arm the civil defendant in Florida with a significant procedural weapon.

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284. Leapai v. Milton, 595 So. 2d 12, 15 n.2 (Fla. 1992).
285. *O'Neil*, 17 Fla. L. Weekly D1762 (Fla. 5th Dist. Ct. App. 1992).
286. *Id.* (Remanded with instructions to the trial court to define the reasons for finding "unreasonable rejection" of the one-dollar-plus-taxable-costs offer).

XI. SUMMARY JUDGMENT

A motion for summary judgment may only be granted if the pleadings, depositions, answers to interrogatories and admissions on file together with affidavits,[287] if any, show 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.[288] If the record reflects the existence of any genuine issue of material fact or the possibility of any issue, or if the record raises even the slightest doubt that an issue might exist, summary judgment is improper.[289] Florida courts continue to be more restrictive than the Federal courts in granting summary judgment.[290] As the Third District Court recently stated, "our law continues to be that expressed in *Holl v. Talcott* [and] *Visigardi v. Tirone* . . . and the numberless cases which follow them."[291]

Summary judgement is unlike: 1) a motion to dismiss[292] that raises a question of law as to the sufficiency of the facts alleged to state a cause of action, or 2) a motion to strike[293] that seeks to remedy pleading defects like redundancy, repetition, and sham, or 3) a motion for directed verdict[294] which occurs after the presentation of evidence. Conversely, for example, the sufficiency of the allegations of a complaint *should* be determined on a motion to dismiss, not by summary judgment.[295]

The plaintiff is not the only party who may oppose a defendant's motion for summary judgment. In *U-Haul Co. v. Meyer*[296] a defendant's (Ford's) motion for summary judgment, unopposed by the plaintiff, was challenged by a codefendant (U-Haul).[297] In this tort action U-Haul was required to oppose a judgment relieving Ford of liability or lose any future

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287. FLA. R. CIV. P. 1.420(e); TSI Southeast, Inc. v. Royals, 588 So. 2d 309 (Fla. 1st Dist. Ct. App. 1991) (affidavits must be made on the personal knowledge of the affiant, must not be conclusory, and must set forth the facts on which the statement is based).

288. Grissett v. Circle K. Corp., 593 So. 2d 291, 293 (Fla. 2d Dist. Ct. App. 1992); FLA. R. CIV. P. 1.510(c).

289. *Grissett*, 593 So. 2d at 293.

290. 5G's Car Sales, Inc. v. Florida Dep't of Law Enforcement, 581 So. 2d 212 (Fla. 3d Dist. Ct. App. 1991) (to the extent that Celotex Corp v. Catrett, 477 U.S. 317 (1986) and similar cases loosen the restriction on the use of summary judgment, they do not represent Florida law).

291. *Id.* at 212.

292. FLA. R. CIV. P. 1.420.

293. FLA. R. CIV. P. 1.140(f), 1.150.

294. *Id.* 1.480.

295. Bowman v. Davies, 586 So. 2d 1332, 1333 (Fla. 1st Dist. Ct. App. 1991).

296. 586 So. 2d 1327 (Fla. 1st Dist. Ct. App. 1991).

297. *Id.* at 1331.

right of contribution from Ford.[298] Ford's motion was successfully challenged by U-Haul, and U-Haul maintained its future claim of contribution from Ford.[299]

Rule 1.510(c), which pertains to motions for summary judgment, contains the following requirement: "The motion shall state with particularity the grounds upon which it is based and the substantial matters of law to be argued and shall be served at least twenty days before the time fixed for the hearing . . . ."[300]

Although in practice most motions for summary judgment are filed at the same time as the notice of hearing, there are exceptions. In *Titusville Assoc. v. Barnett Banks Trust*,[301] the Florida Supreme Court held that the twenty day requirement applies only to the motion, not the notice of hearing.[302] Further, the court stated that the notice of hearing served ten days before the hearing afforded the opposing party timely notice.[303] While periods of less than ten days may be questionable with regard to giving the opposing party timely notice, there is no question that such notice of the time, place, and subject of the hearing must be given.[304]

XII. DIRECTED VERDICT

The legal principles governing directed verdicts are well established.[305] A motion for a directed verdict is proper only when there is no evidence upon which the jury could lawfully find a verdict for the non-moving party.[306] All inferences of fact must be construed most strictly in

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298. *Id.* (citing Holton v. H.J. Wilson Co., 482 So. 2d 341 (Fla. 1986); FLA. STAT. 768.31(4)(f) (1989) which states: "The judgment of the court in determining the liability of the several defendants to the claimant for an injury or wrongful death shall be binding as among such defendants in determining their right to contribution.").

299. *U-Haul*, 596 So. 2d at 1331.

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

301. 591 So. 2d 609 (Fla. 1991).

302. Titusville Assoc. v. Barnett Banks Trust, 591 So. 2d 609, 610 (Fla. 1991) (disapproving Wakefield Nursery v. Hunter, 443 So. 465 (Fla. 4th Dist. Ct. App. 1984) which was in direct conflict on this issue).

303. *Id.*

304. Berchtold v. Griffin, 592 So. 2d 377, 378 (Fla. 4th Dist. Ct. App. 1992); Kelly v. Militana, 595 So. 2d 113, 114 (Fla. 3d Dist. Ct. App. 1992) (no motion, no notice); Fouts v. Bowling 596 So. 2d 1992 (Fla. 3d Dist. Ct. App. 1992) (Plaintiff's motion in limine may not serve as a vehicle for presentation of an unnoticed motion for summary judgment).

305. Keene v. Chicago Bridge & Iron Co., 596 So. 2d 700, 704 (Fla. 1st Dist. Ct. App. 1992); FLA. R. CIV. P. 1.480.

306. Salem v. Benmelech, 590 So. 2d 1008 (Fla. 3d Dist. Ct. App. 1991).

favor of the nonmovant.[307] If there is *any* evidence to support a possible verdict for the non-moving party, a directed verdict is improper.[308]

In the event that a motion for directed verdict is overruled and additional evidence is produced, any later review of the matter by the trial or appellate courts must take into account *all* the facts adduced both before and after the initial motion.[309]

In *McCain v. Florida Power Corp.*, the plaintiff, McCain, was awarded $175,000 in a personal injury jury trial.[310] The Second District Court of Appeal reversed and remanded for entry of a directed verdict in favor of the defendant, concluding the injury was not foreseeable.[311] The court expressly stated that its opinion was based solely on the evidence adduced up to the time of the defendant's motion for directed verdict, which occurred at the end of McCain's case-in-chief.[312] The court concluded that the denial of the motion was error and that everything occurring afterward was a nullity.[313]

The Florida Supreme Court reversed, stating the "law in Florida is clear . . ." that in this case the court must take into account *all* the facts adduced both before and after the initial motion.[314]

XIII. Prejudgment Interest/Costs and Interest/Attorneys' Fees

A. *Prejudgment Interest*

Prejudgment interest compensates the aggrieved party for the time and use of his money beginning on the date, as determined by the verdict, when the claim began to accrue. The Florida Supreme court has held: "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

307. Regency Lakes Apartments Assoc., Ltd., v. French, 590 So 2d 970 (Fla. 1st Dist. Ct. App. 1991).

308. *Keene*, 596 So. 2d at 704 (quoting Pritchett v. Hacksonville Auction, Inc., 449 So. 2d 364, 365 (Fla. 1st Dist. Ct. App. 1984).

309. McCain v. Florida Power Corp., 593 So. 2d 500, 502 (Fla. 1992).

310. *Id.* at 501.

311. *Id.*

312. *Id.* at 502.

313. *Id.*

314. *McCain*, 593 So. 2d at 502 (citing Gulf Heating & Refrigeration Co. v. Iowa Mut. Ins. Co., 193 So. 2d 4 (Fla. 1966)).

statutory rate from the date of the loss."[315] The statutory rate is simple interest per annum and cannot itself bear interest.[316]

Unlike attorneys fees and costs, prejudgment interest is an element of damages that must be part of the final judgment.[317] It is awarded as just compensation to those who are damaged by having their property withheld or destroyed and as such is directly related to the cause at issue and is not incidental to the main adjudication.[318] By reserving jurisdiction to address the issue of prejudgment interest a trial court has not disposed of all material issues in controversy and a final money judgment would be improper.[319] If the trial court improperly renders such an order, once an appeal is taken the trial court will lack jurisdiction to take any further action on the matter improperly reserved; unless directed to do so by the district court of appeal.[320] Finally, it should be noted that while prejudgment interest is available in contract-based causes of action, if previously pled by the prevailing party, it is not recoverable in tort actions or usurious transactions.

B. *Costs and Interest*

Under sections 57.041[321] and 772.11[322] of the Florida Statutes, certain legal costs and charges may be awarded to the prevailing party in a civil action.[323] Sanctions assessed for failure to respond to discovery in aid of execution may constitute costs and may be recoverable from another party by contract.[324]

Taxation of costs for discovery purposes, depositions, and requests for

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315. Dykema Gossett v. Armbruster, 595 So. 2d 589, 590 (Fla 4th Dist. Ct. App. 1992) (quoting Argonaut Ins. Co. v. May Plumbing Co., 474 So. 2d 212, 215 (Fla. 1985)); *see also* FLA. STAT. § 55.031 (1989) (lacking a liquidation agreement, the court should impose a prejudgment rate of 12% per annum simple interest).

316. Perez Sandoval v. Banco De Commercio, S.A., C.A., 582 So. 2d 179 (Fla. 3d Dist. Ct. App. 1991).

317. McGurn v. Scott, 596 So. 2d 1042, 1045 (Fla. 1992).

318. *Id.* at 1044.

319. *Id.*

320. *Id.* at 1045.

321. FLA. STAT. § 57.041 (1989).

322. FLA. STAT. § 772.11 (1991) (which entitles a defendant in a civil theft claim to recover reasonable attorney's fees and court costs in the trial and appellate courts upon a finding that the claimant raised a claim which was without substantial fact or legal support).

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

324. Tri State Ins. Co. v. Fitzgerald, 593 So. 2d 1118 (Fla. 3d Dist. Ct. App. 1992) (insurance policy required insurers to pay all "costs" taxed against insured in any suit defended by insurers, and sanctions are costs).

production, are allowed or disallowed depending on whether they serve a useful purpose in determining issues before the trial court.[325] Court reporters' attendance fees and one-half the cost of transcribing depositions have been found to serve the useful purpose of aiding in preparation for trial.[326] In contrast, fees for an expert witness deposed five weeks after summary judgment served no useful purpose.[327]

To calculate taxation of fees for expert witnesses—those who actually attend court to testify—the court must consider a listing of itemized costs per expert witness used and a determination as to whether the cost listed was reasonable.[328] The fees of an expert witness attorney who testifies as to reasonable attorneys fees may also be awarded as costs.[329] Such expert testimony is, in fact, required to establish reasonable attorneys fees.[330]

C. *Attorneys' Fees*

Generally, attorney's fees incurred while prosecuting or defending a claim are not recoverable in the absence of a statute or contractual agreement authorizing their recovery.[331] While "general, actual, or compensatory damages have not been defined as including attorney's fees,"[332] the term "suit money" has.[333]

Statutes which authorize attorney's fees awards are held to be in derogation of the common law, and therefore must be strictly construed.[334]

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325. Tremack Co. v. Federal Ins. Co., 600 So. 2d 38 (Fla. 3d Dist. Ct. App. 1992) (citing Miller Yacht Sales, Inc., v. Scott, 311 So. 2d 762 764 (Fla. 4th Dist. Ct. App. 1975), *cert. denied*, 328 So. 2d 843 (Fla. 1976) for the useful purpose test).

326. *See Tremack*, 600 So. 2d at 38.

327. *Id.*

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

329. DeBiasi v. S & S Builders, Inc., 593 So. 2d 314 (Fla. 4th Dist. Ct. App. 1992).

330. Silva v. Hernandez, 595 So. 2d 230 (Fla. 3d Dist. Ct. App. 1992) (citing Crittenden Orange Blossom Fruit v. Stone, 514 So. 2d 351 (Fla. 1987)).

331. Bidon v. Department of Professional Regulation, 596 So. 2d 450, 452 (Fla. 1992); *see also* Medina v. Medina, 461 So. 2d 1028 (Fla. 5th Dist. Ct. App. 1985) (providing for attorney's fees for services performed by an attorney in creating or bringing into the court a fund or property).

332. *Id.*

333. City of Tampa v. Hines, 596 So. 2d 160 (Fla. 2d Dist. Ct. App. 1992) (city held subject to garnishment for alimony, child support, and attorney's fees).

334. Ciaramello v. D'Ambra, 590 So. 2d 946 (Fla. 2d Dist. Ct. App. 1991) (citing Kittel v. Kittel, 210 So. 2d 1 (Fla. 1967)); *see also In re* Attorney's Fees Awarded v. Bellamy, 599 So. 2d 751 (Fla 4th Dist. Ct. App. 1992) (denying attorney fees in excess of maximum provided by FLA. STAT. § 925.036(1)).

If a claim under a statute providing for such fees is dismissed, no fees associated with that statute's authority will be awarded.[335]

Attorney's fees are available under a variety of statutes governing a wide variety of subjects such as probate,[336] special public defender,[337] eminent domain,[338] and arbitration proceedings.[339]

More generally, section 57.105 of the Florida Statutes provides for the award of attorney's fees to a prevailing party where the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party.[340] The test for a "prevailing party" is "whether the party succeeded on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit."[341]

Where the legislature is silent on factors it considers important in determining a reasonable fee, Florida courts may look to the criteria enumerated in the Rules Regulating the Florida Bar,[342] and may apply *Rowe*[343] risk multipliers where appropriate.[344]

However, "where the legislature has set forth specific criteria for determining reasonable attorney's fees to be awarded pursuant to a fee-

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335. Central Ins. Underwriters v. National Ins., 599 So. 2d 1371, 1374 (Fla. 3d Dist. Ct. App. 1992).

336. FLA. STAT. § 925.036(1)(1991).

337. *Id.* § 925.036.

338. *Id.* § 73.091.

339. 1990 Fla. Laws ch. 90-109, § 14 (1990).

340. FLA. STAT. § 57.105(1) (1991); Rojas v. Drake, 569 So. 2d 859, 860 (Fla. 2d Dist. Ct. App. 1990) (stating fees awarded to the prevailing party of post-divorce harassment case when an offending party continuously filed motions and frivolous actions that were so devoid of merit, both on the facts and the law, as to be completely untenable).

341. Smith v. Adler, 596 So. 2d 696, 697 (Fla. 4th Dist. Ct. App. 1992) (quoting Hensley v. Eckerhart, 461 U.S. 424, 433 (1983), *adopted by* Pappert v. Mobiliniom Assoc. V, 512 So. 2d 1096 (Fla. 4th Dist. Ct. App. 1987)).

342. Rule 1.5 of the Rules Regulating the Florida Bar.

343. Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985). In *Rowe*, the Florida Supreme Court determined that the trial court's fee computation should be based on:

1) number of hours reasonably spent in litigation;
2) the reasonable hourly rate applicable to the specific type of litigation involved;
3) multiply (1) and (2), and when necessary;
4) allow adjustment of the fee to compensate for failure to prevail on the claims or based on the nature of the litigation; and
5) specified findings as to the above factors).

Id. at 1147.

344. Schick v. Department of Agric. & Cons. Serv., 599 So. 2d 641, 643 (Fla. 1992).

authorizing statute, the trial judge is bound to use only the enumerated criteria."[345] In *Schick v. Department of Agriculture and Consumer Services*,[346] the Florida Supreme Court held that a trial court may not use contingency multipliers when those multipliers were not specified in the statute providing for the attorney's fees.[347]

All claims for attorney's fees based on statute or contract must usually be pled to be recovered.[348] Once properly pled in the complaint, a motion for attorney's fees may be made after final judgment and accompanied by proof of fees, personal testimony of the attorney who performed the services, and sufficient proof of reasonable time spent in arriving at the total amount of fees requested.[349]

XIV. RES JUDICATA/COLLATERAL ESTOPPEL

Res judicata is an affirmative defense, Florida Rules Civil Procedure 1.110(d), and must be raised in the pleadings or deemed to be waived.[350] In order to invoke the defense of *res judicata* or collateral estoppel so as to bar a pending action based on a final judgment entered in a prior action it must be established that in both actions there is an identity:

1) in the *thing sued for*,
2) of the *cause of action*,
3) of *parties*, and
4) of the *capacity of the parties*.[351]

Thus, where a party is subject to a final judgment of paternity in a

345. *Id.*

346. 599 So. 2d 641 (Fla. 1992).

347. *Id.* at 644; *see* Standard Guar. Ins. Co. v. Quanstrom, 555 So. 2d 828 (Fla. 1990) (discussing contingency fee multipliers in the three basic categories: 1) public policy enforcement; 2) tort and contract claims; and 3) family law, eminent domain, and estate and trust matters).

348. Sandoval v. Banco De Comercio, 585 So. 2d 584, 584 (Fla. 1991) (citing Stockman v. Downs, 573 So. 2d 835 (Fla. 1991) for the rule and the exception that "[w]here a party has notice that an opponent claims entitlement to attorney's fees, and by its conduct recognizes or acquiesces to that claim or otherwise fails to object to the failure to plead entitlement, that party waives any objection to the failure to plead a claim for attorney's fees").

349. Standard Guar. Ins. Co. v. Quanstrom, 555 So. 2d 828, 834 (Fla. 1990).

350. Evans v. Evans, 595 So. 2d 988 (Fla. 1st Dist. Ct. App. 1992).

351. West v. Kawasaki Motors Mfg. Corp., 595 So. 2d 92, 94 (Fla. 3d Dist. Ct. App. 1992).

child support proceeding, he cannot relitigate that judgment four years later.[352] The issue of paternity is *res judicata*. Where the first judgment is rendered by a federal court, federal principles of collateral estoppel apply, and identity of parties is not required when collateral estoppel is used defensively.[353]

Florida courts also recognize exceptions to the identity of parties requirement under the *res judicata* doctrine.[354] In *West v. Kawasaki Motors Manufacturing Corp.*,[355] the Third District Court found a motorcycle policeman was barred from suing a motorcycle manufacturer for product defects after receiving an unfavorable summary judgment against the manufacturer's wholesale distributor on the same claim.[356]

> The most recurring theme in all of these cases, whether couched in res judicata or collateral estoppel terms, is that a plaintiff who has had an opportunity to litigate his claim of injury caused by an allegedly defective product against one of the parties in the chain of distribution of the product-i.e., the manufacturer, wholesale distributor and retailer-has had his day in court and should not thereafter be able to pursue another party in the same chain with the same allegations.
>
> *He has had his day in court on the issue in a forum of his own choosing and against a party of his own choosing who was closely related to the present defendant.*[357]

The same sword cut in the opposite direction in *Mitchell v. Edge*.[358] In *Mitchell*, a plaintiff home buyer obtained a verdict against the defendant company's builder.[359] Because the first defendant was bankrupt and could not satisfy the verdict, the plaintiff brought a second suit against the builder's supervisor and company vice-president who unsuccessfully raised the res judicata defense.[360] The Second District Court quoted from the Restatement (Second) of Judgments, sections 29, 49, 50 (1982):

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352. Walden v. Munson, 593 So. 2d 1215 (Fla. 2d Dist. Ct. App. 1992) (absent a fraud on the court).
353. Hochstadt v. Orange Broadcast, 588 So. 2d 51, 52 (Fla. 3d Dist. Ct. App. 1991).
354. *Id.*
355. 595 So. 2d 92 (Fla. 3d Dist. Ct. App. 1992).
356. *West*, 595 So. 2d at 97.
357. *Id.*
358. Mitchell v. Edge, 598 So. 2d 125 (Fla. 2d Dist. Ct. App. 1992).
359. *Id.* at 125.
360. *Id.* at 128.

> When the claimant thus brings consecutive actions against different persons liable for the same harm, the rendition of the judgment in the first action does not terminate the claims against other persons who may be liable for the loss in question. The judgment itself has the effect of officially confirming the defendant's obligation to make redress, an obligation which under the substantive law co-exists with that of the other obligor. *No reason suggests itself why the legal confirmation of one obligation should limit or extinguish the other.*[361]

In summary, any fact, issue, or cause of action, including matters raised by motion, that has been decided by a trial court of competent jurisdiction, shall not be relitigated so long as the judgment or decree stands unreversed.[362]

361. *Id.* (emphasis added).

362. Alvarez v. Alvarez, 598 So. 2d 162 (Fla. 3d Dist. Ct. App. 1992).