Civil Procedure: 1992 Survey of Florida Law

William VanDer Creek*
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William VanDercreek

Abstract

Florida Civil Procedure continues to change and develop, adapting to the demands of an increasingly dynamic environment.

KEYWORDS: pleadings, discovery, dismissal
# Table of Contents

I. INTRODUCTION .............................................. 96
II. JURISDICTION OVER THE SUBJECT MATTER:
    CHANGES IN COUNTY COURT JURISDICTION .... 97
III. JURISDICTION OVER THE PERSON ............... 99
    A. Procedures for Determination of
       Jurisdiction ......................................... 99
    B. Connectivity: The Problems of General and
       Specific Jurisdiction ............................... 102
    C. Waiver by Appearance; Collateral Attack;
       Child Support and Custody ..................... 105
IV. VENUE .................................................. 106
V. DISQUALIFICATION OF JUDGES ................... 108
VI. PLEADINGS ............................................. 110
VII. DISCOVERY ............................................ 115
VIII. DEFAULT .............................................. 120
IX. DISMISSAL ............................................. 123
X. OFFER OF JUDGMENT ................................. 126
    A. History ............................................ 126
    B. New Questions ................................... 127
    C. The $1 Strategy .................................. 127
XI. SUMMARY JUDGMENT ................................. 129
XII. DIRECTED VERDICT ................................. 130
XIII. PREJUDGMENT INTEREST/COSTS AND INTERESTS/ATTORNEY'S FEES
    A. Prejudgment Interest ............................. 131
    B. Costs and Interest .............................. 132
    C. Attorney's Fees ................................ 133
XIV. RES JUDICATA/COLLATERAL ESTOPPEL .......... 135

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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"1 to govern all future offers of judgment where the cause of action accrued after October 1, 1990.2 The decision enables litigants to focus their collective efforts under one statute3 if their offer was unreasonably rejected, including defendants receiving a judgment of no liability.3

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.4 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.5

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.6 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 motion for directed verdict.7

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.8 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

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1. In re AMENDMENTS TO THE FLORIDA RULES OF CIVIL PROCEDURE, 604 So. 2d 1110 (Fla. 1992).
5. Id.
7. Id.
11. Id.
14. 1991 Fla. Laws 269 (to be codified at FLA. STAT. § 34.01(1)(c)(4) (1991)).
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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

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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. Where a party has received notice of a specific matter jurisdiction to rule. In Grand Coteau Corp. v. Consolidated Bank, 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.

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.

In Saffan v. Saffan, 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 Steffen v. Steffen, 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

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 § 322.265(1)(b)3 of the Florida Statutes 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).

In 1992, VanDercreek

III. JURISDICTION OVER THE PERSON

A. Procedures for Determination of Jurisdiction

In Florida, a plaintiff must plead facts which uphold jurisdiction over a non-resident in the event they are served out of state. Additionally, under the 1980 amendment adding rule 1.070(l), it is sufficient to track the language of the long-arm statute in the pleading. If the defendant opposes jurisdiction, he must file evidentiary affidavits challenging the factual basis for the jurisdiction. Once challenged, the burden of proof returns to the plaintiff to establish the factual basis for jurisdiction. Supporting affidavits, attached either to the complaint or supplemental discovery materials, as well as a live evidentiary hearing enables the trial court to resolve disputes in identical evidentiary facts.

In order to satisfy the evidentiary burden of proving jurisdiction, the plaintiff often uses the discovery process. Failure to answer such discovery requests can cost the defendant his affirmative defense of lack of jurisdiction.

25. Id. at 1158.
26. Id.
27. Venetian Salami Co. v. Parthenisis, 554 So. 2d 499 (Fla. 1989).
28. Rule 1.070(l) states: "When service of process is to be made under statutes authorizing service on non-residents of Florida, it is sufficient to plead the basis for service in the language of the statute without pleading the facts supporting service." Fla. R. Civ. P. 1.070(l) (1980).
29. In AG Rolex, Inc. v. Hawkerfield Corp., the court held that where the affidavits are in direct conflict the lower court should hold a limited evidentiary hearing to determine the credibility and weight of the evidence before ruling on a question of jurisdiction. 385 So. 2d 429, 430 (Fla. 3d Dist. Ct. App. 1981) (citing Fla. STAT. § 48.193(1)(b) and Venetian Salami Co., So. 2d at 502-03); see also World Metals, Inc. v. Towey's Foundry & Mach. Co., 585 So. 2d 1185 (Fla. 5th Dist. Ct. App. 1991).
30. Insurance Corp. of Ireland Ltd. v. Compagnie Des Bauxites de Guinee, 458 U.S. 694, 707 (1982) (the United States Supreme Court upheld striking the defense of lack of jurisdiction as a sanction where the defendant had failed to respond to interrogatories).
business in the state.\textsuperscript{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,\textsuperscript{32} "maintaining a matrimonial domicile" within the state when an alimony, child support, or division of property proceeding is commenced,\textsuperscript{33} by breach of contract,\textsuperscript{34} or by sexual intercourse resulting in conception in a proceeding for paternity.\textsuperscript{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,\textsuperscript{36} is to be interpreted in light of "traditional notions of fair play and substantial justice."\textsuperscript{37} Minimum contacts require more than just correspondence, a one-time visit for conferencing purposes or telephone calls.\textsuperscript{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.\textsuperscript{39} In Georgia Insurers

\textsuperscript{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).


\textsuperscript{33} Id.

\textsuperscript{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.

\textsuperscript{35} Section 48.193(1)(b) 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.

\textsuperscript{36} See generally id. §§ 48.011-31.

\textsuperscript{37} International Shoe Co. v. Washington, 325 U.S. 310 (1945); see also Venetian Salani Co., 554 So. 2d at 500.

\textsuperscript{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 hailed 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).

\textsuperscript{39} Grand Couturier Corp. v. Consolidated Bank, 596 So. 2d 679 (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 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.

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

\textsuperscript{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 liability to an insolvency pool in the state of Georgia.

\textsuperscript{42} Id. at 379.

\textsuperscript{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).

\textsuperscript{44} Id.

\textsuperscript{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(c) 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(e) of the Florida Rules of Civil Procedure); see also Berdeaux v. Eagle-Ficher Indus., Inc., 375 So. 2d 1295 (Fla. 3d Dist. Ct. App. 1980); Hernandez v. Pages, 580 So. 2d 793 (Fla. 3d Dist. Ct. App. 1991). But see Morales v. Sperry Rand Corp., 378 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).
Insolvency Pool v. Brewer, 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. 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.

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. 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.

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, through service 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.

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

B. Connexity: The Problems of General and Specific Jurisdiction

In White v. PepsiCo, Inc., 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 statute. 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.

Service within the state, served upon an appointed resident agent of a foreign corporation, is virtually tantamount to personally serving a foreign citizen while he is physically present in the state. In Burnham v. Superior Court, the United States Supreme Court reversed the power of the court 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 actually while the transient was physically present within the state.

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.

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.

While the Florida Supreme Court cited to both Helicopteros and Perkins v. Benguet Consolidated Mining Co., it is important to note that, unlike White, 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.

In Perkins, the United States Supreme Court held that where a foreign corporation was generally and systematically carrying on business activities within the 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.

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

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 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 of Appeal where it was shown the bank had not adequately served process of the complaint, and subsequent notices of hearing were not given to the Carteris. Since there was defective notice, the lower court lacked personal jurisdiction over the Carteris sufficient to award deficiency judgments or costs and fees following a real property foreclosure over which the court had in rem jurisdiction only).

48. Rile-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:


50. Id. at 890.

52. 110 S. Ct. 2105 (1990).

53. Id. at 2111.


55. White, 568 So. 2d at 888 n.3 (citations omitted).


58. 568 So. 2d 886 (1990).

59. Helicopteros, 466 U.S. at 437.

60. 342 U.S. 487 (1951).
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citizen while he is physically in the state. In Burnham v. Superior Court, 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.

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

WHETHER, IN ACTIONS THAT ACCRUE 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.


52. 110 S. Ct. 2105 (1990).

53. Id. at 2111.


55. White, 568 So. 2d at 888 n.3 (citations omitted).


59. Helicopteros, 466 U.S. at 437.

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conducted more than a million dollars worth of business activities in Texas. The plaintiffs in *Helicopters* did not argue "specific" jurisdiction, in the alternative to a finding of general jurisdiction by the Court. 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 helicopter crashed in Peru.

In *International Shoe Co. v. Washington*, 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. The Court's "traditional notions of fair play and substantial justice" test was created, providing flexibility in jurisdictional questions. Conversely, the Court took a more narrow view in *Hanson v. Denckla*, 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. The Court determined that the legal question turned on whether the Delaware trust authorized appointment through the exercise of a will.

In a more recent case, *Carnival Cruise Lines, Inc. v. Shute*, 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. Carnival Cruise Lines operates its base of business in Florida and publishes a forum selection clause on each ticket it issues. 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. In reversing, the Supreme Court found the forum clause to be a reasonable

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61. 466 U.S. at 416.
62. Id.
63. 326 U.S. 310 (1945).
64. Id. at 311.
65. Id. at 316.
67. Id. at 251-53.
68. Id. at 253.
70. Id. at 1529.
71. Id. at 1524.
72. Id. at 1525.
73. Id. at 1527.
75. Id.
76. Id.
77. M.T.B. Banking Corp. v. Bergamo Da Silva, 592 So. 2d 1215 (Fla. 3d Dist. Ct. App. 1992); PA. R. CIV. P. 1.140(b).
79. Carter, 587 So. 2d at 570.
80. Id.
82. Id. at 574.
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 helicopter 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 substitute for state law, allowing defendant to be heard in Florida courts.

In *Yon v. Fleming*,73 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.74 The hearing was initially scheduled to determine if New York is a reasonable substitute for Florida law.

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61. 466 U.S. at 416.
62. Id.
63. 326 U.S. 310 (1945).
64. Id. at 311.
65. Id. at 316.
67. Id. at 251-53.
68. Id. at 253.
70. Id. at 1529.
71. Id. at 1524.
72. Id. at 1525.
73. Id. at 1527.
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).
79. Carter, 587 So. 2d at 570.
80. Id.
82. Id. at 574.

https://nsuworks.nova.edu/nlr/vol17/iss1/5
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 contractual 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 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. Vene,94 the court found that where the supplementary proceeding, with venue in Dade County, requires discovery from the impeded 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

83. Id.; see also Uniform Child Custody Jurisdiction Act, Fla. STAT. §§ 61.1302(3)-(3)
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 establish-
ment, enforcement or modification of child support, the enforcement hearing officer was
empowered to conduct proceedings without the prior consent of both parties).
87. Id.
89. Id.
90. Id. at 845-46.
91. Id., 32 Ill. App. 3d at 806.
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92. Id.
94. 594 So. 2d 331 (Fla. 3d Dist. Ct. App. 1992); Urban v. Venne, 595 So. 2d 1108
(3d Dist. Ct. App. 1992); Coral Contractors, Inc. v. Paul, 387 So. 2d 554 (Fla. 5th Dist.
95. Patterson, 594 So. 2d at 332.
96. 588 So. 2d 1078 (Fla. 4th Dist. Ct. App. 1991).
97. Id. at 1079 (citing Granado Quiñones 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. Dateline, 588 So. 2d at 1080.
100. Id. at 787.
101. Id.
102. Id.

90. 12
91. 107
92. 92
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Improper joinder of parties cannot be used to establish venue. In Jacobs & Goodman, P.A. v. McLin, Burnsed, Morrison, Johnson & Robuck, P.A., 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. Dual venue requires the joinder of a bona fide defendant. 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. The state “venue privilege” is exemplified in Department of Labor v. Summit Consulting, Inc., 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.

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...” A sufficient motion for disqualification must demonstrate that the “facts set forth would place a reasonably prudent person in fear of not receiving a fair and impartial trial.” Merely pleading prejudice based on adverse rulings is not a “well-founded” basis for recusal. Motions must be timely filed, or show good cause why there was an inordinate delay in filing. 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.

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.” 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.

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. 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. Moreover, when a motion to disqualify is filed, the


110. PLA. R. CV. P. 1.132(G).

111. 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). 112. 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).


114. Rodríguez 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 disbar his admission to the bar, plaintiff had motioned for recusal of the second judge assigned to his case).

115. See Okawonska v. Ferro, 590 So. 2d 21 (Fla. 3d Dist. Ct. App. 1991) (Where the Third District Court of Appeal granted the writ after the trial judge had made "base veracular" statements to the litigant in open court); see also FLA. BAR CODE JUD. CONDUCT, Canon 3(A)(3) (1991).

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103. 582 So. 2d 98 (Fla. 5th Dist. Ct. App. 1991).
104. Id. at 100.
105. Id.
107. Id. at 862.
108. Id.
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).
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Recusal was the central theme in \textit{Town Centre v. Overby},\textsuperscript{120} where a law firm alleged it was unable to get fair and impartial judgments from a particular trial court judge due to an impeding law suit to challenge the local rule requiring that motions be filed with an accompanying notice of hearing attached.\textsuperscript{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.\textsuperscript{122} The Third District Court of Appeal granted disqualification in two of the three cases.\textsuperscript{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.\textsuperscript{124} For a well developed treatise on disqualification law in Florida, read Judge Baskin’s dissent in \textit{Nateman v. Greenbaum}.\textsuperscript{125}

VI. PLEADINGS

The biggest change in the area of Pleadings occurred in a substantive revision of rule 1.080(h)(f) by the Florida Supreme Court, effective at midnight on January 1, 1993,\textsuperscript{126} which will allow the use of facsimile (fax) for service of pleadings and papers.\textsuperscript{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 \textit{Pluess-Stauffer Industries, Inc. v. Rollason Engineering & Manufacturing, Inc.},\textsuperscript{128} the appellate court found the complaint failed to make a sufficient allegation of jurisdiction. The court further opined that,

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\item 120. 592 So. 2d 774 (Fla. 3d Dist. Ct. App. 1992).
\item 121. Id. at 775.
\item 122. Id.
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\item 124. Id. at 776 (citing \textit{Brown v. Dugger}, 547 So. 2d 1281 (Fla. 3d Dist. Ct. App. 1989)).
\item 125. 582 So. 2d 643, 645-48 (Fla. 3d Dist. Ct. App. 1991) (rejecting same basis denied).
\item 126. In re AMENDMENTS TO THE FLORIDA RULES OF CIVIL PROCEDURE, 17
\item 127. Id.
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\textit{VanDercreek}: Civil Procedure: 1992 Survey of Florida Law

"[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."\textsuperscript{129} It is improper for the court to address issues outside the pleadings filed for consideration by the court.\textsuperscript{130} In \textit{Miami Electronics Center, Inc. v. Suporta},\textsuperscript{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.\textsuperscript{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.\textsuperscript{133} Similarly, in \textit{Jaramillo v. Dubov},\textsuperscript{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 \textit{Wilcox v. Lang Equities, Inc.},\textsuperscript{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."\textsuperscript{136} In \textit{Bouldin v. Okaloosa County},\textsuperscript{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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\item 131. 597 So. 2d 903 (Fla. 3d Dist. Ct. App. 1991).
\item 132. Id. at 904 (citing \textit{Pla. R. Civ. P. 1.110(d), 1.140(b) & 1.190(b)}).
\item 134. 588 So. 2d 677 (Fla. 3d Dist. Ct. App. 1991).
\item 135. 588 So. 2d 318.
\item 136. Id. at 319.
\item 137. 580 So. 2d 205 (Fla. 1st Dist. Ct. App. 1992) (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).
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  \item \textsuperscript{126} In re AMENDMENTS TO THE FLORIDA RULES OF CIVIL PROCEDURE, 17 Fla. L. Weekly 477 (1992).
  \item \textsuperscript{127} Id.
  \item \textsuperscript{128} 597 So. 2d 957 (Fla. 5th Dist. Ct. App. 1992).
  \item \textsuperscript{129} Id. at 958 (citing Plummer v. Hoover, 519 So. 2d 1158 (Fla. 5th Dist. Ct. App. 1988)); Diminio v. Fartins, 577 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).
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  \item \textsuperscript{132} Id. at 904 (citing FLA. R. CIV. P. 1.140(d), 1.140(b) & 1.190(b)).
  \item \textsuperscript{133} See Wilcox v. Lang Equities, Inc., 588 So. 2d 318 (Fla. 3d Dist. Ct. App. 1991).
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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 claim 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 respondent 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 respondent 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,”

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(1) 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
District Court of Appeal in Sekot Laboratories, Inc. v. Gleason, 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.

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 respondent superior in the original complaint but then failed to realign that theory in subsequent amended pleadings. The appellate court considered the theory to have been "abandoned" when indications of an intention to pursue the respondent superior claim failed to appear in subsequent amended pleadings filed by the inmate.

Rule 1.190 states that when a party requests to amend their complaint, "leave of court shall be given freely when justice so requires." 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. In Hatcher v. Chandler, 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, the benefit of the doubt should be given to the appellant through the privilege of amendment."

In Bill Williams Air Conditioning & Heating, Inc. v. Haymarket Cooperative Bank, several of the counterclaim appellants sought to file in a third amended answer arose from the same "transaction or occurrence," 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.

In Fireman's Insurance Co. v. Venko, by granting summary judgment in error, the trial court had rescinded an underlying securities contract without joinder of an indispensible 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.

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, 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. Post-judgment petitions for attorney fees are untimely.

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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).
140. 588 So. 2d 236 (Fla. 2d Dist. Ct. App. 1991).
141. Id. at 237.
143. Bill Williams Air Conditioning & Heating, Inc. v. Haymarket Cooper Bank, 592 So. 2d 302 (Fla. 1st Dist. Ct. App. 1991); see also New River Yachting Ctr., Inc. v. Bucchicci, 407 So. 2d 607 (Fla. 4th Dist. Ct. App. 1982), review denied, 415 So. 2d 1360 (Fla. 1983);
dispute exists, the court cannot strike the pleading simply because one party alleges the facts to be false.\textsuperscript{155} In \textit{Montero v. Duval Federal Savings \\& Loan Ass'n},\textsuperscript{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.\textsuperscript{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."\textsuperscript{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.\textsuperscript{159}

In \textit{Matey v. Reinman},\textsuperscript{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. In \textit{Ingersoll v. Hoffman},\textsuperscript{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.\textsuperscript{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.\textsuperscript{163} The supreme court found that the statutory compliance was not jurisdictionally fatal,\textsuperscript{164} and that failure to comply may be excused by a showing of waiver

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\item \textsuperscript{155} Id. at 429.
\item \textsuperscript{156} 581 So. 2d 938 (Fla. 4th Dist. Ct. App. 1991).
\item \textsuperscript{157} Id. at 939.
\item \textsuperscript{158} Fla. R. Civ. P. 1.140(b).
\item \textsuperscript{159} Montero, 581 So. 2d at 939.
\item \textsuperscript{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)).
\item \textsuperscript{161} 589 So. 2d 223 (Fla. 1991).
\item \textsuperscript{162} Id.
\item \textsuperscript{163} Id.
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or estoppel.\textsuperscript{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.\textsuperscript{166}

Fraud claims must be pleaded with particularity.\textsuperscript{167} In \textit{Batlemento v. Dove Fountain, Inc.},\textsuperscript{168} the court determined that "particularity" requires identification of the false representation of fact and how the representation is false.\textsuperscript{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.\textsuperscript{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 \textit{Global Recreation v. Arco Shows},\textsuperscript{171} must contain an "explicit finding of willful or deliberate noncompliance with the court's authority."\textsuperscript{172}

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

\section*{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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\item \textsuperscript{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)).
\item \textsuperscript{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.
\item \textsuperscript{167} Fla. R. Civ. P. 1.120(b).
\item \textsuperscript{168} 593 So. 2d 234 (Fla. 5th Dist. Ct. App. 1991).
\item \textsuperscript{169} Id. at 238 (citing Gordon v. Etue, Wardlaw & Co., P.A., 511 So. 2d 384 (Fla. 1st Dist. Ct. App. 1987)).
\item \textsuperscript{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).
\item \textsuperscript{171} 585 So. 2d 455 (Fla. 2d Dist. Ct. App. 1991).
\item \textsuperscript{172} Id. at 456 (citing Commonwealth Fed. Sav. & Loan Ass'n v. Tubero, 569 So. 2d 247 (Fla. 1992)).
\item \textsuperscript{173} 579 So. 2d 730 (Fla. 1991).
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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 Mertens'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 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 willful 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. Hoffman-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 Glenagle Ship Management Co. v. Leonardi,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

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").
178. Id. at 91.
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)).
183. Id. at 337.
184. Id. at 338 (quoting Dodson v. Persell, 390 So. 2d 704, 708 (Fla. 1980)).
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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 case law. 201

202. See also North Broward Hosp. Dist. v. Button, 592 So. 2d 367 (Fla. 4th Dist. Ct. App. 1992) (appellee 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 unsigned assertion by plaintiff's counsel was not sufficient).


204. Id. at 1144.

205. 599 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).


209. Id. at 947.
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193. Id. at 910.
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. 590 So. 2d 111 (Fla. 1992).
199. Id. at 115.
201. It is interesting to note the tenor of the First District Court of Appeal opinion in Smith, in that Cragar overruled Jacksonville Medical Co., Inc. v. Aken, 560 So. 2d 1313 (Fla. 1st Dist. Ct. App. 1990), to the extent that it conflicted with Cragar.

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.' In State Farm Mutual Life Insurance Co. v. LaForest, 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."

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 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.

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. In Thomas v. Thomas, the appellate court took the transcript 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 appellate the "opportunity to be present and to confront the witness."
Inadequate notice can result in a new trial, as seen in Office Depot, Inc. v. Miller, 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. 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.

When the court orders arbitration, all proceedings on issues subject to the arbitration must cease. In Greenstein v. Baxasa Howell Mobley, Inc., 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.

In Palmer v. WDI, Inc., the Fifth District Court of Appeal refused certiorari where the trial court had denied discovery of certain documents. Certiorari is "the appropriate vehicle for testing the correctness of an order governing discovery." 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.

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 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. 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. The court may also enter a default judgment for failure to plead, and if "any paper" has been filed, the defaulting party shall be notified that an application for default has been filed.

Several cases reaching the appellate level recently indicate a general confusion over the meaning of "any paper" at the trial court level. In Beitsnik Construction Co. v. Kestling Carpets, Inc., 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. 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. 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.

Once a default judgment has been entered, the defendant's motion to vacate must either demonstrate excusable neglect, assert a meritorious defense, or demonstrate that the defendant acted with due diligence by taking action to defend and contest immediately upon notification of the filing.
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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, 399 So. 2d 209 (Fla. 3d Dist. Ct. App. 1982)).
212. Office Depot, 584 So. 2d at 591.
215. Id. at 403; Fla. Stat. § 682.08(2) (1989).
217. Id. at 1088.
218. Id. (quoting Allstate Ins. Co. v. Walker, 583 So. 2d 356 (Fla. 4th Dist. Ct. App. 1991)).
219. Id.
of civil procedure will control unless the Supreme Court has expressly enacted a rule providing otherwise.229 An example of this conflict is seen in Crocker v. Diland Corp.,230 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.231 The court clarified that the statute requires "responsive pleadings, not motion practice."232 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.233

IX. DISMISSAL

In general terms, a dismissal is an order for the termination of a case without a trial of any of its issues.241 It signifies the final ending of a suit; an end to the proceeding.242 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.243 Consequently, Florida trial courts "may not grant a motion for involuntary dismissal once a prima facie case is presented."243 Rule 1.420 governs the termination of actions by dismissal and provides for both voluntary and involuntary dismissals.244 A party may voluntarily dismiss the same action without prejudice only once.245 Subsequent voluntary dismissals operate "as an adjudication upon the merits when served by the plaintiff who has once dismissed in any court

229. Gonzalez v. Badcock's Home Furnishings Ctr., 343 So. 2d 7, 8 (Fla. 1977).
231. Id. at 1097.
232. Id. at 1099 (citing Aetna Life Ins. Co. v. County Casuals, Inc., 5 Fla. Supp. 2d 107 (Orange County Ct. 1983)).
233. Id. at 1100.
235. Id. at 331.
237. 1219.
238. Section 1.140(x)(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(x)(2).
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 the 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 "willfulness 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 willful 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 the toll to file a response.238 A statutory time limitation which conflicts with the rules 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

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229. *Atlantic Asphalt & Equip. Co.*, 578 So. 2d at 293.
232. *Id. at 747* (citing *North Shore Hosp., Inc. v. Barber*, 143 So. 2d 849 (Fla. 1962)).
234. *Id. at 687.*
235. *Reed v. Albright*, 593 So. 2d 1207, 1208 (Fla. 5th Dist. Ct. App. 1992);
238. *Id. at 1219.*
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241. *Id. at 1097.*
242. *Id. at 1099* (citing *Aetna Life Ins. Co. v. Country Casuals, Inc.*, 5 Fl. Supp. 2d 107 (Orange County Crt. 1983)).
243. *Id. at 1100.*
244. 1 FLA. DEC. 2d 330.
245. *Id. at 331.*
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 . . .


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" . . .").


254. Hernandez, 880 So. 2d at 795.

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


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.

258. Id.


260. Id. at 1308-09.

261. Id. at 1306.

262. Id. at 1308.

263. Id.

264. Del Duca, 587 So. 2d at 1308.

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\textsuperscript{258} Id.

\textsuperscript{259} Del Duca v. Anthony, 587 So. 2d 1306 (Fla. 1991).

\textsuperscript{260} Id. at 1308-09.

\textsuperscript{261} Id. at 1306.

\textsuperscript{262} Id. at 1308.

\textsuperscript{263} Id.

\textsuperscript{264} Del Duca, 587 So. 2d at 1308.

\textsuperscript{265} Id. at 1309 (citing Anthony v. Schmitt, 557 So. 2d 656, 662 (Fla. 2d Dist. Ct. App. 1990) (quoting Barnett Bank v. Fleming, 308 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 offeror’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 statute; 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

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.
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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

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, 265 So. 2d 21, 40-41 (Fla. 1972).
276. Id.
278. Fla. Stat. § 768.79 (1990); cf. Fla. Stat. § 768.79 (1)(b) (1989) (providing that offer "shall not be made 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.
282. Id.
rejected, the offer is merely a maneuver to prepare for collecting attorney's 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," 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."[284]

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.288

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.

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 infrequent cases which follow them."291

Summary judgment 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

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).
289. Gessett, 593 So. 2d at 293.
290. 50'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 Ccelotex Corp v. Carrett, 477 U.S. 317 (1983) and similar cases loosen the restriction on the use of summary judgment, they do not represent Florida law).
291. Id. at 212.
293. Fla. R. Civ. P. 1.140(f), 1.150.
294. Id. at 1.480.
297. Id. at 1331.
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Even though the Florida Supreme Court stated, "we do have some concerns as to whether a one dollar offer of settlement is a bona fide offer," 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."²⁸⁶

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.

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).
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 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.,310 the plaintiff, McCain, was awarded $175,000 in a personal injury jury trial.311 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.312 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.313 The court concluded that the denial of the motion was error and that everything occurring afterward was a nullity.314

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.315

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

298. Id. (citing Holton v. H.J. Wilson Co., 482 So. 2d 341 (Fla. 1986); FLA. STAT. 766.31(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. CV. P. 1.510(e).
301. FLA. STAT. 766.31(4)(f).
303. Disapproving Wakefield Nursery v. Hunter, 443 So. 465 (Fla. 4th Dist. Ct. App. 1984) which was in direct conflict on this issue.
304. Id.
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)).
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299. U-Haul, 596 So. 2d at 1331.
300. Fla. R. Civ. P. 1.150(c).
301. 591 So. 2d 609 (Fla. 1991).

303. Id.

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. The statutory rate is simple interest per annum and cannot itself bear interest. Unlike attorneys’ fees and costs, prejudgment interest is an element of damages that must be part of the final judgment. 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. 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. 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. 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 and 772.11 of the Florida Statutes, certain legal costs and charges may be awarded to the prevailing party in a civil action. Sanctions assessed for failure to respond to discovery in aid of execution may constitute costs and may be recoverable from the prevailing party by contract.

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


318. Id. at 1044.

319. Id.

320. Id. at 1045.


322. Fla. STAT. § 772.11 (1989) (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).


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).
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\textsuperscript{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 211, 215 (Fla. 1985)); see also prejudgment rate of 1.2% per annum simple interest.


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

\textsuperscript{318} Id. at 1044.

\textsuperscript{319} Id.

\textsuperscript{320} Id. at 1045.

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

\textsuperscript{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 insurer in any suit defended by insurers, and sanctions are costs).
If a claim under a statute providing for such fees is dismissed, no fees associated with that statute’s authority will be awarded.\textsuperscript{335} Attorney’s fees are available under a variety of statutes governing a wide variety of subjects such as probate,\textsuperscript{336} special public defender,\textsuperscript{337} eminent domain,\textsuperscript{338} and arbitration proceedings.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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,\textsuperscript{342} and may apply \textit{Rowe}\textsuperscript{343} risk multipliers where appropriate.\textsuperscript{344}

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

337. \textit{Id.} § 925.036.
338. \textit{Id.} 73.091.
340. \textit{Id.} § 57.105(1) (1991); Rojas v. Drenke, 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).
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.\textit{Id.} at 1147.
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\textsuperscript{344} Id. at 1147.

\textsuperscript{345} 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.\textsuperscript{346} In Schick v. Department of Agriculture and Consumer Services,\textsuperscript{347} 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.\textsuperscript{348}

All claims for attorney's fees based on statute or contract must usually be pled to be recovered.\textsuperscript{349} 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.\textsuperscript{350}

\textbf{XIV. RES JUDICATA/COLLATERAL ESTOPPEL.}

\textit{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.\textsuperscript{351} In order to invoke the defense of \textit{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.\textsuperscript{352}

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

\textsuperscript{345} Id.

\textsuperscript{346} 599 So. 2d 641 (Fla. 1992).

\textsuperscript{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).

\textsuperscript{348} Sandoval v. Banco De Comercio, 585 So. 2d 584, 584 (Fla. 1991) (citing Stockman v. Down, 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").

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


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):

354. Id.
356. West, 595 So. 2d at 97.
357. Id.
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 un-reversed.362
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354. Id.
356. West, 595 So. 2d at 97.
357. Id.
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361. Id. (emphasis added).