Florida Practice and Procedure

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Abstract

The Florida courts, as one would expect, decided a large number of cases concerning procedural issues during this survey period.

KEYWORDS: Florida, jurisdiction, venue
ble tolling applied to administrative proceedings. The courts reaffirmed a trend which began in 1981 of robbing the Cross Key decision of its effectiveness. The result is that Florida courts have moved into the national mainstream in the area of the delegation doctrine. The courts continued to engage in less than totally principled application of the standards of judicial review. In other areas the courts continued the process of gradually filling in the gaps in our knowledge about what the APA and other statutes require.

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The Florida courts, as one would expect, decided a large number of cases concerning procedural issues during this survey period. Most of the cases, either because of their peculiar facts or because of the courts' summary treatment of them, do not warrant discussion. This article addresses cases which, in the author's opinion, present novel or interesting resolutions of procedural issues or provide guidance for practitioners in resolving particular problems. On occasion, the author indulges in the luxury of criticism, but the primary emphasis of the article is reporting the application of the procedural rules.

JURISDICTION, PROCESS, VENUE

The district courts of appeal struggled with several cases during the survey period in an attempt to bring order to Florida's long-arm statutes. A number of the cases occurred in the domestic relations setting.

In Bolton v. Bunny's Pride & Joy, Inc., the court certified the question "May delivery of a defective product into Florida for placement in the stream of commerce constitute 'committing a tortious act within this state' as provided by section 48.193(1)(b), Florida Statutes?" Plaintiffs were injured in Indiana when a seat in their van collapsed. The seat was manufactured in Florida and placed in the van as part of a conversion package installed by the defendant, a Georgia corporation. The van was then sold and delivered to a Florida retailer for sale to Florida users. The Fourth District Court of Appeal held that the delivery of a van with a defective seat into Florida constituted a "tortious act" within the meaning of the Florida long-arm statute. In reaching its holding, the court relied almost exclusively on decisions of

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1. 521 So. 2d 322 (Fla. 4th Dist. Ct. App. 1988).
the Illinois court of appeal interpreting the similar Illinois statute. The court noted that previous decisions had indicated that for purposes of the tortious act section of the long arm statute, the place of injury must be Florida, but appeared to accept earlier decisions that had held that the application of the tortious act section does not necessarily depend upon the place of injury.

Though the court recited that it was persuaded by the reasoning of the Illinois intermediate courts, the opinion is unclear as to exactly what that reasoning is. In *Braband v. Beech Aircraft Corp.*, the Illinois court appeared to give the word "tortious" a very broad definition; any act committed in the jurisdiction which involves a breach of a duty to another and makes the actor liable in damages. In *Connelly v. Uniroyal, Inc.*, the Illinois court held that the tortious act statute applies not only to an injury which occurs within the state, but also to all elements and conduct which relate to or have sufficient causal connection with the injury. It will be interesting to see what the Florida Supreme Court has to say on the issue in answering the certified question, especially in light of the recent decision of the United States Supreme Court in *Asahi Metal Industry Co. v. Superior Court*, which called into question the taking of jurisdiction based on the "stream of commerce" theory.

In *Ranger Nationwide, Inc. v. Cook*, the court held that a foreign corporation which registers to do business in Florida is amenable to jurisdiction no matter what the nature of the claim or whether the claim arises out of the business activities in Florida. The court stated that an argument to the contrary "borders on, if it does not cross, the frontier of the frivolous." In that case, plaintiff's decedent was killed in an accident in North Carolina, involving a truck, traveling from Savannah, Georgia to New Brunswick, New Jersey, pursuant to a trip lease arranged by a Maryland corporation not authorized to do business in Florida. The truck was carrying a trailer under lease by a Delaware corporation licensed to do business in Florida. Plaintiff sued the truck driver, the owner of the tractor, the owner of the trailer, and the lessee of the trailer. All defendants were served pursuant to Florida Statutes, section 48.193(2) which requires no connection between the Florida activity of the defendant and the cause of action sued upon. The court held that with respect to the defendants who had not registered to do business in Florida, both the statute and the constitution would require that in the absence of such a connection, the activities of the defendants must be "substantial and not isolated." The court held the activities to be isolated. While the result seems fair with respect to the defendants who had not registered to do business in Florida, one wonders why the court failed to analyze the activities of the registered defendant in light of the fact that other courts have distinguished between registering to do business and actually doing business.

In *City Contract Bus Service, Inc. v. Woody*, the court held that the "connectivity" requirement, that is, the connection between the activity in Florida and the cause of action, must be specifically pleaded in order to confer jurisdiction. In *City Contract*, Tennessee residents sued defendant, a Georgia corporation, for injuries arising out of a motor vehicle accident occurring in Atlanta, Georgia. In response to a motion to dismiss in which defendant alleged it had no office or other facility in Florida and had engaged in no business activities in Florida, plaintiffs relied on a computer printout from the Secretary of State of Georgia listing the principal office address of the defendant as a Jacksonville post office box. The appellate court reversed the trial court's denial of the motion to dismiss and remanded, suggesting that the document from the Secretary of State, without more, does not establish either
the Illinois court of appeal interpreting the similar Illinois statute. The court noted that previous decisions had indicated that for purposes of the tortious act section of the long arm statute, the place of injury must be Florida, but appeared to accept earlier decisions that had held that the application of the tortious act section does not necessarily depend upon the place of injury.

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In City Contract Bus Service, Inc. v. Woody, the court held that the "connectivity" requirement, that is, the connection between the activity in Florida and the cause of action, must be specifically plead in order to confer jurisdiction. In City Contract, Tennessee residents sued defendant, a Georgia corporation, for injuries arising out of a motor vehicle accident occurring in Atlanta, Georgia. In response to a motion to dismiss in which defendant alleged it had no office or other facility in Florida and had engaged in no business activities in Florida, plaintiffs relied on a computer printout from the Secretary of State of Georgia listing the principal office address of the defendant as a Jacksonville post office box. The appellate court reversed the trial court's denial of the motion to dismiss and remanded, suggesting that the document from the Secretary of State, without more, does not establish either

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7. Id. at 303, 367 N.E.2d at 122.
9. Id. at 303, 370 N.E.2d at 119.
12. 519 So. 2d 1087 (Fla. 3d Dist. Ct. App.), rev. denied, 531 So. 2d 167 (Fla. 1988).
13. Id. at 1088.
14. Id. at 1089.
that the defendant is actually engaged in the transaction of business as required for jurisdiction under Florida Statutes, section 48.081(5) or that defendant is engaged in substantial, and not isolated activity within the meaning of section 48.193(2). The allegations in the complaint failed to track either the language of section 48.081(5) or section 48.193(2) and proof was not specifically directed to these requirements. The message seems clear, plaintiff must specifically plead elements necessary to establish jurisdiction under either statute and stand prepared to provide sufficient proof if challenged. A call to the Secretary of State may not be sufficient. 17

Plaintiff in Plummer v. Hoover 18 was similarly unsuccessful because of a pleading defect. Defendant’s automobile was being operated with his consent in Florida when plaintiff was injured. Process was served upon defendant in Kentucky. The complaint failed to allege that the defendant was a nonresident of Florida nor did it allege that he permitted a motor vehicle to be operated with his consent in the state of Florida as required by Florida Statutes, section 48.171. To the plaintiff’s assertion that jurisdiction was sought under Florida Statutes, section 48.193, the court responded that the complaint failed to allege any of the exhaustive list of acts or omissions upon which courts of the state can assert jurisdiction over out-of-state residents. Denial of the motion to quash was reversed.

Jurisdiction in domestic relations actions continued to be a problem for Florida courts in matters of paternity, custody disputes, and property settlements. In Department of Health & Rehabilitative Services v. Wright 19 the Florida Supreme Court resolved a conflict between the First and Second District Courts of Appeal involving the Application of Florida Statutes, section 48.193 to paternity cases. 20 In Bell v. Truffnell 21, the district court of appeal had held that in failing to pay child support, a putative father had breached a duty imposed by law and had therefore committed a tortuous act within the meaning of the long-arm statute, even though the fact of paternity itself had not been established in a judicial proceeding. In Wright, the supreme court held that failure to pay child support cannot be considered a tort until a duty to pay such support has been established by law. It took its reasoning from the opinion of the Second District Court of Appeal in Wright: “[A] court cannot as an initial matter, assume that a defendant is the father of a child so it can adjudicate the matter of non-support, and upon finding non-support, use such “tortious” conduct as the basis of jurisdiction to adjudicate paternity.” 22

In Wright, Luke, a resident of Florida was visited by her boyfriend Wright, and just over eight months later, bore a son. Wright, a member of the armed forces, was not a Florida resident nor did the couple share a matrimonial domicile in Florida. Since Wright never resided in the State of Florida, Florida Statutes, section 48.193(1)(e), which gives jurisdiction over support cases where defendant has resided in the state or the couple has established a matrimonial domicile, would not support jurisdiction.

Justices Kogan and Barkett dissented to the holding that the “tortious act” section did not give jurisdiction under these facts, arguing that the ruling is an unjustified limitation of personal jurisdiction and precludes a cause of action in which a duty has been breached without providing any means of litigation. 23 Justice Kogan would accept the reasoning of courts that have held that it is enough to allege facts sufficient to support long-arm jurisdiction in the pleadings and then require the party seeking to assert jurisdiction to prove those allegations in the action. This would allow the issues of paternity and support to be decided in one action and would be, according to Justice Kogan, an “updated and more reasonable” approach. 24

In deciding a matter of interstate custody, the Second District Court of Appeal certified the following question to the Florida Supreme Court in Williams v. Starner 25: “Whether the holding in Wells v. Ward,” 26 that the court granting the dissolution has exclusive jurisdict-

17. Unless, of course, the defendant is actually registered to do business in Florida in which case Ranger Nationwide seems to suggest no inquiry into the defendant’s business activities will be made.
18. 519 So. 2d 1158 (Fla. 5th Dist. Ct. App. 1988).
19. 522 So. 2d 838 (Fla. 1988).
20. See also Klukewich v. Howenstein, 508 So. 2d 471 (Fla. 3d Dist. Ct. App. 1987) which conflicted with Bell v. Truffnell, 418 So. 2d 422 (Fla. 1st Dist. Ct. App. 1982) and which was resolved consistently with Wright.
23. Wright, 522 So. 2d at 841 (Kogan, J., dissenting).
24. Id. at 842. The Florida Legislature has amended FLA. STAT. § 48.193 (Supp. 1988) adding subsection (b) which now reads, “With respect to a proceeding for paternity, engaging in the act of sexual intercourse within this state with respect to which child may have been conceived.” 1988 Fla. Laws 88-176.
25. 532 So. 2d 469 (Fla. 2d Dist. Ct. App. 1988).
26. 314 So. 2d 138 (Fla. 1975).
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tion to modify custody provisions, "is still valid law in light of the en-
actment of the Uniform Child Custody Jurisdiction Act in 1977."27 In
Williams, the wife filed a "petition for dependency" in the juvenile di-
vision of the circuit court of Lee County alleging that the husband had
abandoned the children. She alleged it would be in the best interests of
the children if she were awarded custody. At a hearing on the petition
for dependency, attorneys for both parties advised the trial judge that
they had reached an agreement for the case to be transferred to Lee
County Circuit Court for post-dissolution proceedings. In the transfer
order, the trial judge stated that the petition for dependency would be
determined to be a petition for modification of the final judgment of
dissolution. Husband, represented by new counsel, filed a motion to dis-
miss for lack of jurisdiction alleging that Hillsborough County, which
granted the final judgment of dissolution, would be the only court to
have jurisdiction to modify the custody agreement. The trial judge de-
nied the motion to dismiss based on the agreement of the parties, and a
petition for writ of prohibition followed.

In granting the writ of prohibition, but certifying the question, the
Second District Court of Appeal noted that personal jurisdiction may
be waived, but that subject matter jurisdiction may not be waived or
conferred upon a court by agreement of the parties.28 Under Wells, the
issue of the proper forum to determine or modify custody has been one
of subject matter jurisdiction, and case law has consistently held that
once the chancery court obtains jurisdiction over a child ancillary to
divorce proceedings, it has inherent and continuing jurisdiction to pro-
tect the child.29 This reasoning had been applied to interstate custody
disputes until the passage of the Uniform Child Custody Jurisdiction
Act (UCCJA).30 The UCCJA abrogated common law with respect to
jurisdiction to entertain interstate custody determinations and has as its
purposes the avoidance of jurisdiction competition and conflicts and the
facilitation of enforcement of child custody decrees.31 In view of the
passage of this act, it seemed illogical, in the view of the second dis-
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but could not modify a decree entered in Hillsborough County. Accord-
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28. Id. at 471.
29. Id. at 472 (quoting Cone v. Cone, 62 So. 2d 907, 908 (Fla. 1953)).
31. Id. § 61.1302 et seq. (1987).
33. 519 So. 2d 1027 (Fla. 2d Dist. Ct. App. 1988).

be modified by the circuit court in the county in which either the child
and custodial parent or non-custodial parent resides. Presently by stat-
ute, alimony and child support obligations may be modified by the
court in the county in which either party resides.

The Second District Court of Appeal was correct in granting the
writ of prohibition for the reason that under the present law in an in-
trastate custody dispute the court originally granting the dissolution
has exclusive jurisdiction, but the matter would perhaps be one better
left for the legislature rather than the courts.

Under the UCCJA, visitation rights are deemed matters of cus-
tody, and thus the Act applies to cases involving interstate visitation
problems. Accordingly, the Second District Court of Appeal held in
Heyward v. Heyward,32 that the trial court should have abstained from
determining visitation rights and primary residence of a child whose
closest ties were with the State of New York. In that case, the parties
were divorced in New York where they and their child resided. The
New York decree gave the mother custody and the father specific visi-
tation rights. Subsequently, the mother, without notice to the father,
took the child to Florida. The father filed a petition for modification in
New York asking that sole custody be awarded to him. The New York
court granted temporary custody to the father and directed that the
order could be enforced by means of the UCCJA. The father came to
Florida in an attempt to reclaim the child. The mother then filed a
complaint in Pinellas County seeking to establish the New York judg-
ment as a Florida judgment and then to have modification thereof. The
Florida court issued a temporary order restraining the father from un-
supervised visitation with the child. Ultimately, the Florida court en-
tered an order finding that it had jurisdiction over the father and the
child to determine custody of the child.

While the child had some contacts with Florida in that the mother
had family members here and intended to buy a house here, there were
also family in New York. The UCCJA requires a court to consider the
relationship of the child to each jurisdiction, but it also prohibits a state
from modifying a custody decree of another state if "[i]t appears . . .
that the court which rendered the decree does not now have jurisdiction
. . . or has declined to assume jurisdiction to modify the decree."33
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ation to modify custody provisions, "is still valid law in light of the en-
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ing the Florida proceedings, the Florida court, said the Second District Court of Appeal, should decline jurisdiction.88

The Third District Court of Appeal had the opportunity to determine a case involving international property disputes in *Montano v. Montano*.89 In that case, the parties, a Guatemalan citizen and an American citizen, were married in Miami by a Guatemalan notary public. A certificate of marriage was issued and recorded in Guatemala. The wife filed for dissolution in Miami. The court issued a final judgment dissolving the marriage, fixing an amount for child support, alimony and attorney's fees and ordering a distribution of property. On appeal, the husband first argued that because the marriage was not performed in compliance with Florida formalities, the Florida courts would lack jurisdiction to dissolve the marriage. The court of appeal held that under principles of comity, a marriage valid under foreign law may be treated as a Florida marriage for dissolution purposes. The court would have jurisdiction in rem to dissolve the marriage. As to the disposition of real property, however, the husband's position was correct. The wife had been unable to obtain service of process over the husband. The Notice of Action for constructive service failed to describe the real property as required by statute.90 For similar reasons, that the court lacked in rem jurisdiction over any matter but the dissolution itself, the award of custody, support and alimony was improper.

Two cases involving service of process decided during this survey period are worth noting: *Carlini v. State Department of Legal Affairs*,91 because the court takes some time to educate the practitioner on the niceties of challenges to process and *Citrex v. Landsman*,92 because it involves the use of trickery in service of process.93

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35. In Gordey v. Graves, 528 So. 2d 1319 (Fla. 5th Dist. Ct. App. 1988) the court held that the trial court should have exercised jurisdiction in a UCCJA act case where the contacts with Florida were significant and there was no evidence that the foreign court would have jurisdiction under Fla. Stat. § 61.1308 (1987). It is clear from reading both cases that it is not sufficient to inquire only into the contacts with the state without also considering the possibility of jurisdiction in the courts of the foreign state.

36. 520 So. 2d 52 (Fla. 3d Dist. Ct. App. 1988).


38. 521 So. 2d 254 (Fla. 4th Dist. Ct. App. 1988).

39. 528 So. 2d 517 (Fla. 3d Dist. Ct. App. 1988).

40. Other cases of process cases included: Bridges v. Bridges, 520 So. 2d 318 (Fla. 2d Dist. Ct. App. 1988) (service of notice upon attorney who had withdrawn held insufficient); Higgins v. Garcia, 522 So. 2d 95 (Fla. 3d Dist. Ct. App. 1988) (corporate officer served process in midst of deposition immune from process as individual while appearing as officer of corporation); Ross v. Breeder, 528 So. 2d 64 (Fla. 3d Dist. Ct. App. 1988) (partner entitled to notice of liens pending upon posting of bond where required instruments would not have put good faith purchaser on notice that there was a cloud on title).

41. 473 So. 2d 721 (Fla. 4th Dist. Ct. App. 1985).

42. 118 So. 2d 71 (Fla. 3d Dist. Ct. App. 1960).

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The Third District Court of Appeal had the opportunity to determine a case involving international property disputes in Montano v. Montano.\textsuperscript{87} In that case, the parties, a Guatemalan citizen and an American citizen, were married in Miami by a Guatemalan notary public. A certificate of marriage was issued and recorded in Guatemala. The wife filed for dissolution in Miami. The court issued a final judgment dissolving the marriage, fixing an amount for child support, alimony and attorney's fees and ordering a distribution of property. On appeal, the husband first argued that because the marriage was not performed in compliance with Florida formalities, the Florida courts would lack jurisdiction to dissolve the marriage. The court of appeal held that under principles of comity, a marriage valid under foreign law may be treated as a Florida marriage for dissolution purposes. The court would have jurisdiction in rem to dissolve the marriage. As to the disposition of real property, however, the husband's position was correct. The wife had been unable to obtain service of process over the husband. The Notice of Action for constructive service failed to describe the real property as required by statute.\textsuperscript{87} For similar reasons, that the court lacked in rem jurisdiction over any matter but the dissolution itself, the award of custody, support and alimony was improper.

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37. FLA. STAT. § 49.08(4) (1987).
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42. 118 So. 2d 71 (Fla. 3d Dist. Ct. App. 1960).

In Carlini, the State instituted an action for forfeiture of real property, sending the process to the address for which forfeiture was sought. Notice was delivered to Peter Carlini, brother-in-law of the defendant, who did not reside at the attempted place of service. Defendant filed a motion to quash service of process attaching the affidavit of Carlini stating that the defendant did not reside at the address and that her whereabouts were unknown. The trial court denied the motion because the motion failed to inform the movant how to cure defects in the service. This requirement had been announced by the Fourth district in Leatherwood v. Royal Oaks Rentals,\textsuperscript{44} and had also been set forth by the Third district in Over 30 Association, Inc. v. Blatt.\textsuperscript{45}

In Carlini, the court receded from the requirement that the motion must state how the defects can be cured, stating that there is no requirement in Florida Rule of Civil Procedure 1.140(b) that the motion state how the defects can be cured. All that is required is that the motion give the grounds and the substantial matters of law to be argued. Requiring that the motion state how the defects may be cured improperly shifts the burden of proof from plaintiff to defendant, said the court. In Carlini process was attempted under Florida Statutes, section 48.031(1), the general process statute requiring service at the usual place of abode by leaving the process with a person who resides therein. Since the address was not the defendant's usual place of abode and Carlini, with whom the papers were left, was not a resident of the abode, service was clearly improper.

In a special concurrence, Judge Glickstein applauded the author of the majority opinion (Judge Walden) for his questioning behind the reasoning of the precedents. Judge Glickstein sought to distinguish between quashing service of process and dismissing an action when there is an issue of jurisdiction over the person. He quoted from a major treatise\textsuperscript{46} which explains that motions under 12(b)(4) and 12(b)(5) of the Federal Rules of Civil Procedure (Florida Rules 1.140(b)(4),(5)) differ from the other Rule 12 motions in that they offer the court the possibility of quashing process thus retaining the case and avoiding dis
missal. When an action is dismissed, the plaintiff must restate the entire action while if the process is quashed, only the service need be repeated. The latter procedure is preferred in those cases where there is a reasonable prospect that the plaintiff will be ultimately successful in serving thus avoiding needless delay and expense in reinstating the action.44

The service of process by trickery issue arose in *Citrex v. Landsman.*45 Defendants were Mexican residents who initiated settlement negotiations in order to settle a commercial dispute. Prior to defendants' arrival in the United States, the plaintiffs filed a complaint in the dispute and procured a summons. They then changed the location of the settlement conference and, before the conference began, had the defendants served by a deputy sheriff. The appellate court reversed the trial court's denial of a motion to quash. The court refused to accept plaintiffs' argument that service was proper because they had made no affirmative misrepresentations and the defendants had initiated the settlement conference. The court felt that because the complaint was filed, summons issued and location changed, and process served before the settlement negotiations started, the plaintiffs clearly had no intention to participate in settlement, and the conference was merely an artifice to serve defendants. While it may have seemed an easy and inexpensive way to serve process on foreign defendants, such conduct is clearly outside the range of fair dealing.

Generally, courts have little difficulty applying Florida's general venue statute,46 which allows for venue where the defendant resides, where the cause of action accrues, or where the property in litigation is located. In *Goodmakers v. Godmakers,*48 however, the court was faced with determining the meaning of "property in litigation" in a dissolution action.48 The issue presented was whether this provision of the general venue statute applies to marital dissolution cases. The court held that it does not. The "property in litigation" provision applies to actions local in nature, that is, proceedings against property having a fixed loca-

cation. A dissolution of marriage is a transitory action, an action relating to a person or personal property. While some in personal actions involve real property, it is the nature of the underlying issues that determines whether the action is local or transitory. Unless the underlying issue is an action on the property itself, the action is personal or transitory. Therefore, the defendant may be sued in the county where he resides or where the cause of action accrued.

The local-transitory distinction also cropped up in *Halls Ceramic Tile, Inc. v. Tiede-Zoeller Tile Corp.*49 The litigation concerned the construction of the Peabody Hotel in Orlando. The contract between the parties had a forum selection clause stating that all disputes in the contract would be brought in New York. A cross claim involving Halls' suit on a payment bond posted in Orange County where the notice of bond had been filed was dismissed based on the forum selection clause. The court of appeal held that where bonds have been posted to exempt the property from foreclosure of mechanic's liens, the proper forum is the court where the real property is located and the security is posted. According to the court, while these are not technically in rem suits, they are not the kind of transitory actions in which courts will decline to exercise jurisdiction on the basis of forum selection clauses.

A conflict between the general venue statute and a special venue statute, Florida Statutes, section 607.274(2), was the issue in *Gallagher v. Smith.*50 In that case appellants filed a four count complaint in Broward County. After a hearing, it was transferred to Duval County. The complaint alleged counts in breach of contract, conversion, and civil theft and sought in the fourth count dissolution of the corporation organized pursuant to the contract under suit. The motion to change venue was based upon the fact that Florida Statutes, section 607.274(2) provides that proceedings by shareholders of a corporation to liquidate the corporation shall be brought in the county in which the last known principal office of the corporation, as shown by the records of the Department of State, is situated. In holding that this section must apply to the fourth count of the complaint, the court rejected an argument that specific venue statutes control over the general venue statute only in cases of one count. The court held the special venue statute must apply to the fourth count.

Application of that statute was not easy, however. The records of the Department of State indicated that the street address of the initial

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44. *Id. at § 1354, quoted in Carlini v. State Dept. of Legal Affairs, 521 So. 2d 254, 257 (Fla. 4th Dist. Ct. App. 1988).*
45. *528 So. 2d 517 (Fla. 3d Dist. Ct. App. 1988).*
46. *FLA. STAT. § 47.011 (1987).*
47. *520 So. 2d 575 (Fla. 1988).*
49. *522 So. 2d 111 (Fla. 5th Dist. Ct. App. 1988).*
50. *517 So. 2d 744 (Fla. 4th Dist. Ct. App. 1987).*
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registered office of the corporation was in Duval County. Appellants submitted an affidavit of a corporate officer stating that since the specific Broward County site for the principal place of business had not yet been determined when the business was incorporated, an initial address in Duval County had been used. The affidavit was, however, unsworn and hence could not be relied upon. Further evidence submitted by the appellants tended to indicate that the business establishment was in Broward, rather than Duval County despite that this fact was not reflected in the State Department records. The court then asked, what if the records of the Department of State are patently incorrect or the principal office of the corporation is not shown in the records? Finding no help in the statutes, the court determined that where the State Department’s records are incorrect, independent evidence should be considered and that “principal office” is not the same as “initial registered office” for the purposes of the venue statute.

Assuming the fourth count had required a transfer of the action to Duval County, the court asked whether the three remaining counts were properly transferred with it. That question was answered in the affirmative as Florida Statutes section 47.122 and Florida Rule of Civil Procedure 1.270 provide that an action may be transferred to any other court of record in which it might have been brought for the convenience of the parties or witnesses or in the interest of justice and that a court may consolidate actions when they involve common questions of law or fact. The question whether such a transfer would be in the interest of convenience, however, was complicated by a failure of the record to reflect factors of convenience. Obviously, a remand was the only workable solution.

PLEADING, PRETRIAL, DISCOVERY AND LIMITATIONS

During this survey period the Florida Supreme Court announced that Florida recognizes the “military contractor’s defense” in asbestos cases in response to a certified question from the United States Court of Appeals for the Eleventh Circuit. In Dorse v. Armstrong World Industries, Inc., defendant asserted the “government specifications defense” or “military contractor’s defense” in response to a wrongful death action based on negligence, strict liability, including failure to warn, and breach of implied warranty. Defendant responded that it manufactured and sold asbestos-containing materials to the Navy pursuant to federal government contracts which required strict compliance with contract specifications. According to the Florida Supreme Court, an independent contractor who asserts this defense must show that the decision to confront or create a known material risk essentially was made by the military. Additionally, the contractor must show compliance with the specifications precisely prescribed and required by a contract between it and the government. The defense is inappropriate where the contract in question is to supply goods or services of a commercial, nonmilitary nature, that is, when the goods or services are the same or substantially similar to goods produced for sale to nonmilitary buyers. The court adopted the test used by the Court of Appeals for the Eleventh Circuit requiring affirmative proof that 1) the contractor did not participate or only minimally participated in the design of the defective product; or 2) that the contractor timely warned the military of the risks of the design and of alternative designs known to the contractor, and that the military clearly authorized the contractor to proceed with the design.

In announcing the existence of the “military contractor’s defense,” the court based its reasoning on the federal war-making and defense powers, rather than on sovereign immunity. Because an independent contractor is not an agent of the government, it cannot participate in governmental immunity. A state court, however, has no power to alter or modify decisions on matters vital to the national defense by allowing judicial remedies of injunctions or damages, even when the conduct, in a civilian context, would be tortious.

In Reno v. Adventist Health Systems, the court, in reviewing the granting of a motion for judgment on the pleadings, reminded the litigants of the proper role of the reply to an affirmative defense. In that case, the plaintiff had failed to respond to a defense that plaintiff could not recover for a hospital’s refusal to permit the plaintiff, a radiologist, to use the hospital’s radiology facilities because the hospital had in effect an exclusive contract for provision of radiological services. The trial court granted a motion for judgment on the pleadings because plaintiff admitted the affirmative defense by failure to reply. The appel-

52. 513 So. 2d 1265 (Fla. 1987).
53. Id. at 1269 (quoting Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 746 (11th Cir. 1985), cert. denied, 476 U.S. 1139 (1987)).
54. Id. at 1268-69.
55. 516 So. 2d 63 (Fla. 2d Dist. Ct. App. 1987).
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Failure to plead an affirmative defense at all was excused in Suris v. Tropical Federal Savings & Loan Association.67 Tropical sued alleging Suris had failed to make payments on a promissory note executed and delivered to it. Suris denied every allegation in his answer. When Tropical moved for summary judgment, Suris filed an affidavit swearing that the signature on the note was not his. The trial court entered summary judgment in favor of Tropical. The appellate court reversed. It noted that failure to plead an affirmative defense waives the issue and that forgery must be raised by specific allegation in the answer. Nevertheless, the court held, it could "look beyond the issues presented in the pleadings to ensure that a party is not deprived of his full day in court... if the record indicates he has a bona fide defense."68

Dismissal for lack of prosecution continued to be troublesome for the district courts of appeal. The Fourth District Court of Appeal overturned dismissals in two cases. In Cohn v. Nostalgia Realty, Inc.,69 the trial court granted an extension of time warning that the case would be dismissed for failure to comply with the court's order if not disposed of by a certain date. Appellants moved for a second extension of time when it became apparent that an arbitrator would not be available until after the specified date. The motion was unopposed. Nevertheless, the court dismissed for failure to prosecute. Finding no willful disobedience or bad faith, the appellate court reversed. In Personalized Air Conditioning, Inc. v. C.M. Systems of Pinellas County, Inc.,70 the ap-

pellant's response to an order to show cause why the action should not be dismissed for lack of prosecution was that plaintiff had filed a petition for bankruptcy during the pendency of the suit, thus automatically staying the action. The district court held that because of the stay the subsequent order dismissing for failure to prosecute was void.

Insurance companies were successful in obtaining dismissals under Florida Statutes, section 627.7262 of two actions through common law writ of certiorari. In State Farm Fire & Casualty Co. v. Nail,71 plaintiff sued the insured and State Farm for injuries suffered in an altercation at a football game. State Farm successfully moved to dismiss on the basis of the nonjoinder statute.72 After plaintiff's action was filed, State Farm filed a declaratory judgment action against its insured seeking a determination of its rights and liabilities under a homeowner's policy. Plaintiff filed a motion to consolidate the negligence action and the declaratory judgment action, and the trial court consolidated the two actions for purposes of discovery and trial. The appellate court held that in allowing consolidation the trial judge departed from the legislative mandate that insurance companies shall not be parties to negligence actions nor should discovery be had against the insurer until the liability of the insurer is determined. Similarly, in Cincinnati Insurance Co. v. Moffett,73 the First District Court of Appeal held that a trial judge's order departed from the essential requirements of law. The order denied a motion to dismiss based upon the nonjoinder statute because the insurance company had failed to provide details of coverage as required by law.74 While sanctions may be appropriate for such behavior, the court is not free to ignore the clear mandate of the statute. In both instances, judicial attempts to move the cases along with economy of judicial resources were frustrated by the statutory mandate.

In Abelson v. McGee,75 the refusal to allow joinder was an abuse of discretion. Two real estate mortgages were foreclosed against an estate. The estate sought to join an interested third party and to assert, by amendment, a counterclaim against the plaintiff based upon the same transaction as was the subject matter of the complaint. The trial court refused to allow the joinder, but provided in the final judgment

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67. 515 So. 2d 1049 (Fla. 3d Dist. Ct. App. 1987).
68. Id. at 1050 (citing Forte v. Tripp & Skipit, 339 So. 2d 698, 700 (Fla. 3d Dist. Ct. App. 1976)). On the other hand the trial court went too far in recognizing a defense in Ehrman v. Florida Nat'l Bank, 515 So. 2d 1063 (Fla. 5th Dist. Ct. App. 1987). It granted a motion to dismiss based on an existing court file with which the judge was familiar when no determinative affirmative defense appeared upon the face of the pleadings.
69. 516 So. 2d 1073 (Fla. 4th Dist. Ct. App. 1987).
70. 516 So. 2d 1073 (Fla. 4th Dist. Ct. App. 1987).
71. 516 So. 2d 1022 (Fla. 5th Dist. Ct. App. 1987).
73. 513 So. 2d 1345 (Fla. 1st Dist. Ct. App. 1987).
74. FLA. STAT. § 627.7264 (1987).
75. 522 So. 2d 1074 (Fla. 4th Dist. Ct. App. 1988).
https://nsuworks.nova.edu/nlr/vol13/iss3/3
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61. 516 So. 2d. 1022 (Fla. 5th Dist. Ct. App. 1987).
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In matters of discovery, the greatest number of cases involved discovery sanctions. The First and Third District Courts of Appeal, however, decided cases involving the qualified privilege of journalists, both courts ordering discovery. In Carroll Contracting, Inc v. Edward,89 the trial court refused to allow the plaintiff to subpoena photographs taken by an off duty photographer who happened upon the accident scene. There was no contention that the photographs were obtained as a result of the use of confidential sources. Noting that some Florida courts have acknowledged a qualified privilege which protects against compelled disclosure of confidential sources,88 the court held that the privilege is not absolute and can be overcome by the need for disclosure in the interest of justice. The court in Carroll Contracting held that in this case the photographs were the best and exclusive way to prove the conditions of the road at the time of the accident and the privilege, if it existed at all, was overcome. In so holding, the court avoided conflict with the Second District Court of Appeal which has held that the journalist's privilege extends to non-confidential information gathered by a news reporter.89

The Third District Court of Appeal reached the same result as the court in Carroll Contracting in Miami Herald Publishing Co v. Morejon.90 In that case a criminal defendant subpoenaed a reporter who had witnessed an arrest and search at the Miami International Airport. At the time of the arrest and search, the reporter was on an assignment to prepare an article about the airport. An article did appear in which certain details of the arrest appeared though it was undisputed that the reporter did not rely on any confidential news sources in writing the article. The court, in denying certiorari and thus upholding the denial of a motion to quash the subpoena, specifically refused to extend the privilege as far as the Second District Court of Appeal had done, saying that to do so would create an "across-the-board work privilege for journalists."91 The court reasoned that non-confidential news sources are not likely to dry up if journalists are required to testify; thus news gathering and dissemination would not be threatened. Like the Fifth District Court of Appeal in Carroll Contracting, the court avoided conflict by holding that the privilege has no application when the reporter is merely an eyewitness in the case and is not relying on confidential sources.92

Florida Rule of Civil Procedure 1.360(a) allows the court to require a party to undergo a physical or mental examination by a physician when mental or physical condition is in controversy. In Loomis v. Kaplaneris,93 the Second District Court of Appeal held that the term "physician" does not include clinical psychologists. In so determining, the court relied in part on the history of the rule, noting that prior to 1972, the words "or other qualified expert" followed the word physician in the rule. The amendment was intended to restrict the examinations to physicians only.94 Noting that the similar federal rule, rule 35, has been inconsistently applied to psychologists, the court relied on Barry v. Barry,95 which refused to extend the term "physician"96 to permit an examination by a "vocational rehabilitative counselor."97

During this survey period, trial courts seeking to use dismissal as a sanction for discovery violations were generally reversed. In each case, the appellate courts required a finding of bad faith or willfulness before such a severe sanction could be imposed. In Ariv v. Perlow,98 plaintiff's pleadings were struck when he failed to appear at a deposition. At the time of the deposition, the plaintiff was involved in criminal proceedings in Canada, and one of the conditions of his bail was that he register daily with the Canadian

71.  Id. at 1207.
72.  Id. at 1208.
73.  519 So. 2d 1058 (Fla. 2d Dist. Ct. App. 1988).
74.  Id. (citing In re Florida Bar: Rules of Civil Procedure, 265 So. 2d 21 (Fla. 1972)).
75.  426 So. 2d 1229 (Fla. 4th Dist. Ct. App. 1983).
77.  Uppermost in the court's mind appeared to be the need to have a rule that avoids inquiry into the qualifications of the psychologist as opposed to the more defined training programs of physicians. Loomis, 519 So. 2d at 1059 (quoting Comastro v. Tourtelot, 118 F.R.D. 442, n.1 (N.D. Ill. 1987)).
78.  528 So. 2d 139 (Fla. 4th Dist. Ct. App. 1988).
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66. See Fla. R. Civ. P. 1.170(f), 1.180(a), 1.190(a), 1.210(a).
67. 528 So. 2d 951 (Fla. 5th Dist. Ct. App. 1988).
68. Id. at 953 (citing Goddess County Times, Inc. v. Horne, 426 So. 2d 1234
(Fla. 1st Dist. Ct. App.), rev. denied, 441 So. 2d 631 (Fla. 1983)).
69. Tribune Co v. Green, 440 So. 2d 484 (Fla. 2d Dist. Ct. App. 1983), rev
denied, 447 So. 2d 886 (Fla. 1984).
70. 529 So. 2d 1204 (Fla. 3d Dist. Ct. App. 1988).
71. Id. at 1207.
72. Id. at 1208.
73. 519 So. 2d 1058 (Fla. 2d Dist. Ct. App. 1988).
74. Id. (citing In re Florida Bar: Rules of Civil Procedure, 265 So. 2d 21 (Fla.
1972)).
75. 426 So. 2d 1299 (Fla. 4th Dist. Ct. App. 1983).
76. Fed R. Civ. P. 35 has been amended to specifically include examinations by
77. The rule is thus intended to be a mechanism to provide expert opinion in
cases in which a party may have an actual or potential need for expert
opinion, but not in cases where the party’s main purpose is to disrupt
discovery or to gain an unfair advantage in the dispute.
78. 528 So. 2d 139 (Fla. 4th Dist. Ct. App. 1988).
authorities. In Zafirakopoulous v. South Miami International Crashline Corp., the trial court dismissed the action when plaintiff failed to appear for a compulsory physical examination. Plaintiff was in Greece at the time the examination was set, and her counsel expressed her willingness to submit to an examination any time after her return to the United States. In Donner v. Smith, the plaintiff’s case was dismissed on the basis that plaintiff had failed to respond to supplemental interrogatories. The interrogatories were nonexistent, and no motion to compel had been served. In Slomovic v. Grandman, the trial court was reversed because it imposed costs and fees after granting a motion for sanctions without ruling on the accompanying motion to compel.

Construction of Florida Statutes, section 95.031(2), the statute of repose in products liability cases, consumed an inordinate amount of time in the supreme court during this survey period. Section 95.031(2) was a statute of repose which precluded products liability actions if they were brought more than twelve years after the product was sold. In 1986, the legislature amended section 95.031(2) so as to repeal the statute of repose in products liability actions. The question occurring in several cases from the district courts of appeal was whether the statute should be construed to operate retroactively to causes of action which accrued before the effective date of the amendment. In Melendez v. Dreis & Krump Manufacturing Co., this question was answered in the negative. Melendez was injured on May 12, 1982 while operating an allegedly defective press-brake machine which had been sold to the original purchaser on October 28, 1963. The plaintiff filed suit on May 17, 1983, more than twelve years after the product was sold to the original purchaser. Because the plaintiff was not injured by the machine until almost seven years after the statutory period ended, the claim would be barred under the statute. If, however, the legislative repeal of the statute in 1986 could operate retroactively to Melendez’s case, the action could continue.

In holding the statutory repeal did not have retroactive application, the court looked to cases requiring that before a statute of limitations can be applied retroactively, there must be a clear legislative intent that it be given retroactive application. Since the legislature provided only that the statute should become effective on July 1, 1986, the court could find no clear manifestation of retroactive effect.

A second question occurring in these cases arises from the history of Florida Statutes, section 95.031(2). In Battilla v. Allis Chalmers Manufacturing Co., the supreme court had held that section 95.031 was unconstitutional because it deprived plaintiffs of access to the courts under article I, section 21 of the Florida Constitution. In Pullum v. Cincinnati, Inc., the court receded from Battilla, holding that the section was constitutional even with respect to causes of action that did not accrue until after the twelve-year statute of repose had expired. The question occurring in Melendez, and the other cases, was whether Pullum would apply so as to bar a cause of action that accrued after the statute was declared unconstitutional in Battilla, but before the decision in Pullum.

The court answered this question in the affirmative. Melendez wished for the statute to be given prospective effect only, thus allowing the action to proceed because it accrued during the period that the limiting statute was considered unconstitutional. The decision in Pullum was, however, silent on the question of retroactivity. Under the general rule announced in Black v. Nesmith, a decision of a court of last

79. 513 So. 2d 1353 (Fla. 3d Dist. Ct. App. 1987).
80. 517 So. 2d 709 (Fla. 4th Dist. Ct. App. 1987).
81. 523 So. 2d 701 (Fla. 4th Dist. Ct. App. 1988).
82. Other sanction cases decided during the survey period were Maxwell v. Rolls-Royce Motors, Inc., 522 So. 2d 1043 (Fla. 4th Dist. Ct. App. 1988) (response was vague and jumbled but good faith effort to comply with discovery orders provided dismissal); A Professional Nurse, Inc. v. Department of Health & Rehabilitation Services, 519 So. 2d 1061 (Fla. 1st Dist. Ct. App. 1988) (preventing party from presenting any testimony too severe a sanction for failure to respond to request for production).
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84. 515 So. 2d 735 (Fla. 1987).
87. 392 So. 2d 874 (Fla. 1980).
88. 476 So. 2d 657 (Fla. 1985), appeal dismissed, 475 U.S. 1114 (1986).
90. 475 So. 2d 963 (Fla. 1st Dist. Ct. App. 1984).
resort which overrules a prior decision is retroactive as well as prospective in its application unless the decision states it is prospective only. Therefore, the plaintiff’s action was barred.

The rule that Pullum operates retroactively is subject to exception where property or contract rights have been acquired under and in accordance with a previous statutory construction and those rights would be destroyed by retroactive application. In Brackenridge v. America Corp., the injured plaintiff argued that he was entitled to relief because he relied upon the decision of unconstitutionality in Battista. The court held he could not have detrimentally relied on Battista because his accident was fortuitous and did not occur as a result of conduct prompted by the decision. The expenditure of funds in the prosecution of the suit prior to Pullum did not constitute the acquisition of property or contract rights.

Similarly, in Clausell v. Hobart Corp., the court held that the retroactive application does not violate due process under the United States Constitution. The court reasoned that although the United States Supreme Court has acknowledged that a cause of action is a species of property, the state is free to create substantive immunities and defenses for use in adjudication of the right. Florida Statutes, section 95.031 provided a defense to a cause of action rather than creating a cause of action; therefore the decisions holding it unconstitutional and then constitutional gave the plaintiff no vested right.

92. 517 So. 2d 667 (Fla. 1987); cert. denied, 109 S. Ct. 30 (1988).
93. In National Ins. Underwriters v. Casa No. Matter Corp., 522 So. 2d 53 (Fla. 5th Dist. Ct. App.), rev. denied, 531 So. 2d 1352 (Fla. 1988), the court held that the plaintiff had relied on Battista where the plaintiff had several months from the date of the accident to file before the expiration of the statute of repose but filed after the statute of repose had expired. Pullum was rendered almost three months after the suit was initiated.
94. 515 So. 2d 1275 (Fla. 1987); cert. denied, 108 S. Ct. 1459 (1988).
96. Other statute of limitations cases of interest during this survey period are McDonald v. Melvar, 514 So. 2d 1151 (Fla. 2d Dist. Ct. App. 1987) (FLA. STAT. § 768.57, 95.11(4)(b) (1987) apply to dentists and “medical practitioners”) and Abston v. Bryan, 519 So. 2d 1123 (Fla. 5th Dist. Ct. App. 1988) (for a complaint to be “filed” for the purpose of tolling the statute of limitations, it is necessary only that the complaint be received by the clerk, not that the fee be paid).
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98. 517 So. 2d 726 (Fla. 3d Dist. Ct. App. 1987), rev. denied, 528 So. 2d 1183 (Fla. 1988).
resort which overrules a prior decision is retroactive as well as prospective in its application unless the decision states it is prospective only. Therefore, the plaintiff's action was barred.

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92. 517 So. 2d 667 (Fla. 1987), cert. denied, 109 S. Ct. 30 (1988).
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**Civil Procedure**

**TRIAL, SUMMARY JUDGMENT**

During this survey period, the Florida Supreme Court Committee on Standard Jury Instructions recommended, and the Florida Supreme Court adopted, amendments to the Standard Jury Instructions.97 The amendments are to number 2.1, the introductory instruction, and are designed to cause the jurors to focus more narrowly on the issues that are before them and to provide a new definition of the evidence that the jurors should consider. The amendment instructs the jury to consider only those issues submitted. Evidence is defined as sworn testimony of the witnesses, all exhibits received in evidence, and all facts which may be admitted or agreed to by the parties.

The practice of allowing counsel to write instructions backfired in Vine v. Scarborough.98 The defendant's trial counsel was asked to go through the submitted proposed instructions and put together a proposed set for the court. These instructions, over objection by the other party, were read to the jury. After being instructed, the jury retired and was given a special verdict form. After the jury had returned, defendant's counsel informed the trial judge that she had not given an instruction on defendant's unjust enrichment theory and requested a charge on that theory. The trial judge called the jury's attention to the unjust enrichment portion of the special verdict form and instructed the jury on unjust enrichment, resubmitting the issue to the jury. The jury changed its answers on the form giving relief to the defendant on its counterclaim. On appeal, the court approved of the submission of the unjust enrichment issue to the jury as the legal and equitable claims in the action were closely intertwined. It disapproved, however, of the resubmission of the unjust enrichment issue after the jury had found against the defendant as reflected on the special verdict forms. There was no showing that the jury was confused; therefore the resubmission of the issue may have overly influenced the jury. Additionally, the court held that the defendant's objections would have been waived by its failure to submit the charge.

Improper questioning on voir dire was the subject of an appeal in John Deere & Co. v. Thomas,99 a personal injury action brought by an injured employee. The trial court had granted a new trial on the basis...
that appellant's trial counsel had asked prospective jurors whether they or their families had ever been injured on the job or brought a workers' compensation claim. The trial court's decision, which granted a new trial because the defendant's remarks to the jury concerning workers' compensation benefits had influenced the jury against the plaintiff from the start of the lawsuit, was based on cases in which evidence disclosing that the plaintiff had been compensated by workers' compensation had been adduced;\textsuperscript{100} thus, in these cases, the risk was present that the jury would conclude that the plaintiff had already been compensated for his injuries. In \textit{John Deere} the remark had been isolated and had occurred before evidence was presented rather than at any time close to the jury's deliberations. Under these circumstances, the appellate court held that the remark was not prejudicial.

Though the courts normally review a number of summary judgment cases during a given survey period, they are not discussed unless they have some interest beyond the facts of the individual cases. The following cases are included because they discuss procedural aspects of summary judgment.

Two cases involved the question when should the motion be made? Under the rule,\textsuperscript{101} a party may move for summary judgment at any time after the expiration of twenty days after commencement of the action. Thus, it is possible for a plaintiff to move for summary judgment before the defendant files an answer. In \textit{West Florida Community Builders, Inc. v. Mitchell},\textsuperscript{102} the court points out that a plaintiff does so at his peril. The burden to show that there is an absence of a genuine issue of material fact is very high; plaintiff is required to show that no answer the defendant could serve or affirmative defense it might assert could present an issue. The court in \textit{Florida Community Builders} held that the plaintiffs had failed to carry that burden in an action on the implied warranty of habitability where the defendant presented affidavits showing that it had supplied no fill which might have caused the structural cracks the plaintiff complained of. There would be an issue not only as to whether the defendant had supplied the fill, but also as to whether fill was even required.


101. \textit{FLA. R. CIV. P. 1.510.}

102. 528 So. 2d 979 (Fla. 2d Dist. Ct. App. 1988).
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100. Id. at 927 (citing Eichel v. New York Central R.R. Co., 375 U.S. 253 (1963); Kreitz v. Thomas, 422 So. 2d 1051 (Fla. 4th Dist. Ct. App. 1982); Cook v. Ensey, 277 So. 2d 848 (Fla. 3d Dist. Ct. App.), cert. denied, 285 So. 2d 414 (Fla. 1973)).


102. 528 So. 2d 979 (Fla. 2d Dist. Ct. App. 1988).

In Roland v. Gold Coast Savings & Loan Association, plaintiff’s motion for partial summary judgment was granted before plaintiff served a reply to the defendant’s affirmative defenses. The opinion is sparse, but it appears that the trial judge determined summary judgment was proper though the plaintiff had not shown it was the holder of a note or that it had given notice of default. The judgment was apparently given contingent upon correcting the deficiency in the record. The court of appeal disapproved of the contingent judgment. Again the plaintiff moved too early.

Supporting evidence for summary judgment was at issue in Ferguson v. V.S.L. Corp. and Jordan v. State Farm Insurance Co. In Ferguson, the trial court asked counsel to advise him of the evidence to be presented on the morning of trial. At the conclusion of the presentation, summary judgment was granted. On appeal, Ferguson complained that the depositions relied upon in entering summary judgment were not on file at the time the judgment was entered. The appellate court held that because the depositions were physically in existence and “before the court” the rule was satisfied even though the depositions were not filed before the pretrial conference. Additionally, Ferguson’s counsel was permitted, but declined to offer any evidence known to him to exist which would defeat a summary judgment.

In Jordan, the motion for summary judgment was based upon a deposition in which the plaintiff testified that the driver in front of him pulled away from the light, appeared lost or indecisive, and then stopped less than 100 feet from the intersection. In an affidavit in opposition to the motion, the plaintiff explained that the defendant proceeded 180 feet when the defendant suddenly and unexpectedly, without any warning, came to a stop. The affidavit was stricken as being contradictory to the deposition and submitted solely to avoid summary judgment. The appellate court agreed that it was properly stricken. When a party may in an affidavit explain or elaborate on his testimony, he may not repudiate his former testimony so as to create a jury issue and avoid summary judgment.
APPELLATE PROCEDURE

Several appellate rules were amended during this survey period. Rules 9.020(g), 9.330(a) and (b), and 9.340(b) have been amended to eliminate the necessity of filing a separate motion for rehearing before moving for certification of a question to the Florida Supreme Court based on conflict or great public importance. Rule 9.030(b)(1)(B) was amended to make it clear that the rule refers to all non-final orders referenced in Rule 9.130 instead of just those listed in 9.130(a)(3). Rule 9.100(c) now includes petitions for review of non-final agency action as petitions which must be filed within thirty days of rendition. Parties may now make additional copies of a transcript by their own methods rather than having the court reporter make copies under Rule 9.200(b)(2). The amendment to Rule 9.310(c)(1) eliminates the requirement that bonds be approved by the clerk of the court. Rule 9.410 has been amended to provide specifically that sanctions may be imposed for violations of the Rules and for frivolous or bad faith filings. These sanctions may be imposed on motion of the court after ten days notice. Forms in Rule 9.900(d) and (g)II.5 were also amended.

Florida Rule of Appellate Procedure 9.130 allows review of orders which otherwise would not be appealable because they are non-final orders. Among those appealable are orders concerning venue, determining jurisdiction over the person, and determining the issue of liability in favor of a party seeking affirmative relief. All three provisions created confusion for parties during this survey. In Rosie O'Grady's, Inc. v. Del Portillo, the defendant unsuccessfully appealed an order denying its motion to dismiss for lack of prosecution and its motion to dismiss for the plaintiff's failure to pay the transfer fee under the transfer of venue rule. On appeal the defendant conceded that no appeal would lie from the motion to dismiss for failure to prosecute, but argued that the failure to pay the transfer fee would be an order "concerning venue" under the appellate rule thus allowing interlocutory review. The court distinguished the failure to pay the fee from an issue concerning the locus of the action, stating that the purpose of the rule is to avoid the irreparable injury that may befall a party who is compelled to litigate in an improper forum. According to the court, the failure to pay the fee "is not a matter of such import that it requires an appellate court's immediate attention." The court in Warren v. Southeastern Leisure Services, Inc. held that an order directing a party to answer an impleader complaint in proceedings supplementary is an order which determines subject matter jurisdiction, not personal jurisdiction, and is therefore, not immediately appealable. In their motion to quash and dismiss the complaint in impleader, the appellants alleged that the complaint was defective for failure to follow the steps for proceedings supplementary, specifically, that they had failed to file an affidavit stating the judgment was unsatisfied, failed to file an unsatisfied writ of execution, and failed to show that the appellants were liable to the judgment debtor. The court defined jurisdiction over the person as referring to service of process or the applicability of the long arm statute to non residents and characterized the order appealed from as one which determines the appellee's right to proceed with the impleader action, that is, the propriety of the steps the appellee took to invoke the subject matter jurisdiction of the trial court.

In Bravo Electric Co. v. Carter Electric Co., the court held that an order granting plaintiff's motion for partial summary judgment, as opposed to the judgment itself, was not appealable as an order determining liability. The order appealed from stated: "[T]he Motion of Carter Electric for Partial Summary Judgment, filed by the plaintiff as to liability only is granted." A judgment itself could be appealed under Appellate Rule 9.130 (a)(3)(C)(iv), but an order merely granting a motion is not an adjudication settling questions of law or fact. Judge Orfinger dissented from the majority position in this case. While noting that a remand would be appropriate with a non-final order, he argued that there is nothing in the rule to suggest that summary judgment must actually be entered to support appeal of a non final order determining liability and that the prior version of the rule specifically allowed appeal from orders granting partial summary judgment on liability in civil actions. The revision to allow appeal from an order...
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109. 521 So. 2d 183 (Fla. 3d Dist. Cl. App. 1988).
110. Fla. R. Civ. P. 1.060(c).
112. Rosie O'Grady's, Inc., 521 So. 2d at 184.
113. 522 So. 2d 979 (Fla. 1st Dist. Cl. App. 1988).
115. 522 So. 2d 480 (Fla. 5th Dist. Cl. App. 1988).
116. Id.
117. Id. at 481 (Orfinger, J. dissenting) (citing Fla. R. App. P.
which determines liability in favor of a party seeking affirmative relief, he argued, should be read to specifically take out the argument that summary judgment must be entered. The omission of the word “judgment,” he felt indicated that the supreme court did not intend to require judgments as a condition to seeking appellate review under this provision. The majority argued just the opposite. The purpose of the revision was to eliminate summary defense judgments since they would be subject to plenary appeals and to restrict the appealability of “non-final judgments.”

Acceptance of the majority’s holding in this case definitely exalts form over substance. The majority remedied for entry of a judgment an order which certainly determined liability in favor of the plaintiff. That the determination failed to state that it was an order granting a judgment would not appear to affect its finality for the purposes of appeal.

Matters of rendition and timely filing of notice of appeal continue to be problems in the courts of appeal. Florida procedures make it possible for a court to treat a notice of appeal of a non-final order which is not covered in Rule 9.130 as a petition for common law certiorari, but the difference in the filing requirements for petitions for common law certiorari and interlocutory appeals have created confusion. Rule 9.100 requires that the petition be filed with the clerk of the court having jurisdiction within thirty days of rendition of the order sought to be reviewed. Notice of appeal is filed with the clerk of the lower court and is forwarded by the clerk of the lower tribunal. In Johnson, the notice of appeal was timely filed in the lower court, but notice did not reach the clerk of the appellate court until after thirty days. The court held that because the time limits are jurisdictional, it had no jurisdiction to treat a notice of appeal as a petition for certiorari unless the notice of appeal is filed in the appellate court within thirty days from the rendition of the order. It certified the question to the supreme court whether the notice of appeal timely filed in the lower court must be filed in the appellate court within thirty days of rendition for the appellate court to have jurisdiction to treat the notice as a petition for com-

118. Id. at 482.
120. E.g., Comb’s v. State, 436 So. 2d 93 (Fla. 1983); Hackenberg v. Artesian Pools, Inc., 440 So. 2d 475 (Fla. 5th Dist. Ct. App. 1983).

mon law certiorari. The Second District Court of Appeal has recently certified the same question. In Konigsburg v. Grand. In that case, appellant tendered payment of the judgment to appellee after entry of final judgment against appellant. Appellee rejected the tender on the ground that he wanted to preserve his right to appeal. Appellee filed a notice of appeal, and appellant filed notice of cross appeal. The trial court concluded that appellant's tender of payment was sufficient to cut off interest from the time of judgment, but that the filing of the cross appeal reactivated the running of interest. The appellate court held that the appellant's tender of the full amount due, without any words of condition, relieved him from the subsequent accrual of interest. Appellee's filing of the appeal was what triggered appellant's exercise of his appeal rights, but it did not modify the unequivocal tender of payment. The general rule is that a tender relieves the debtor of subsequent accrual of interest.

**CONFLICTS OF LAW**

Florida Statutes, section 95.10, the “borrowing statute,” was designed to discourage forum shopping and the use of a Florida forum when an action would be barred by the statute of limitations elsewhere. The statute provides that when the cause of action arose in another forum and the forum’s laws forbid the action because of the lapse of time, the action will be barred in Florida. In Celotex Corp. v. Meehan, the court was faced with the application of the borrowing statute to three asbestos cases. The central issue to all three was where the cause of action arose for the purposes of applying the statute. In Bates v. Cook, Inc., the court had held that the “most significant relationships” test should be applied in deciding conflicts of law questions concerning the statute of limitations. In Meehan, the plaintiff had been exposed to asbestos when he worked in New York from 1942 to 1944. He moved to Florida, and eight years later, he was diagnosed as having asbestosis and mesothelioma caused by inhalation of asbestos.

123. 529 So. 2d 1180 (Fla. 4th Dist. Ct. App. 1988).
124. 523 So. 2d 141 (Fla. 1988).
125. 509 So. 2d 1112 (Fla. 1987).
which determines liability in favor of a party seeking affirmative relief, he argued, should be read to specifically take out the argument that summary judgment must be entered. The omission of the word “judgment,” he felt indicated that the supreme court did not intend to require judgments as a condition to seeking appellate review under this provision. The majority argued just the opposite. The purpose of the revision was to eliminate summary defense judgments since they would be subject to plenary appeals and to restrict the appealability of “nonfinal judgments.”

Acceptance of the majority’s holding in this case definitely exalts form over substance. The majority remanded for entry of a judgment an order which certainly determined liability in favor of the plaintiff. That the determination failed to state that it was an order granting a judgment would not appear to affect its finality for the purposes of appeal.

Matters of rendition and timely filing of notice of appeal continue to be problems in the courts of appeal. Florida procedures make it possible for a court to treat a notice of appeal of a non final order which is not covered in Rule 9.130 as a petition for common law certiorari, but the difference in the filing requirements for petitions for common law certiorari and interlocutory appeals have created confusion. Rule 9.100 requires that the petition be filed with the clerk of the court having jurisdiction within thirty days of rendition of the order sought to be reviewed. Notice of appeal is filed with the clerk of the lower court and is forwarded by the clerk of the lower tribunal. In Johnson, the notice of appeal was timely filed in the lower court, but notice did not reach the clerk of the appellate court until after thirty days. The court held that because the time limits are jurisdictional, it had no jurisdiction to treat a notice of appeal as a petition for certiorari unless the notice of appeal is filed in the appellate court within thirty days from the rendition of the order. It certified the question to the supreme court whether the notice of appeal timely filed in the lower court must be filed in the appellate court within thirty days of rendition for the appellate court to have jurisdiction to treat the notice as a petition for common law certiorari. The Second District Court of Appeal has recently certified the same question.

The role of post judgment interest was the subject of the decision in Konigsburg v. Grand. In that case, appellant tendered payment of the judgment to appellee after entry of final judgment against appellant. Appellee rejected the tender on the ground that he wanted to preserve his right to appeal. Appellee filed a notice of appeal, and appellant filed notice of cross appeal. The trial court concluded that appellant’s tender of payment was sufficient to cut off interest from the time of judgment, but that the filing of the cross appeal reactivated the running of interest. The appellate court held that the appellant’s tender of the full amount due, without any words of condition, relieved him from the subsequent accrual of interest. Appellee’s filing of the appeal was what triggered appellant’s exercise of his appeal rights, but it did not modify the unequivocal tender of payment. The general rule is that a tender relieves the debtor of subsequent accrual of interest.

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118. **Id.** at 482.
119. **Bravo Elec. Co.,** 522 So. 2d at 481 n.2. (Emphasis in original).
120. **E.g., Combs v. State, 436 So. 2d 93 (Fla. 1983); Hackenberg v. Artesian Pools, Inc., 440 So. 2d 475 (Fla. 5th Dist. Ct. App. 1983).**
121. **Fla. R. App. P. 9.130(b).**

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123. 529 So. 2d 1180 (Fla. 4th Dist. Ct. App. 1988).
124. **Id.** at 1181 (quoting Morton v. Amsin, 129 So. 2d 177 (Fla. 3d Dist. Ct. App. 1961)).
125. 523 So. 2d 141 (Fla. 1988).
126. 509 So. 2d 1112 (Fla. 1987).
fibers. His wife filed suit against Celotex in 1979. The trial court applied the New York statute of limitations as required by the borrowing statute and held the claim barred. The Third District Court of Appeal reversed. The district court reasoned that a cause of action in tort arises in the jurisdiction where the last act necessary to establish liability occurred and in Florida a cause of action accrues only when the plaintiff knew or should have known of the existence of the cause of action. Therefore, according to the district court, the cause of action accrued in Florida and application of the borrowing statute would not be necessary. Unlike Florida, New York has expressly rejected the discovery standard for accrual of causes of action and would have held the cause of action accrued when the wrongful act took place in 1944-45 in New York. The Florida Supreme Court rejected the reasoning of the Third District Court of Appeal. It held that the court must apply the most significant relationship test and where the injury is discovered is only one factor to be considered in the analysis. Because Meehan was a resident of New York at the time of exposure and continued to reside in New York for twenty-five years after the exposure, the court felt that New York had the most significant relationship. The only contact with Florida was that the injury manifested itself and was discovered in this state. Thus, at the time of the district court of appeal decision, the Florida borrowing statute would apply, and the New York law would bar the action.

The issue was not so easy, however. During the pendency of the appeal before the Florida Supreme Court, the New York Legislature enacted a statute allowing a one-year period for claimants previously barred to bring actions for the recovery of damages for exposure to asbestos and other substances. Meehan therefore contended that his action was revived by the new statute. The Florida Supreme Court agreed holding that it must follow the law in effect at the time of its decision and allow the revival of the cause of action.127

Following the reasoning of Meehan, the court decided the case of Nance v. Johns-Manville Sales Corp.128 Nance had been exposed to asbestos while working in Norfolk, Virginia between 1940 and 1945. His asbestos related illness was diagnosed in Florida in 1979, and he

127. The court noted that under Florida law, an expansion of the limitations period would only be allowed if the statutory change were made before the cause of action was barred by the prior statute. The court failed to explain why Florida law would not be applied to this issue. Meehan, 523 So. 2d at 146 n. 4.

128. 466 So. 2d 1113 (Fla. 3d Dist. Ct. App. 1985).

filed suit in Florida in 1980. Virginia's two-year statute of limitations had begun to run from the time plaintiff was hurt, "to be established from available competent evidence, produced by a plaintiff or defendant, that pinpoints the precise date of injury with a reasonable degree of medical certainty."129 Because the only relationship with Florida was the diagnosis of the disease, under the reasoning of Meehan, the Florida borrowing statute would apply to bar the action under the Virginia statute of limitations.130

The third case, that of Colon v. Celotex,131 was the reverse of the other two. Colon had been exposed to asbestos in Florida during the twenty-five years he worked as an installer and dismantler of asbestos products manufactured by Celotex. In 1979, he visited a doctor in Tennessee who diagnosed his bronchial problems as asbestosis. He returned to Florida and filed suit in 1980. The trial court entered summary judgment for Celotex based on the reasoning that the Florida borrowing statute would require the application of the Tennessee one-year statute of limitations. The Third District Court of Appeal agreed that the borrowing statute would require application of the Tennessee statute because the cause of action was discovered while the plaintiff was in Tennessee. The Florida Supreme Court, analyzing the significant relationships, held that the borrowing statute would not apply. Nance was a Florida resident, employed in Florida and exposed to the asbestos in Florida. Under these facts, the court held, the injury arose in Florida, notwithstanding the fact that it was discovered by a doctor in Tennessee. To agree with the Third District Court of Appeal would mean that a plaintiff suffering from a latent disease would always be bound by the statute of limitations of the state where the diagnosis took place, regardless of lack of other connection with that state.

The results of the cases seem just, but Justice Barkett's concurrence points to lack of sufficient reasoning, if not faulty reasoning on the part of the majority. Her major concern was with the majority's failure to apply the significant relationships test fully. First, she suggested, it is necessary to distinguish between the place of injury and the place of exposure. To concentrate on the place of exposure ignores es-

129. 523 So. 2d 141, 147 (quoting Locke v. Johns-Manville Corp., 221 Va. 951, 959, 275 S.E.2d 900, 905 (1981)).

130. The Florida Supreme Court did not actually conclude that the action would be barred because the record was not sufficient to analyze the relationships. It remanded for application of the significant relationships test.

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established Florida law in occupational disease cases. It was those cases which caused the development of the discovery standard because such diseases may exist unrecognized for so long. Since not everyone who is exposed to asbestos develops a disease, undue emphasis should not be placed on the place of exposure. Further, the analysis of the majority ignores other significant relationships; for example it fails to consider the interest of the State of Florida in allowing recovery to resident citizens. Justice Barkett noted that since Celotex was not even manufacturing asbestos at the time Meehan was exposed, and since it could not be shown from the record that New York was its principal place of business or manufacture, the interest of the State of New York would be slight. She would remand for a full analysis of the relationships set out in Bishop v. Florida Specialty Paint Co., the seminal significant relationships case.

CLAIM AND ISSUE PRECLUSION

Ordinarily res judicata prevents the filing of successive motions for relief from judgment under Florida Rule of Civil Procedure 1.540. The court in Crocker Investments, Inc. v. Statesman Life Insurance Co., however, refused to apply the doctrine when to do so would work an injustice. In that case, a successful creditor sought to enforce its judgment through garnishment of Statesman Life Insurance Company on the belief that Statesman was in possession of personal property belonging to the debtor. Statesman responded by letter from its attorney stating it had no property of the debtor, but default was entered prior to receipt of the letter. Judgment was entered against Statesman.

132. 389 So. 2d 999 (Fla. 1980).
133. Other conflicts of law cases of interest during this survey period are: Avis Rent-A-Car Systems, Inc. v. Abraxantes, 517 So. 2d 25 (Fla. 3d Dist. Ct. App. 1987) (trial court erred in failing to consider proof of or application of Cayman Island law when only contact with Florida was that plaintiffs were Florida residents); Gustafson v. Jensen, 515 So. 2d 1298 (Fla. 3d Dist. Ct. App. 1987) (Florida law, rather than law of Denmark, applied to antenuptial agreement executed in Denmark when agreement failed to provide for wife and failed to disclose the husband’s assets).
134. 515 So. 2d 1305 (Fla. 2d Dist. Ct. App. 1987), rev. denied, 525 So. 2d 877 (Fla. 1988).
135. Id. at 1307 (citing DelCincino v. Eastern Airlines, Inc., 283 So. 2d 97 (Fla. 1973) and Wallace v. Luxmoore, 156 Fla. 725, 24 So. 2d 302 (1946)).
136. Id. at 1306 n.1 (Default was premature. The twentieth day fell on a Sunday and the garnishee should have had until close of business Monday to respond. Default was entered on the second day after notice).

Statesman filed a motion to set the judgment aside claiming it had no property of the debtor, but the trial court denied the motion. Statesman then filed a motion to vacate default or in the alternative a motion to amend final judgment. It asserted in the second motion that the letter from the attorney constituted a “paper received” under Florida Rule of Civil Procedure 1.500(b) entitling it to notice of application for default. The motion was granted. The appellate court ruled that while ordinarily a party must appeal rather than file successive motions, Florida’s liberal policy of granting motions to set aside default combined with the fact that a letter is sufficient under Rule 1.500(b) to trigger notice of application for default meant that a “serious procedural irregularity” had occurred in the action and res judicata should not apply to bar the second motion in the interests of justice.

Collateral estoppel did bar a second action in West Point Construction Co. v. Fidelity & Deposit Co. West Point entered into a subcontract with Fast Electric to perform electrical work on a Georgia prison construction project. Fidelity assured West Point that Fast could be bonded, but a “battle of the forms” ultimately kept the bonds from being issued. West Point filed an action in Georgia seeking declaratory relief to establish Fidelity’s obligation on the bonds. The Georgia trial court ruled that though no contractual obligation existed, Fidelity was obligated on the basis of its promise to issue the bonds. This decision was overturned by the Georgia court of appeals.

West Point then filed a complaint against Fidelity and others in Florida alleging breach of contract. Fidelity asserted the affirmative defense of collateral estoppel and moved for summary judgment. The Third District Court of Appeal affirmed the trial court’s holding that collateral estoppel barred relitigation of a breach of contract action against Fidelity. The parties and issues were identical to those in the Georgia action. The Georgia court had determined that no contractual obligation existed, and the Georgia court of appeals had found that even if an enforceable promise to issue the bonds existed, it was kept when Fidelity issued the bonds rejected by West Point. Thus collateral estoppel barred relitigation of the same issue in Florida.
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137. Id. at 1307.
138. 515 So. 2d 1374 (Fla. 3d Dist. Ct. App. 1987).
139. Fidelity delivered the executed bonds to West Point on Fidelity forms. West Point refused the bonds, requiring that they be on West Point forms. Fast refused to execute the second set of bonds.
ATTORNEY FEES

Two cases were decided regarding the necessity for hearings to determine attorney fees. In Crittenden Orange Blossom Fruit v. Stone, the deputy commissioner in a workers' compensation case held hearings for the purpose of determining compensability of the claim, bad faith denial of claim, and setting of attorney's fees. In affirming the orders, the appellate court held that the award of attorney's fees should include time spent by the claimant's attorney in preparing for and prosecuting the claim for attorney's fees and implied that the recovery of costs in workers' compensation cases now included expert witness fees of those testifying as to the amount of fees. The supreme court had previously held that the workers' compensation statute allowing attorney fees did not apply to collateral proceedings for determination of the amount of attorney's fees, but the district court concluded that the previous ruling was no longer relevant in the light of subsequent statutory revisions of the workers' compensation statutes in 1979. Additionally, the claimant argued that unless they can be compensated, it is an imposition on attorneys to testify concerning fees, yet expert testimony is necessary to support the establishment of the fee. The supreme court resolved the problem by holding that it is no longer necessary in every case to have a hearing only for the purpose of proving the amount of reasonable attorney's fees in workers' compensation proceedings. Now, the deputy commissioner may award a reasonable attorney's fee based on consideration of a detailed affidavit of the claimant's attorney concerning the time spent on the case. Opposing counsel should be permitted to challenge in writing both the reasonableness of the time spent and the applicability of other factors recognized in Florida Statutes.

141. See also, Naal v. Rinker Materials Corp., 528 So. 2d 450 (Fla. 4th Dist. Ct. App. 1988) (collateral estoppel did not bar litigant from obtaining award of attorney's fees not previously litigated). R & S Partnership v. Martin Schiffel Enter., Inc., 529 So. 2d 794 (Fla. 3d Dist. Ct. App. 1988) (judgment for third party defendant on indemnity cross claim did not estop third party plaintiff from litigation where appellate decision determined cross claim was moot). 514 So. 2d 351 (Fla. 1987).


143. Citations to the Florida Statutes are to the 1982 edition unless otherwise noted.


145. Crittenden, 354 So. 2d at 353.

146. Id.

147. 528 So. 2d 491 (Fla. 1st Dist. Ct. App. 1988).


149. The court allowed the appellant to correct the deficiency in the record by granting a motion to abate the appeal to allow the parties to submit statements of the proceedings to the trial court for approval and adoption pursuant to Fla. R. App. P. 9.200(b)(3).

150. 517 So. 2d 743 (Fla. 4th Dist. Ct. App. 1987).
estoppel would apply. 143

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141. See also, Nail v. Rinker Materials Corp., 528 So. 2d 450 (Fla. 4th Dist. Ct. App. 1988) (collateral estoppel did not bar litigation of a claim for false arrest based on the same transaction as a dismissed action for malicious prosecution); R & S Partnership v. Martin Schaffel Enter., Inc., 529 So. 2d 794 (Fla. 3d Dist. Ct. App. 1988) (judgment for third party defendant on indemnity cross claim did not estop third party plaintiff from litigation where appellate decision determined cross claim was moot).
142. 514 So. 2d 351 (Fla. 1987).
145. Crittenden, 514 So. 2d at 353.

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section 440.34(1). The deputy commissioner retains discretion to require a hearing and must do so if requested by any party. 148 The court stated that the rule of not requiring a hearing in every case is consistent with the aims of the workers' compensation law to provide speedy results at a minimum cost.

In Morgan v. South Atlantic Production Credit Association, 149 the court reaffirmed the general rule that an evidentiary hearing should be held on the attorney's fee issue. In that case, appellants objected to the time claimed by the appellee's counsel and to the reasonableness of the fee recited in the affidavit. The trial court determined that an evidentiary hearing was unnecessary. The First District Court of Appeal reversed, based on a long line of cases holding that determination of an attorney's fee through affidavits over objection of the other party is improper despite appellee's argument that there was no evidence in the appellate record that appellant objected to the fee determination based on the affidavit. 150

In News & Sun-Sentinel Co. v. Palm Beach County, 151 the court held that attorney's fees are recoverable in an action to obtain access to public records even when the denial is based on a good faith belief that the documents are exempt from disclosure. The newspaper, unsuccessful in an attempt to obtain production of records regarding the presence of toxic substances under Florida Statutes, section 119.07, the Public Records Act, filed a petition to compel production and a petition for writ of mandamus, alleging that the Palm Beach County Fire-Rescue Department knew of and failed to produce the documents. The fire-rescue department counterclaimed, requesting a declaratory judgment. Florida Statutes, section 119.12 allows the recovery of attorney's fees if a civil action is filed against an agency and the court determines the agency "unlawfully" refused to permit inspection, examination, or copying. The trial court apparently felt that the use of the term "unlawfully" indicated a "good faith" or "honest mistake" exception applied to the attorney's fees statute. The appellate court disagreed noting that

146. Id.
147. 528 So. 2d 491 (Fla. 1st Dist. Ct. App. 1988).
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the fee provision may be viewed as a penalty for noncompliance with the disclosure provisions and thus would motivate the records holder to be more responsive when a request is made. If this were the sole purpose, a good faith exception might make sense, as a records holder with a mistaken belief that documents were exempt could not be more responsive. According to the court, however, the statute is also meant to compensate members of the public when a request for disclosure is frustrated and no specific exemption is involved. Members of the public whose right to the information is vindicated by court order should be compensated for their endeavors. Said the court, "The public should not be required to undergo clarification of a law passed for its special benefit." 153

Several Florida courts have held in the past that attorney's fees are recoverable under statutory authority when an attorney represents himself. 154 The court in McClung v. Posey, 155 held that an attorney representing himself in an action based upon a contract which authorizes fees should be allowed to recover the fee. The court appeared persuaded by policy reasons cited by the Oklahoma Supreme Court in Weaver v. Laub, 156 that attorneys who represent themselves spend the same time and expense as they would representing another party and these services are just as valuable when rendered in their own behalf as when they are representing others. Additionally, according to the Oklahoma court, attorneys rendering services in their own cases may be damaged just as much as if they paid an attorney to represent them because of the loss of time. It makes no difference to the party obligated to pay costs and fees whether they are paid to an attorney representing himself or another attorney paid to represent him. (The Oklahoma court also noted that policy reasons exist for not allowing the fees; an attorney may be tempted to protract a suit for the sake of professional profit, and an attorney ought not be allowed to become his own client and then charge for his services.) 157

Practitioners seeking ways to enforce payment of fees will find use-

151. Id. at 744.
153. 514 So. 2d 1139 (Fla. 5th Dist. Ct. App. 1987), rev. denied, 523 So. 2d 578 (Fla. 1988).
155. Id.
156. 517 So. 2d 88 (Fla. 3d Dist. Ct. App. 1987), rev. denied, 525 So. 2d 879 (Fla. 1988).
157. Id. at 91-92 (quoting Sinclair, Lewis, Siegel, Heath, Nussbaum & Zavertnik, P.A. v. Bascom, 428 So. 2d 383, 384 (Fla. 1983)).
158. Id. at 92 n.4.
159. If there are no proceeds, or if the attorney has not claimed a charging lien, he may bring an action at law on the contract, in which case, the client is entitled to a jury trial. Id. at 93 n.7.
the fee provision may be viewed as a penalty for noncompliance with the disclosure provisions and thus would motivate the records holder to be more responsive when a request is made. If this were the sole purpose, a good faith exception might make sense, as a records holder with a mistaken belief that documents were exempt could not be more responsive. According to the court, however, the statute is also meant to compensate members of the public when a request for disclosure is frustrated and no specific exemption is involved. Members of the public whose right to the information is vindicated by court order should be compensated for their endeavors. Said the court, "The public should not be required to undertake clarification of a law passed for its special benefit."183

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153. 514 So. 2d 1139 (Fla. 5th Dist. Ct. App. 1987), rev. denied, 523 So. 2d 576 (Fla. 1988).
155. Id.
ne. Florida cases have apparently held that simply filing suit gives clients sufficient notice.161

ATTORNEYS AND JUDGES

Disciplinary proceedings brought before the Florida Supreme Court under article V, section 15 of the Florida Constitution are regularly reported in the Southern Reporter and are beyond the general reach of this survey. One such proceeding, however, deserves mention because it involves the discipline of an attorney acting in a non-attorney role. Respondent in Florida Bar v. Hosner,167 entered into an lease-purchase agreement with the lessee.168 He was joined as a defendant in a lease agreement by the lessor, Blue Bird Leasing, Inc., entered into a lease-purchase agreement in which the lessee would make monthly payments for two years and would receive title to the automobile upon payment of a substantial balloon payment at the end of the lease. The title was not delivered until eleven months after the payment because the attorney had used it as collateral for another loan. The attorney had endorsed the lease's check, but failed to deposit it in the account of Blue Bird or pay the bank which held the title to the car. In issuing a public reprimand, the court dismissed the argument that the conduct was not related to the practice of law. Said the court, lawyers are held to higher standards of conduct in business dealings than are non-lawyers. An extension of the attorney's argument would leave the bar powerless to discipline lawyers who engage in other illegal, but not law-related activities such as dealing in cocaine or committing securities fraud.

The client's remedy for attorney incompetence is the malpractice action. In two cases involving the purchase of condominiums, the courts reached different results regarding liability of an attorney representing purchasers of a unit. In stake v. Harlan,169 the court held that an attorney has a duty to inform clients of a possible change in the law through certification of a question that could materially affect their transaction. The purchasers entered into a transaction which involved their assuming a mortgage which contained a "due-on-sale" clause requiring written consent of the mortgagee prior to assumption of the mortgage. The attorney advised the buyers that they need not comply with the assumption procedure as had been held in Weiman v. McHaf-
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161. Litman, 517 So. 2d at 93 n.6 (citing Daniel Mones P.A. v. Smith, 486 So.
2d 559, 561 (Fla. 1986)).
162. 520 So. 2d 567 (Fla. 1988).
163. 529 So. 2d 1183 (Fla. 2d Dist. Ct. App. 1988).
allege that the attorney has been retained; it is necessary to allege the relationship of attorney and client with respect to the acts or omissions that the action is based upon. In other words, the purchasers must be able to allege that they hired the attorney to investigate the possibility of structural damage. Generally, the duties of an attorney retained to represent the buyer in a real estate transaction involve investigation and reporting on the title and its marketability and the handling of the closing. No claim was made that these matters were handled negligently or that the attorney withheld information or had information which should have put him on notice that there were structural problems with the building. Accordingly, the denial of the motion to dismiss was affirmed.

During this survey period the supreme court certified the need for additional judges at both the district and circuit levels. At the district level, the court certified an immediate need for six additional judges based upon the attempt to meet the national recommendation that each judge handle no more than 250 case filings per year. Florida judges currently exceed 325 case filings per year. At the circuit level, the court certified the need for an additional nine judges with additional provisional certifications based on participation in a career criminal pilot program.

Following its lead in establishing mandatory continuing legal education for attorneys, the court adopted a rule requiring mandatory continuing legal education for judges. The judges are required to accumulate thirty hours of continuing legal education every three years, at least two of which must be in judicial ethics. New judges are required to complete courses of the Florida Judicial College and the appropriate appellate counterpart. Course work is to be approved by the Florida Court Education Council.

One wonders whether additional course work in ethics would have saved one circuit judge of the Fifth Circuit who was issued a public reprimand in In re Sturgis. The reprimand covered five kinds of conduct including: (1) brandishing a handgun (without threatening to fire); (2) ex parte communications; (3) continuing the practice of law after being elevated to the bench; (4) serving in a fiduciary capacity after appointment and failing to properly close out files; and (5) using his official position to prevent inspection of files. The court felt the most serious of these offenses was the guardianship and later probate of the estate of a lifelong friend of the judge’s. The court accepted the Judicial Commission’s recommendation that the judge not be removed for this infraction because, although the judge admitted neglect in the matter, he derived little profit and “filthy lucre” was not his motive.

The sentencing of former Judge Arden Merckle for bribery was brought before the court in Merckle v. State. The trial court had departed from the sentencing guidelines in giving Merckle a five-year sentence, and the departure was upheld by the Second District Court of Appeal. The second district had held that the status of judge and the breach of the public trust constituted clear and convincing reasons for the departure, but had certified the question to the supreme court. Merckle argued that the acts by which the court justified departure, abusing status as a judge, accepting a bribe, and breach of the public trust were inherent components of the offense of bribery and therefore could not support departure. The supreme court distinguished between judges and other “public servants” referred to in the bribery statute. Judges are unique among public servants in that they may not be lobbied or talked to ex parte. By the nature of his office, a judge sits in “ultimate judgment” in a forum which defines the rights and responsibilities of citizens. The court reasoned that when a judge violates the bribery statute, he causes severe harm to the entire judicial system and should expect to be treated more harshly than a lesser public servant.

Justices Kogan and Barkett dissented. Justice Kogan agreed that the usual punishment for bribery would seem inadequate to punish the offense, but criticized the court for treating a judge differently from another public official. Abuse of status as a public official, accepting a bribe, and breach of the public trust, the reasons given by the trial court, are, in his view, inherent in the crime of bribery. The reasoning of the majority allows enhancement in every case if inherent components, specifically breach of the public trust, can be used to justify departure. Therefore, the basic purpose of the guidelines, to ensure uniform treatment of offenders, is frustrated by the enhancement in this
allege that the attorney has been retained; it is necessary to allege the relationship of attorney and client with respect to the acts or omissions that the action is based upon. In other words, the purchasers must be able to allege that they hired the attorney to investigate the possibility of structural damage. Generally, the duties of an attorney retained to represent the buyer in a real estate transaction involve investigation and reporting on the title and its marketability and the handling of the closing. No claim was made that these matters were handled negligently or that the attorney withheld information or had information which should have put him on notice that there were structural problems with the building. Accordingly, the denial of the motion to dismiss was affirmed.

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168. Id. at 118 (Second District Court of Appeal (2); Third District Court of Appeal (1); Fourth District Court of Appeal (2); Fifth District Court of Appeal (1)).
169. Id. at 116.
170. R. JUD. ADMIN. Rule 2.150.
171. 529 So. 2d 281 (Fla. 1988).
172. Id. at 285.
173. 529 So. 2d 269 (Fla. 1988).
174. 312 So. 2d 948 (Fla. 2d Dist. Ct. App. 1987).
175. Id. at 952.
Relief from Judgment

In the area of relief from judgment, the courts have refined their positions in a number of jurisdictions. The Third District Court of Appeal has stated that under Florida Rule of Civil Procedure 1.540(b)(5), limited jurisdiction is conferred upon courts to grant relief based upon a prior judgment reversed on appeal despite the failure to reserve jurisdiction to grant relief.176 In Austin v. B.J. Apparel Corp.,177 the trial court entered judgment against the buyer in a suit against the seller and personal representative of the guarantor of the representations of the sellers. The decision against the buyer was based on a judgment in favor of the sellers in bankruptcy court. At the time it dismissed the buyer’s claim, the court noted that the buyer would be free to relitigate the bankruptcy decision were reversed. Upon the reversal, the buyer filed a motion for relief under Florida Rule of Civil Procedure 1.540(b)(5) which allows a party relief from judgment if the judgment was based upon a prior judgment which has been reversed. The sellers argued that the trial court had failed to specifically reserve jurisdiction and no relief could be granted. The appellate court disagreed, holding that Rule 1.540(b)(5) confers limited jurisdiction to grant relief when a prior judgment has been reversed and reservation of jurisdiction is not necessary.

Though a judge has considerable power to act in the interests of justice under Rule 1.540, that power is not unlimited. In Rude v. Golden Crown Land Development Corp.,178 judgment was entered for the plaintiffs in a boundary dispute. Almost a year after entry of final judgment, the defendants filed a motion for relief under Rule 1.540 asserting excusable neglect on the grounds their attorney was incompetent, that the judgment was void for lack of subject matter jurisdiction, and that the judgment was void for failure to join the county as an indispensable party. The defendants submitted affidavits by a surveyor stating that he was given the wrong trial date by the incompetent attorney and that the attorney had been drinking when he interviewed him the week before trial. The trial judge heard the motion to vacate, but no witnesses were called nor were the affidavits offered into evidence. Nevertheless, the motion was granted. The appellate court held the granting of the motion was an abuse of discretion. Although the trial judge has discretion to grant such a motion when fairness demands, he cannot do so in the absence of sufficient evidence of mistake, accident, excusable neglect, or surprise. The record reflected that the defendants were aware of the attorney’s drinking problem, and indeed one trial date had been cancelled as a result of the attorney’s hospitalization for the drinking problem. Though the defendants argued they thought he had been rehabilitated, there was no evidence in the record. (An affidavit to that effect was attached to the motion, but not put into evidence.) Vacation of the final judgment without sufficient evidence constituted an abuse of discretion.179

The Third District Court of Appeal granted modification of judgment to a judgment creditor experiencing difficulty in executing the judgment because of a deficiency in the language of the judgment in DuBreuil v. Regnwall.180 The trial court had refused to modify the judgment in favor of the judgment creditor by adding the words “for which let execution issue.” Without these words, the creditor was unable to obtain a writ of execution. In Murphy v. Murphy,181 the court had construed the absence of those words in the judgment as having the effect of granting the judgment debtor a stay of execution. The court felt bound by Murphy though it expressed a preference for holding that judgment should issue absent an express stay of execution.182

The area in which the trial judge perhaps enjoys the most deference is the granting of a new trial.183 The appellate court reversed a decision to grant a new trial in Fitzgerald v. Molle-Teeters,184 a personal injury case in which the plaintiff was awarded only three dollars as compensation for pain and suffering, disability, mental anguish, and loss of capacity for enjoyment of life. A trial court may not grant a

176. Id.
179. 527 So. 2d 249 (Fla. 3d Dist. Ct. App. 1988).
180. See Fla. R. Civ. P. 1.550 providing for execution after the time for post-trial motions has passed.
181. 378 So. 2d 27 (Fla. 3d Dist. Ct. App. 1979).
case. Justice Kogan invited the legislature to consider the question of appropriate punishment.

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motion for a new trial “if reasonable men can differ as to whether the verdict was against the manifest weight of the evidence.” 185 The record reflected that plaintiff had a pre-existing condition, recurring back and neck problems resulting from other accidents, and that expert opinion conflicted as to the plaintiff’s medical problems. Because a jury is free to disbelieve testimony regarding pain and suffering and may inquire into the reasonableness and necessity of medical expenses, the record supported the jury’s decision.186

A new trial is proper where the jury has been influenced by matters outside the record.187 In Mein, Joest & Hayes, M.D., P.A. v. Weiss,188 the plaintiff alleged that a doctor had negligently applied forceps in delivering her baby resulting in injury to her. Counsel for the defendants suggested during closing argument that if the doctor would not have applied the forceps, the baby would have been brain damaged. Since there was no evidence in the record that this was a medical possibility, the trial court properly awarded a new trial on the ground that the argument improperly influenced the jury.

DEFAULT

Florida courts have not materially changed their position on relief from default judgment during this survey. Generally, default can be set aside upon a showing of excusable neglect, a meritorious defense, and due diligence.189 Trial courts regularly apply a principle of liberality in considering motions to set aside default.190 In Rosenblatt v. Rosenblatt,191 the trial court erroneously concluded that it had no discretion to set aside default when the circumstances which would justify the setting aside of the default occurred after the petitioner was entitled to seek default. In that case, the appellant-husband was hospitalized twenty-five days after service of process. The default was entered four days after he was shot and paralyzed, and default judgment was entered a month later. The appellate court felt it was clear that the trial judge would have recognized the failure to file a responsive pleading as excusable neglect if the injury had occurred a few days earlier, that is during the twenty days allowed for answer. The husband conceded that until the injury, he had no reason to file an answer to the petition. The trial court, believing it had no discretion to set aside the default when the excusable neglect occurred after the time for default, failed even to consider the question of meritorious defense. The appellate court held that a trial court is not precluded, as a matter of law, from exercising its discretion to set aside default where an event otherwise constituting excusable neglect occurs after the time for filing a responsive pleading, but before the entry of a default. Accordingly, it remanded the case to allow the trial court to consider whether a meritorious defense existed and whether the appellee-wife would suffer any prejudice if the default were set aside. Thus, the principle of liberality is illustrated once again.192

185. Id. at 648.
186. The appellate court indicated that its independent review of the record did not support the trial court’s conclusion that the verdict reflected only three dollars for pain and suffering, disability, mental anguish, and loss of the capacity for the enjoyment of life. Id.
188. Id.
189. See Brandi v. Dolman, 421 So. 2d 689 (Fla. 4th Dist. Ct. App. 1982); Fla. R. Civ. P. 1.500.
190. E.g., North Shore Hosp., Inc. v. Barber, 143 So. 2d 849 (Fla. 1962).
191. 528 So. 2d 74 (Fla 4th Dist. Ct. App. 1988).
192. Other cases during this survey of interest in the area of default are: Cole v. Blackwell, Walker, Gray, Powers, Flick & Hoehl, 523 So. 2d 725 (Fla. 3d Dist. Ct. App. 1988) (failure to give notice of hearing on damages after default in action to collect attorney fees denial of due process); DeRyder v. State, 521 So. 2d 135 (Fla. 5th Dist. Ct. App. 1988) (failure to respond because complaint complicated and time insufficient not excusable neglect); Orlando Sandpiper Partners, Ltd. v. Barber, 519 So. 2d 1137 (Fla. 5th Dist. Ct. App. 1988) (failure of former law firm to promptly forward complaint excusable neglect); Carter, Hawley, Hale Stores, Inc. v. Whitman, 516 So. 2d 83 (Fla. 3d Dist. Ct. App. 1987) (complaint became “lost” in stack of unrelated papers held excusable neglect); Luxamont Farms, Inc. v. Flavin, 514 So. 2d 1133 (Fla. 5th Dist. Ct. App. 1987) (notice of nonjury trial sent by attorney instead of court defective and voided default judgment); Yelvington Transport, Inc. v. Hersman, 513 So. 2d 1361 (Fla. 3d Dist. Ct. App. 1987) (insurer mistiled papers held excusable neglect).
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