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Civil Procedure

George Mencio Jr.

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Civil Procedure

GEORGE MENCIO, JR.*

In 1980 the Supreme Court of Florida adopted comprehensive amendments to the Florida Rules of Civil Procedure. The author critically examines these amendments and discusses their probable impact on civil practice in Florida. The author also surveys and discusses the 1980 legislation and court decisions that have affected or construed the unamended rules.

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I. COURTS, JUDGES, AND ATTORNEYS

A. *Jurisdiction of the Courts*

The Florida Legislature recently amended section 34.01 of the Florida Statutes, which describes the subject matter jurisdiction of the circuit and county courts.¹ The amendment increases the jurisdictional amount for actions filed in county courts from \$2500 to \$5000, exclusive of interest, costs, and attorney's fees, unless the circuit courts have exclusive jurisdiction over the action.² In addition, a county court may now hear all equitable defenses in any proceeding properly before it.³ Because the amendment applies only to causes of action accruing on or after July 1, 1980,⁴ however, there will be two jurisdictional limits for several years.⁵

Even if a Florida court has subject matter jurisdiction, it may be precluded from exercising that power by statute. One such statute is the Uniform Child Custody Jurisdiction Act ("UCCJA").⁶ The UCCJA bars Florida courts from making initial determinations, enforcements, or modifications of out-of-state custody decrees when the foreign state "assumed jurisdiction under statutory

1. 1980 Fla. Laws ch. 80-165 (amending FLA. STAT. § 34.01(1)(1979)). The Florida Constitution of 1968 provides that circuit courts shall have original jurisdiction of all cases not vested in the county courts. FLA. CONST. art. V, § 5(b).

2. FLA. STAT. § 34.01(1) (1981); *see Kent v. Connecticut Bank & Trust Co.*, 386 So. 2d 902, 903 (Fla. 2d DCA 1980) (attorney's fees not included); *Occidental Life Ins. Co. v. Hernandez*, 377 So. 2d 808 (Fla. 3d DCA 1979) (if maximum recovery under insurance policy less than jurisdictional amount, case should be transferred to county court regardless of amount of attorney's fees).

3. FLA. STAT. § 34.01(1) (1981).

4. *Id.*

5. *See id.* § 95.11 (limitations of actions other than for the recovery of real property); H. TRAWICK, JR., *TRAWICK'S FLORIDA PRACTICE AND PROCEDURE* § 3-2 (1981 ed.).

6. FLA. STAT. §§ 61.1302-1348 (1981).

provisions substantially in accordance with [the] act.”⁷ For example, in *Trujillo v. Trujillo*,⁸ the District Court of Appeal, Third District, held that the circuit court was required to recognize and enforce a custody decree that a New York court had rendered in accordance with the UCCJA. The trial court was “[w]ithout any jurisdictional basis to entertain modification proceedings, [and] should have summarily enforced the New York decree.”⁹

B. Court Costs

1. ATTORNEY'S FEES

A frequently litigated issue regarding court costs has been the recovery of attorney's fees. Costs do not include attorney's fees unless provided by statute.¹⁰ For example, section 57.105 of the Florida Statutes authorizes a court to “award a reasonable attorney's fee to the prevailing party in any civil action in which the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party.”¹¹ In *Allen v. Estate of Dutton*,¹² the District Court of Appeal, Fifth District, held that an action must be “clearly devoid of merit *both* on the facts and the law” to trigger section 57.105.¹³

In *Allen*, a stepdaughter had brought an action against her stepmother's estate, alleging that she was a beneficiary of a contract between her father and stepmother that had been incorporated into their respective wills. Because the alleged agreement was oral, the trial court found that the daughter's claim was without merit and awarded attorney's fees to the stepmother's estate under section 57.105. In reversing the trial court's award of fees, the Fifth District considered the standard for determining awards under the statute.¹⁴ The court stated that a dismissal either on the pleadings

7. *Id.* § 61.1328.

8. 378 So. 2d 812 (Fla. 3d DCA 1979).

9. *Id.* at 815.

10. *See, e.g., Allen v. Estate of Dutton*, 384 So. 2d 171, 174 (Fla. 5th DCA 1980); *Giachelti v. Johnson*, 308 So. 2d 143, 144 (Fla. 1st DCA 1975).

11. FLA. STAT. § 57.105 (1981).

12. 384 So. 2d 171 (Fla. 5th DCA 1980).

13. *Id.* at 175 (emphasis in original).

14. The court agreed with the appellant's contention that the trial court had no authority to award attorney's fees: “Ordinarily a trial court lacks jurisdiction to award attorney's fees after a party has filed a notice of appeal from a final judgment, without first obtaining permission from the appellate court.” *Id.* at 174. Nevertheless, the Fifth District, after analyzing the legislative intent, determined that “attorney's fees when properly awarded under section 57.105 may be awarded as part of court costs.” *Id.* (citation omitted). Since a trial

or by summary judgment is not enough to invoke the statute's operation.¹⁵ The language of the statute, the court held, requires "a finding of a *total or absolute lack* of a justiciable issue."¹⁶

2. OTHER COURT COSTS

Court costs, which include the litigation fees imposed by the state and the expenses incurred in defending or prosecuting an action, are generally recoverable by the prevailing party.¹⁷ There are, however, exceptions to this general rule. One such exception is section 57.081 of the Florida Statutes, which exempts indigent persons from the payment and prepayment of costs.¹⁸ Previously, this benefit was available to indigent persons holding certificates of insolvency only "in the prosecution of the steps in [a] cause of action as opposed to steps beyond [a] cause of action, i.e., after entry of judgment."¹⁹ In 1980 the legislature amended the controlling statute,²⁰ which now provides:

Any indigent person who is a party or intervenor in any judicial or administrative agency proceeding or who initiates such proceeding shall receive the services of the courts, sheriffs, and clerks, with respect to such proceedings, without charge. No prepayment of costs to any judge, clerk, or sheriff is required in any action when the party has obtained from the clerk in each proceeding a certification of indigency, based on an affidavit filed with him that the applicant is indigent and unable to pay the charges otherwise payable by law to any of such officers. . . .²¹

Thus, indigents are now apparently exempt from costs in any judicial proceeding, including execution of judgments.

C. Judges

The adoption of rule 1.432 is an important new development in the doctrine of judicial disqualification.²² Subsection (a) pro-

court may award costs not included in the final judgment even after the filing of a notice to appeal, the award was not reversed on the ground that the trial court lacked jurisdiction.

15. *Id.* at 175.

16. *Id.* (emphasis in original).

17. FLA. STAT. § 57.041 (1981).

18. *Id.* § 57.081.

19. *Brinker v. Ludlow*, 379 So. 2d 999, 1002 (Fla. 3d DCA 1980) (construing FLA. STAT. § 57.081(1) (1979)).

20. 1980 Fla. Laws ch. 80-348, § 1 (codified at FLA. STAT. § 57.081(1) (Supp. 1980)).

21. FLA. STAT. § 57.081(1) (1981).

22. FLA. R. CIV. P. 1.432 (adopted in 391 So. 2d 165, 173 (Fla. 1980)).

vides that "[a]ny party may move to disqualify the judge assigned to the action on the grounds provided by statute."²³ The motion must be made within a reasonable time after the grounds are discovered, must be verified by the movant, and must allege the facts relied on.²⁴ The challenged judge may not pass on the truth of the allegations, but shall adjudicate only the legal sufficiency of the motion.²⁵ No cases have yet been decided under this new procedural rule.

The supreme court adopted rule 1.432 to unify disqualification procedures,²⁶ and in an apparent response to a number of recent decisions. In *In re Estate of Carlton*,²⁷ the supreme court, after hearing oral argument on the merits, found it was without jurisdiction over a petition for a writ of certiorari. Eleven months later, the petitioners requested a rehearing and asked that the court disqualify Justice Overton from participating in the decision.²⁸ The petitioners based the disqualification request on sections 38.02 and 38.10 of the Florida Statutes²⁹ and Canon 3C(1) of Florida's Code of Judicial Conduct.³⁰ The court found that the petitioner's reliance on the statutes was misplaced because they applied only to trial judges and not to appellate courts.³¹ Noting that the court's treatment of disqualification cases had been inconsistent in the past,³² the court adhered to its more recent decisions and held that "each justice must determine for himself both the legal sufficiency of a request seeking his disqualification and the propriety of withdrawing in any particular circumstances."³³

23. FLA. R. CIV. P. 1.432(a).

24. FLA. R. CIV. P. 1.432(b)-(c).

25. FLA. R. CIV. P. 1.432(d).

26. FLA. R. CIV. P. 1.432, Committee Note.

27. 378 So. 2d 1212, 1212 (Fla. 1979), *recusal denied*, 378 So. 2d 1217 (Fla.), *cert. denied sub. nom. Hayes v. Rogers*, 447 U.S. 922 (1980).

28. The basis of the disqualification petition was Justice Overton's alleged "extremely close association and friendship" with a member of the law firm that had represented the respondent in the original estate matter, but not in the certiorari proceeding. 378 So. 2d at 1218.

29. FLA. STAT. §§ 38.02, .10 (1981).

30. FLA. BAR CODE JUD. CONDUCT Canon 3C.

31. 378 So. 2d at 1219.

32. *Compare* Daytona Beach Racing & Recreation Facilities Dist. v. Volusia County, 372 So. 2d 417 (Fla. 1978) and Department of Revenue v. Golder, 322 So. 2d 1 (Fla. 1975) and Department of Revenue v. Leadership Hous., Inc., 322 So. 2d 7 (Fla. 1975), *cert. denied*, 434 U.S. 805 (1977) (leaving disqualification decision to discretion of challenged justice) with *Ervin v. Collins*, 85 So. 2d 833 (Fla. 1956) and *Ball v. Yates*, 158 Fla. 521, 29 So. 2d 729, *cert. denied*, 322 U.S. 774 (1947) (unchallenged justices rule upon sufficiency of request).

33. 378 So. 2d at 1216.

The court then submitted the petitioners' request directly to Justice Overton, who refused to disqualify himself because the petition was untimely and without merit.³⁴ The Justice noted that a party generally waives any grounds for judicial disqualification if he fails to file the petition within a reasonable time. Because the petitioner knew of the pertinent facts at the time of the initial oral argument before the supreme court, the eleven-month delay was unjustified and constituted a waiver of any grounds for objection.³⁵ Considering the merits of the disqualification petition, which alleged that Justice Overton had a close association with a member of the law firm representing the respondent, the Justice commented: "If friendship alone with a lawyer or member of a firm is a basis for disqualification, then most judges in rural and semi-rural areas and many in metropolitan areas would be subject to disqualification in a large number of cases."³⁶ Remarking further that the lawyer in question was neither counsel of record nor the principal representative in the respondent's other legal matters, Justice Overton concluded that neither the law nor the judicial canons of ethics mandated his disqualification. Thereafter, the full court rejected the petition for rehearing.³⁷

Not only is section 38.10 inapplicable to appellate judges, but according to the District Court of Appeal, First District, the statute applies only to disqualification proceedings initiated before trial. In *Coastal Petroleum Co. v. Mobil Oil Co.*,³⁸ the court severed certain issues from the main action for separate adjudication. At issue were rights in offshore drilling leases on state-owned land. After the trial on the main action, the trial judge announced the substance of his ruling, and gave the parties an opportunity to comment on the form of the order. Four days later, the appellant and the State of Florida jointly requested the judge's recusal because of his prejudicial statements regarding the unadjudicated issues. Although the judge agreed to recuse himself with respect to those issues, he entered final judgment on the adjudicated questions.³⁹ The First District affirmed the judgment, concluding that section 38.10 pertains only to disqualification requests made before

34. *Id.* at 1218.

35. *Id.* at 1218-19.

36. *Id.* at 1220.

37. Justice Overton joined the 4-3 majority. *Id.* at 1220.

38. 378 So. 2d 336, 337 (Fla. 1st DCA 1980).

39. *Id.* at 337.

trial, and not to those made after trial.⁴⁰

In *Pistorino v. Ferguson*,⁴¹ the District Court of Appeal, Third District, reversed the denial of a motion to recuse in a divorce action, even though the motion was technically deficient. During a hearing in which the trial court had awarded temporary custody of the couple's children to their father, the trial judge remarked to the wife's attorney: "[Y]our client is not playing with a full deck. Personally, I think she is crazy, and I will recuse myself anytime you want me to."⁴² When the husband subsequently petitioned for permanent custody, the wife's attorney moved to recuse the trial judge, asserting that the judge had admitted that he could not be impartial.⁴³ The trial court denied the motion because it was untimely under section 38.10 of the Florida Statutes,⁴⁴ and counsel had failed to file a good faith certificate and corroborating affidavits. On appeal, the Third District distinguished earlier cases which had held that the failure to follow procedural requirements bars relief, and ruled that when patent prejudice is apparent, a judge should disqualify himself.⁴⁵ In so holding, the *Pistorino* court may have rendered the procedural safeguards of section 38.10 superfluous by approving a method of judicial disqualification that does not satisfy the statutory requirements.⁴⁶

Another significant decision addressed the issue whether there should be a different standard of disqualification in jury trials from that employed in nonjury trials. In *Marlin v. Williams*,⁴⁷ the trial judge, upon defendant's motion, agreed to recuse himself if the parties tried the case without a jury. The plaintiff had served as a clerk of the trial court for many years and the judge had previously excused himself from presiding over the plaintiff's divorce proceedings because of the longstanding acquaintance. Finding no basis for

40. *Id.*

41. 386 So. 2d 65 (Fla. 3d DCA 1980).

42. *Id.* at 66.

43. *Id.*

44. FLA. STAT. § 38.10 (1981).

45. The court announced that "[w]hen the requirements of the statute are met, the necessity of proving that the judge is . . . prejudiced is obviated. But where the record, as here, reflects that the judge is in fact prejudiced, the necessity of utilizing the statute is obviated." 386 So. 2d at 67 (footnote omitted).

46. The Third District could have based its decision on a principle of justifiable reliance by the wife, or estoppel against the judge. Instead, the determinative issue was apparently whether the wife had made a showing of prejudice in the record. Henceforth, if a motion for disqualification does not comply with the statutory requirements, the court must examine the record to determine the existence of prejudice in fact.

47. 385 So. 2d 1030 (Fla. 4th DCA 1980).

recusation in a jury trial, however, the judge denied the defendant's motion and entered judgment for the plaintiff. The District Court of Appeal, Fourth District, reversed, stating that once the judge agreed to recuse himself in a nonjury trial, he erred by failing to recuse himself from the jury trial. The court remarked that a judge's conduct must meet "the same high standard of neutrality" in both cases.⁴⁸ *Marlin* thus establishes a single standard for recusal in the Fourth District.

D. Attorneys

Two 1980 cases considered the effect of contractual agreements among parties and their attorneys on a subsequent award to a party of "reasonable attorney's fees." In *Trustees of Cameron-Brown Investment Group v. Tavormina*,⁴⁹ the trial court awarded attorney's fees to a group of lenders that had sued to foreclose on a usurious construction loan, but excluded amounts attributable to the time spent on the usury issue.⁵⁰ The promissory notes obligated the borrowers to pay the costs of collection, including a reasonable attorney's fee. Trial testimony suggested that a reasonable fee might exceed \$100,000.⁵¹ Under a fee contract between the lenders and their attorney, however, the lenders' actual fee expense was less than \$25,000. The trial court awarded attorney's fees in the amount actually expended, and the lenders appealed.

The District Court of Appeal, Third District, upheld the fee award. First, it agreed with the trial court that the lenders were not entitled to reimbursement for fees expended in their attempt to enforce the usurious loan provisions.⁵² Second, the court summarily rejected the lenders' contention that allowing the borrowers to profit by the lenders' advantageous fee arrangement violated the collateral source rule.⁵³ Third, the court rejected the lenders' claim that they were entitled to "reasonable" fees, irrespective of their arrangements with counsel. The court stated:

48. *Id.* at 1031.

49. 385 So. 2d 728 (Fla. 3d DCA 1980).

50. *Id.* at 729.

51. *Id.*

52. *Id.*

53. The court characterized the collateral source rule as a doctrine of tort law "developed to prevent a tortfeasor's avoidance of the civil punishment meted out for his wrongdoing." *Id.* While noting that the laws of tort and contract often blend, the court observed that the collateral source rule does not apply to a contract case because the measure of damages is the plaintiff's injury, not the defendant's culpability.

The first question a trial court must answer when faced with a demand for attorneys' fees is not what a reasonable fee *might* be in the absence of any fee contract between the claiming party and his attorney, but whether the *actual* fee agreement against which the claimant seeks indemnity is *unreasonable*: Specifically, whether the agreement is *excessive*, under the terms of the Fla. Bar. Code Prof. Resp., D.R. 2-106(B). If the fee is not excessive, and it is enforceable by both parties thereto, that fee should be awarded. If the fee *is* excessive, then the court should proceed to the determination of a "reasonable" fee, i.e., a quantum meruit fee, based on the same factors it considered when it evaluated the fee contract.

Contractual provision for reasonable attorney's fees is enforceable as an agreement for indemnification; an award based on such a provision is properly limited to the reasonable (read: nonexcessive) expense actually incurred by the obligee thereunder: A party contractually entitled to his attorney's fees may recover the amount he must pay his lawyer, or a reasonable fee, whichever is lower.⁵⁴

The court expressly limited its holding, however, to those instances in which contracts exist both between the parties and between a party and his counsel.⁵⁵ The court also expressly excluded from its holding fees authorized by statute because of public policy considerations.⁵⁶

Earlier in the same year, the District Court of Appeal, Fifth District, ruled in *R.W. King Construction Co. v. City of Melbourne*⁵⁷ that a statute limiting an award of attorney's fees does not normally prevent parties from specifically contracting to exceed that limit. The defendants, a contractor and its surety, appealed a final judgment in favor of the city awarding \$49,131.94 for breach of a construction contract and \$21,700 for attorneys' fees. The appellants challenged the fee award, claiming, *inter alia*, that the court's ruling was contrary to section 627.756 of the Florida Statutes, which, in cases involving sureties, limits recovery to twelve and one-half percent of the final judgment.⁵⁸

54. *Id.* at 731.

55. *Id.*

56. *Id.*

57. 384 So. 2d 654 (Fla. 5th DCA 1980).

58. FLA. STAT. § 627.756 (1981) provides:

Section 627.428 (attorney fee) shall also apply as to suits brought by owners . . . against a surety insurer under payment or performance bonds written by the insurer under the laws of Florida to indemnify such owners . . . against pecuni-

The court found that the fee award was proper because the construction contract provided that the contractor and its surety would indemnify the city for costs, expenses, and damages arising from or in connection with any default by the contractor, including litigation costs and attorney's fees.⁵⁹ Construing the obligation to include the payment of reasonable attorney's fees, the court held that the statute did not create a ceiling on fees and that "parties are free to contract for reasonable attorney fees rather than statutory attorney fees."⁶⁰

II. JURISDICTION OVER THE PERSON

a. *Appearances*

Martino v. Florida Insurance Guaranty Ass'n,⁶¹ illustrates the rule that a party who files a general appearance in an action, intentionally or otherwise, gives a court jurisdiction over his person without formal service of process. In *Martino*, the Florida Insurance Guaranty Association ("FIGA")⁶² filed a notice of appearance and moved to set aside a default judgment previously entered in favor of an insured against an insolvent insurance company. After the trial court denied the motion, FIGA refused to pay the judgment and did not appeal. In a subsequent action by the insured to enforce the default judgment against FIGA, the trial court ruled that FIGA was not responsible for the judgment. On appeal, the District Court of Appeal, Third District, reversed. Noting that FIGA had waived the need for service of process by appearing in the previous action,⁶³ the court held that the default judgment bound FIGA because FIGA had participated in the proceeding after the insurance company had become insolvent.⁶⁴

A party who files an appearance before challenging personal

ary loss by breach of a building or construction contract; except that the amount to be so recovered for fees or compensation of such a plaintiff's attorney shall not be more than 12.5 percent of the amount which the judgment or decree awards such plaintiff under the bond

59. 384 So. 2d at 655.

60. *Id.*

61. 383 So. 2d 942 (Fla. 3d DCA 1980).

62. FIGA is a nonprofit corporation created by statute, FLA. STAT. § 631.55 (1981), to insure the obligations of insolvent insurance companies on covered claims. *Id.* § 631.57.

63. 383 So. 2d 943 n.2 (citing *Hotel & Restaurant Employees & Bartenders Int'l Union v. Lake Buena Vista Communities, Inc.*, 349 So. 2d 1217 (Fla. 4th DCA 1977) and *Royal Indus., Inc. v. Birdsong*, 340 So. 2d 526 (Fla. 1st DCA 1976), *cert. denied*, 351 So. 2d 408 (Fla. 1977)).

64. 383 So. 2d at 94.

jurisdiction gives a court power to render a personal judgment. In *Fulmer v. Northern Central Bank*,⁶⁵ the District Court of Appeal, Second District, held that the filing of a document titled "Notice of Appearance" was "a general appearance which subjected appellee to the jurisdiction of the trial court."⁶⁶ Although the court held that the appellee's explanation of the document could not overcome the effect of its wording, the court noted in dictum that "[a] general appearance entered *after* an assertion of lack of personal jurisdiction would not waive any alleged jurisdictional defect."⁶⁷

The Second District in *White v. Nicholson*⁶⁸ applied the rule it had enunciated in dictum in *Fulmer*. In *White*, an insurance carrier filed a motion on behalf of its insured to quash substituted service of process.⁶⁹ The insured's attorney subsequently entered a notice of appearance. The trial judge ruled that the notice was a waiver of the insured's objections to personal jurisdiction. The Second District reversed, noting that the insured had objected to service of process before filing the appearance. Thus, the insured had not violated the rule that "[a] defendant may not make a general appearance and later repudiate it by attacking the court's jurisdiction over him."⁷⁰

B. Implied Consent

Jurisdictional issues frequently arise in domestic relations cases. In *Walsh v. Walsh*,⁷¹ a Florida resident obtained a divorce decree in 1965 after having served her nonresident husband by publication. The decree incorporated a property settlement agreement that both parties had executed.⁷² The wife sought to enforce

65. 386 So. 2d 856 (Fla. 2d DCA 1980).

66. *Id.* at 857-58 n.2 (citing *Royal Indus., Inc. v. Birdsong*, 340 So. 2d 526 (Fla. 1st DCA 1976), *cert. denied*, 351 So. 2d 408 (Fla. 1977)). The document stated that counsel "hereby enters his appearance on behalf of Northern Central Bank as Trustee in the above referenced cause." *Id.* at 857 n.2.

67. *Id.* at 858 n.3 (emphasis in original).

68. 386 So. 2d 74 (Fla. 2d DCA 1980).

69. FLA. STAT. § 48.171 (1981).

70. 386 So. 2d at 75. The *Nicholson* court compared the defendant's preservation of the jurisdictional challenge to the facts of *Green v. Roth*, 192 So. 2d 537 (Fla. 2d DCA 1966). In *Green*, the plaintiff filed both a complaint and a notice of lis pendens. The defendant corporation first challenged service of process and then moved to discharge the lis pendens and increase a bond. In reversing the lower court, the Second District held that because the corporate defendant "promptly raised the question of jurisdiction over its person," it had not submitted itself to the jurisdiction of the court by proceeding to litigate the other matters. *Id.* at 539.

71. 388 So. 2d 240 (Fla. 2d DCA 1980).

72. *Id.* at 241.

the agreement's support provisions in 1978, and served the husband personally under Florida's long arm statute.⁷³ The husband challenged the court's jurisdiction over him, contending that he had never resided in Florida. The trial court agreed and dismissed the wife's claim for lack of personal jurisdiction.

The District Court of Appeal, Second District, reversed, although it agreed with the trial court that because the husband had never resided in Florida, personal service under sections 48.193 and 48.194 of the Florida Statutes⁷⁴ was inappropriate. Acknowledging that the trial court needed personal jurisdiction in order to enforce the settlement agreement's support provisions, the Second District noted that the final clause provided that "[t]his agreement, if acceptable to the Court, may be incorporated by reference in any judgment or decree so obtained."⁷⁵ From this provision, the court reasoned that the husband had consented to personal jurisdiction for the purpose of enforcing the agreement.⁷⁶

Surely the primary purpose of the parties' agreeing to incorporate the agreement was to allow a court to enforce it. On incorporating the agreement the court elevated it to the dignity and effect of a court decree, which it then had continuing jurisdiction to enforce. . . . Since a court can enforce monetary obligations against a person's property located inside the boundaries of the state in which it sits without having jurisdiction over the person, there was no reason for the husband to consent to this type of enforcement. . . . It follows, therefore, that the husband was consenting to enforcement against his property located outside of the boundaries of the state in which the enforcing court sits, and was consenting to personal jurisdiction on constructive service for that type of enforcement.⁷⁷

C. *Long Arm Jurisdiction*

1. MINIMUM CONTACTS

No state court can constitutionally exercise personal jurisdiction over a nonresident defendant who has not established certain minimum contacts with the state.⁷⁸ The inquiry whether sufficient

73. FLA. STAT. § 48.194 (1981).

74. *Id.* §§ 48.193-.194.

75. 388 So. 2d at 241.

76. *Id.* at 242.

77. *Id.* at 242 (citations omitted).

78. *See, e.g.,* *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Godfrey v. Neumann*, 373 So. 2d 920 (Fla.

contacts exist to bring a nonresident within the state's jurisdiction is twofold. First, the nonresident's activities in the forum state must be within the provisions of the state's long arm statute. Second, the exercise of personal jurisdiction over the nonresident defendant must satisfy the due process reasonableness requirements of the federal and state constitutions.

In *Osborn v. University Society, Inc.*,⁷⁹ a case decided before the adoption of rule 1.070(i) of the Florida Rules of Civil Procedure,⁸⁰ the District Court of Appeal, Second District, declined to exercise personal jurisdiction over a New York corporation. The complaint alleged that the corporate defendant had breached a consulting contract that contained no provision regarding the place of payment.⁸¹ The plaintiff contended that the corporation's non-performance of its obligation to pay the plaintiff in Florida satisfied the requirements of section 48.193(1)(g) of the Florida Statutes.⁸² The statute provides that a nonresident who "breaches a contract in this state by failing to perform acts required by the contract to be performed in this state" is subject to the personal jurisdiction of the Florida courts.⁸³

Although the complaint's jurisdictional allegations technically complied with the wording of section 48.193(1)(g), the Second District observed that the "plaintiff may not constitutionally apply the statute to obtain jurisdiction in the absence of the requisite minimum contacts with the forum state."⁸⁴ The court concluded that the corporation had not been "availing itself of the privilege of conducting activities in Florida."⁸⁵ Moreover, executing a contract with a Florida resident who is to perform "services at an unspecified location is an insufficient contact with Florida upon which to predicate jurisdiction."⁸⁶

*Lakewood Pipe, Inc. v. Rubaii*⁸⁷ also dealt with personal jurisdiction under section 48.193(1)(g).⁸⁸ The plaintiff, Rubaii, entered

1979) (commission of tort under FLA. STAT. § 48.193(1)(b) (1981)).

79. 378 So. 2d 873 (Fla. 2d DCA 1979).

80. FLA. R. Civ. P. 1.070(i); see notes 114-24 and accompanying text *infra*.

81. 378 So. 2d at 874.

82. FLA. STAT. § 48.193(1)(g) (1981).

83. *Id.*

84. 378 So. 2d at 874 (citing Harlo Prods. Corp. v. J.I. Case Co., 360 So. 2d 1328 (Fla. 1st DCA 1978) and Jack Pickard Dodge, Inc. v. Yarbrough, 352 So. 2d 130 (Fla. 1st DCA 1977)).

85. 378 So. 2d at 874.

86. *Id.*

87. 379 So. 2d 475 (Fla. 2d DCA 1979).

88. FLA. STAT. § 48.193(1)(g) (1981).

into a brokerage agreement with a Florida pipe distributor in which Rubaii was to obtain export contracts from the Middle East. The distributor subsequently executed a contract with Iraq to supply pipe casing. This contract did not mention the broker. Shortly before becoming bankrupt, the Florida distributor assigned its Iraqi contract to Lakeland, a Texas company also engaged in the distribution of pipe casing. The two distributors executed the assignment in Texas. Rubaii sued Lakeland under its agreement to pay all brokerage commissions stemming from the Iraqi supply contract.⁸⁹ The trial court subjected Lakeland to Florida in personam jurisdiction under section 48.193(1)(g), which pertains to breaches of contracts calling for performance in Florida by nonresidents.⁹⁰

The brokerage agreement, as did the consulting contract in *Osborn v. University Society, Inc.*,⁹¹ had no provision regarding the place of payment. Rubaii contended that, because both he and the Florida corporation were residents of the state and had executed the agreement in Florida, the assignment of the Iraqi contract obligated Lakeland to pay Rubaii in Florida. The District Court of Appeal, Second District, rejected this reasoning because Lakeland's alleged obligation was too tenuous to satisfy the minimum contacts test.⁹² Rubaii was "merely . . . a gratuitous beneficiary of a guarantee" undertaken in another state.⁹³ Unless Rubaii could plead additional factual allegations regarding Lakeland's contacts with Florida on remand, Florida would not have jurisdiction under section 48.193(1):⁹⁴ "Even where there is facial jurisdiction under the Florida long arm statute, the party over which jurisdiction is asserted must have had sufficient minimum contacts with Florida to satisfy due process requirements."⁹⁵

The plaintiff in *Life Laboratories, Inc. v. Valdes*⁹⁶ sought to invoke Florida's long arm jurisdiction against a foreign pharmaceutical manufacturer in a products liability action before the adoption of rule 1.070(i) of the Florida Rules of Civil Procedure.⁹⁷ The District Court of Appeal, Third District, declined to apply section

89. 379 So. 2d at 476.

90. *Id.* at 477.

91. 378 So. 2d 873 (Fla. 2d DCA 1979).

92. 379 So. 2d at 477-78.

93. *Id.* at 478.

94. *Id.*; see notes 114-24 and accompanying text *infra*.

95. 379 So. 2d at 477.

96. 387 So. 2d 1009 (Fla. 3d DCA 1980).

97. FLA. R. CIV. P. 1.070(i).

48.193(1)(f)2 of the Florida Statutes.⁹⁸ This provision subjects any manufacturer whose product injures a consumer within the state to in personam jurisdiction in Florida. According to the court, the complaint failed to allege any facts that established "that Life Laboratories knew or had any specific reason to anticipate that its products would be shipped in interstate commerce so that it would foreseeably injure a Florida user."⁹⁹ The defendant, Life Laboratories, had only manufactured the product for another company and evidently had made none of the "marketing, advertising, or distribution decisions."¹⁰⁰ The court concluded that Life Laboratories had not purposefully availed itself of the privilege of acting in Florida. "In construing section 48.193(1)(f)2, a nexus more substantial than a mere possibility that a product might reach this state must be pled and, if controverted, overcome."¹⁰¹ In short, this case, *Osborn*,¹⁰² and *Lakeland Pipe*,¹⁰³ demonstrate that prior to the adoption of rule 1.070(i), the minimum contacts standard placed a higher pleading burden on the plaintiff than did section 48.193.

In *A.B.L. Realty Corp. v. Cohl*,¹⁰⁴ the District Court of Appeal, Fourth District, dealt with an action brought against a New York corporation that had sold a Florida condominium to two Michigan residents. Although the parties had signed the contract in Michigan, they conducted the closing in Miami Beach. The purchasers sued the corporation following the imposition of a lien on their condominium for liabilities incurred before the closing.¹⁰⁵ Rather than proceeding under Florida's long arm statute, section 48.193 of the Florida Statutes,¹⁰⁶ the purchasers elected to obtain personal jurisdiction over the corporation under section 48.181(1), an alternative statute that authorizes parties to serve complaints on the Secretary of State.¹⁰⁷ Both sections 48.181(1) and 48.193(1)(a) of the Florida Statutes subject nonresidents who operate, conduct, engage in, or carry on "a business or business venture" in the state

98. FLA. STAT. § 48.193(1)(f)2 (1981).

99. 387 So. 2d at 1011.

100. *Id.*

101. *Id.*

102. *Osborn v. University Soc'y, Inc.*, 378 So. 2d 873 (Fla. 2d DCA 1979).

103. *Lakeland Pipe, Inc. v. Rubaii*, 379 So. 2d 475 (Fla. 2d DCA 1979).

104. 384 So. 2d 1351 (Fla. 4th DCA 1980).

105. *Id.* at 1352.

106. FLA. STAT. § 48.193 (1981).

107. *Id.* § 48.181(1).

to Florida in personam jurisdiction.¹⁰⁸ Section 48.193, however, does not provide for substituted service.

The Fourth District, using the criteria it had developed in *Horace v. American National Bank & Trust Co.*,¹⁰⁹ concluded that the corporate defendant, A.B.L. Realty, engaged in a business venture in Florida. The corporation's "name . . . implies that it is a business entity which derives profit from dealing in real estate."¹¹⁰ The acquisition and sale of the condominium "evidence a voluntary intent to act within the State."¹¹¹ In addition, the property's location and the presence at the closing of the Florida attorney who represented the corporation "justify resort to Florida courts to insure the integrity of the transfer."¹¹² The court, however, declined to exercise personal jurisdiction over the two A.B.L. executives whom the purchasers had named. The allegations of the complaint failed to establish that, under section 48.181(1), either executive had "engaged in a business or business venture" in Florida as individuals.¹¹³

2. PLEADING REQUIREMENTS

Rule 1.070(i) of the Florida Rules of Civil Procedure became effective on January 1, 1981.¹¹⁴ Before then, a number of Florida appellate decisions sanctioned the exercise of personal jurisdiction over a nonresident only if the complaint alleged enough facts to satisfy the minimum contacts doctrine. A plaintiff had the burden of establishing the appropriateness of long arm jurisdiction, which required setting forth the ultimate, as opposed to the evidentiary, facts. Cases such as *Osborn v. University Society, Inc.*,¹¹⁵ *Lakewood Pipe, Inc. v. Rubaii*,¹¹⁶ and *Life Laboratories, Inc. v. Valdes*¹¹⁷ are illustrative of the former pleading requirements.

Subsection (i) of rule 1.070 provides, "When service of process is to be made under statutes authorizing service on nonresidents of Florida, it is sufficient to plead the basis for service in the language

108. *Id.* §§ 48.181(1), .193(1)(a).

109. 251 So. 2d 33, 36 (Fla. 4th DCA 1971).

110. 384 So. 2d at 1355.

111. *Id.*

112. *Id.*

113. *Id.* at 1356.

114. FLA. R. CIV. P. 1.070(i) (adopted in 391 So. 2d 165, 165-66 (Fla. 1980)).

115. 378 So. 2d 873 (Fla. 2d DCA 1979).

116. 379 So. 2d 475 (Fla. 2d DCA 1979).

117. 387 So. 2d 1009 (Fla. 3d DCA 1980).

of the statute without pleading the facts supporting service."¹¹⁸ According to the accompanying Committee Note, the rule was

added . . . to eliminate pleading evidentiary facts for "long arm" service of process. . . . [P]leading the basis for service is sufficient if it is done in the language of the statute. . . . The amendment is limited to pleading. If the statutory allegations are attacked by motion, the pleader must then prove the evidentiary facts to support the statutory requirements.¹¹⁹

As one court noted, under the amended rule, "general and conclusory jurisdictional allegations" will no longer be "entirely insufficient" as a basis for predicating in personam jurisdiction.¹²⁰

The adoption of rule 1.070(i) is likely to have little practical impact on pleading practice. The Supreme Court of Florida intended to eliminate a trap for unwary plaintiffs. Complaints will continue to track the language of section 48.193 of the Florida Statutes¹²¹ and contain only general factual allegations. Motions to dismiss will continue to incorporate affidavits that rebut the plaintiff's allegations and present additional facts designed to preclude the assertion of other jurisdictional bases. Under the new rule, a plaintiff can submit supporting affidavits, rather than being confined to the complaint's factual and jurisdictional allegations.

Nevertheless, this change in the rule is certain to cause some litigation. The absence of factual allegations may make it impossible for a court to exercise jurisdiction on due process grounds because of the minimum contacts requirement.¹²² Furthermore, a default judgment predicated on a limited record may be more susceptible to collateral attack in another state.

Rule 1.070(i), which applies only to service of process on non-residents of Florida, has two important limitations: First, the rule does not apply to allegations that support constructive service of process under chapter 49 of the Florida Statutes involving in rem or quasi in rem jurisdiction.¹²³ Chapter 49 does not enumerate the acts that support jurisdiction, nor is it confined to nonresidents. Second, the rule does not apply to substituted service of process on a Florida resident who "conceals his whereabouts."¹²⁴ These limita-

118. FLA. R. CIV. P. 1.070(i).

119. FLA. R. CIV. P. 1.070(i), Committee Note.

120. *Weatherhead Co. v. Coletti*, 392 So. 2d 1342, 1345 & n.8 (Fla. 3d DCA 1980).

121. FLA. STAT. § 48.193 (1981).

122. See generally cases cited notes 115-17 *supra*.

123. FLA. STAT. ch. 49 (1981).

124. See FLA. STAT. §§ 48.161(1), .181(1) (1981).

tions require plaintiffs to follow preexisting pleading procedures.

3. SERVICE OF PROCESS ON NONRESIDENTS

Another facet of Florida's long arm jurisdiction statutes and their pleading requirements concerns the subtle, but significant, ramifications of serving process under either section 48.181 or section 48.193 of the Florida Statutes.¹²⁵ Since 1973 plaintiffs have had the option of obtaining in personam jurisdiction over nonresidents by either personal or substituted service of process. If an official in a foreign jurisdiction personally serves a nonresident under section 48.194,¹²⁶ the cause of action must stem from an act enumerated in section 48.193 that the nonresident allegedly committed in Florida.¹²⁷ If, however, the Secretary of State receives the summons and complaint, the plaintiff is presumably proceeding under section 48.181.

*A.B.L. Realty Corp. v. Cohl*¹²⁸ illustrates the principle that the method of service affects the analysis of the complaint's jurisdictional allegations. The plaintiffs, Michigan residents, had purchased a Florida condominium from a New York corporation. Following the imposition of liens on their property, the plaintiffs acquired jurisdiction over the foreign corporation and two of its executives by substituted service of process through the Secretary of State.¹²⁹

The District Court of Appeal, Fourth District, observed that "[t]he allegations in the complaint suggest that plaintiffs might have proceeded under either [section 48.191 or 48.193]."¹³⁰ Because the plaintiffs had elected to use substituted service, the court con-

125. FLA. STAT. §§ 48.181, .193 (1981).

126. *Id.* § 48.194.

127. *Id.* § 48.193(2), (3). For a discussion of the interrelationship of subsections (1), (2), and (3) of FLA. STAT. § 48.193 (1981), see *Soule v. Rosasco-Soule*, 386 So. 2d 862 (Fla. 1st DCA 1980), in which the estranged wife of a Virginia resident initiated divorce proceedings in Florida. A Virginia sheriff served process on the husband under FLA. STAT. § 48.194 (1981). Although the couple had resided in Florida from 1934 to 1938, the District Court of Appeal, First District, refused to exercise personal jurisdiction because it read subsection (3) of FLA. STAT. § 48.193 (1981) "in pari materia" with subsection (1)(e):

[R]esidency is sufficient to give this state personal jurisdiction only if the cause of action arises from that residency. There is nothing in the allegations of the complaint in this case that there were any acts or omissions arising out of the Florida residency on which the action of [the wife] is based.

386 So. 2d at 863.

128. 384 So. 2d 1351 (Fla. 4th DCA 1980); see notes 104-08 and accompanying text *supra*.

129. 384 So. 2d at 1353.

130. *Id.*

cluded that it must "limit [its] review to the perspective of section 48.181 and look to see whether plaintiffs have shown that defendants carried on or engaged in a business or business venture within the state."¹³¹ This initial step in the court's reasoning had little effect on the amenability of the foreign corporation to Florida long arm jurisdiction because the engaging in "a business or business venture" language in both sections 48.181(1) and 48.193(1)(a) is nearly identical.¹³² The court, however, declined to exercise in personam jurisdiction over the two executives: the "complaint contains no allegation that either party, individually, as opposed to acting in their corporate capacities, engaged in a business or a business venture in Florida."¹³³ In order to sustain the allegation of fraud against the executives, the plaintiffs should have proceeded under section 48.193(1)(b), pertaining to the commission of torts within the state.¹³⁴

III. VENUE

A. Statutory Requirements

Venue statutes specify the geographical locations in which parties may file actions.¹³⁵ Florida's general venue statute, section 47.011 of the Florida Statutes, provides that "[a]ctions shall be brought only in the county where the defendant resides, where the cause of action accrued, or where the property in litigation is located."¹³⁶ The Supreme Court of Florida recently upheld the constitutionality of section 47.011 in *Florida Public Service Commission v. Triple "A" Enterprises, Inc.*,¹³⁷ a case that reached the supreme court by petition for writ of certiorari to review a circuit court's interlocutory order.¹³⁸ In *Triple "A" Enterprises*, the Public Service Commission ("PSC") had ordered household movers to cease their operations until the movers obtained proper authorization from the Commission. The movers, in turn, sought declaratory

131. *Id.*

132. Compare FLA. STAT. § 48.181(1) (1981) (acceptance of the privilege "to operate, conduct, engage in, or carry on a business venture in the State") with FLA. STAT. § 48.193(1)(a) (1981) (person who "operates, conducts, engages in, or carries on a business or business venture in this State").

133. 384 So. 2d at 1355.

134. *Id.* at 1355-56.

135. H. TRAWICK, JR., *supra* note 5, § 5-1.

136. FLA. STAT. § 47.011 (1981). The statute does not apply to nonresidents.

137. 387 So. 2d 940 (Fla. 1980).

138. *Id.* at 941.

and injunctive relief against the PSC in the Circuit Court for Martin County. The PSC filed a motion for change of venue, arguing that it had a common-law privilege to seek venue in the county of its headquarters.¹³⁹ The circuit court denied the motion, holding that section 47.011 of the Florida Statutes¹⁴⁰ and the body of case law establishing a venue privilege for the PSC were unconstitutional.¹⁴¹ On appeal, the supreme court reversed. First, the court concluded that the common-law venue privilege met all "fundamental requirements of due process" and promoted "efficient and uniform rulings."¹⁴² The court then found that the "sword-wielder doctrine," which is an exception to the common-law privilege, did not apply in this case.¹⁴³ Noting that the sword-wielder doctrine "applies only where direct judicial protection is sought from an unlawful invasion of a constitutional right of the plaintiff, directly threatened in the county where the suit is instituted,"¹⁴⁴ the court found that the PSC's alleged threat to the plaintiff's rights was neither real nor immediate. Since the venue statute was constitutional and the sword-wielder doctrine did not apply, the trial court had erred in denying the PSC's motion for change of venue.

Section 47.051 of the Florida Statutes, which governs venue in actions against corporations, provides in part, that "[a]ctions against foreign corporations doing business in this state shall be brought in a county where such corporation has an agent or other representative, where the cause of action accrued, or where the property in litigation is located."¹⁴⁵ Finding that the statute failed to specify the venue for suits against foreign corporations not qualified to transact business in Florida, the District Court of Appeal, Second District, held in *Cleveland Compania Maritima, S.A. Panama v. Logothetis*¹⁴⁶ that the plaintiff could bring an action in any

139. The common-law rule is that "[a]bsent waiver or exception in civil actions brought against the state, its agencies or subdivisions, venue properly lies in the county of its principal headquarters." *Id.* at 942.

140. FLA. STAT. § 47.011 (1981).

141. The trial court relied on FLA. CONST. art. I, § 21, which provides that "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." The lower court also found that the requested change of venue would have caused an unconstitutional delay in the administration of justice. 387 So. 2d at 943.

142. 387 So. 2d at 943.

143. *Id.* at 942.

144. *Id.*

145. FLA. STAT. § 47.051 (1981).

146. 378 So. 2d 1336 (Fla. 2d DCA 1980).

county in which the court could obtain jurisdiction.¹⁴⁷

In *Cleveland*, an employee brought a personal injury suit against his employer, a Panamanian shipping company, in Hillsborough County. The employee was injured while unloading his employer's ship in Lee County, Florida. Although the ship regularly stopped in Miami, it had only stopped on the west coast of Florida three times in the two years preceding the injury.¹⁴⁸ The Second District concluded that this activity was sufficient to meet the "doing business" requirement of section 47.051 of the Florida Statutes.¹⁴⁹ Although the court declined to address whether "doing business" under the venue statute was tantamount to "carries on a business" under either the jurisdiction or service of process statutes,¹⁵⁰ it held that the corporation's Florida activities met both standards. After finding that the corporation had an agent in Hillsborough County, the district court held that venue was not improper.¹⁵¹

B. *Transfers and Dismissals*

Under rules 1.060(b) and 1.140(b) of the Florida Rules of Civil Procedure,¹⁵² a party waives the right to contest venue if he files a motion to dismiss without raising the issue. Accordingly, in *Gross v. Franklin*,¹⁵³ the District Court of Appeal, Third District, rejected the defendant's first contention that his failure to allege improper venue in his motion to dismiss did not waive his right to have the cause transferred under rule 1.060(b).¹⁵⁴ Instead, the court agreed with the defendant's second contention that his motion to transfer venue was timely because he had filed it before the trial court heard argument on his motion to dismiss.¹⁵⁵ The court reasoned that the defendant was not engaging in dilatory tactics: "dilatoriness does not exist where separate motions raising Rule 1.140(b) defenses are filed before hearing is held on any such

147. *Id.* at 1338.

148. *Id.* at 1337-38.

149. FLA. STAT. § 47.051 (1981).

150. *See id.* §§ 48.181, .193.

151. 378 So. 2d at 1339.

152. FLA. R. CIV. P. 1.060(b), .140(b). The supreme court amended rule 1.060(b) in 1980 to delete references to justice of the peace districts. *In re Rules of Civil Procedure*, 391 So. 2d 165, 166 (Fla. 1980).

153. 387 So. 2d 1046 (Fla. 3d DCA 1980).

154. *Id.* at 1048.

155. 387 So. 2d at 1049.

motion."¹⁵⁶

IV. THE INITIAL PHASES OF AN ACTION

A. Pleadings

Two cases addressed the problem of when a litigant must plead with specificity. In *San Marco Contracting Co. v. Department of Transportation*,¹⁵⁷ the trial court dismissed the construction company's amended complaint because it failed to allege specifically that the company had filed its claim in accordance with a departmental regulation that the parties had inserted in the contract. The contractual term required the construction company to file a claim with the Department of Transportation first. The District Court of Appeal, First District, reversed, distinguishing conditions precedent contained in a contract from statutory prerequisites to bringing suit. The court noted that when a statute creates a cause of action, a pleader must specifically allege compliance with the statutory prerequisites. Noting that the department's specifications were neither a statutory nor an administrative remedy, the court concluded that the filing requirement was a contractual condition precedent, which under rule 1.020(c) of the Florida Rules of Civil Procedure,¹⁵⁸ did not require a specific allegation of compliance.¹⁵⁹

Another case, *Florida Power Corp. v. Zenith Industries Co.*,¹⁶⁰ dealt with the relationship between the judicially created rule that parties are to generally plead general damages and rule 1.020(g) of the Florida Rules of Civil Procedure, which requires the specific pleading of special damages. In *Florida Power*, Zenith sought a refund of allegedly excessive fuel charges. The complaint also alleged unspecified general and special damages. The court defined general damages as "the direct, natural, logical and necessary consequences" of an injury.¹⁶¹ Because any overcharges were properly recoverable only as general damages through the Public Service Commission, not the courts, only special damages were at issue.

156. *Id.*

157. 386 So. 2d 615.

158. FLA. R. Civ. P. 1.020(c).

159. 386 So. 2d at 617. FLA. R. Civ. P. 1.020(c) provides, "In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity."

160. 377 So. 2d 203.

161. *Id.* at 205 (citing *Jacksonville Elec. Co. v. Batchis*, 54 Fla. 192, 44 So. 933 (1907)).

Since Zenith did not plead special damages with particularity, the complaint was deficient.¹⁶²

In addition to inquiring into whether a complaint should contain specific allegations, a litigant commencing an action must also be concerned with the effect of the exhibits attached to his pleadings. Under rule 1.130(b) of the Florida Rules of Civil Procedure, attached exhibits become part of the pleading for all purposes.¹⁶³ Thus, if inartful drafting raises questions about the sufficiency of a pleading, the court may examine attached exhibits to ascertain whether the pleadings and exhibits, taken as a whole, state a cause of action.¹⁶⁴ A problem arises when an inconsistency exists between the general allegations of material fact in a complaint and the specific facts revealed in an exhibit.

In *Schweitzer v. Seaman*,¹⁶⁵ two podiatrists entered into an agreement permitting the defendant, described in the contract as an independent contractor, to use the plaintiff's equipment in exchange for a percentage of his gross revenue. The defendant also agreed that, if the arrangement terminated, he would not practice podiatry within five miles of their office for a three-year period. The defendant subsequently violated the covenant not to compete. The plaintiff's amended complaint alleged that the agreement created a partnership. Noting the conflict between the allegation in the complaint and the terms of the agreement, which the plaintiff had attached as an exhibit to the pleadings, the Fourth District held, "Where there is an inconsistency between the general allegations of material fact in the complaint and the specific facts revealed by the exhibit, and they have the effect of neutralizing each other, the pleading is rendered objectionable."¹⁶⁶ The court affirmed the trial court's dismissal of the complaint.

B. Counterclaims, Cross-Claims, and Third-Party Practice

Recent developments treat cross-claims and counterclaims almost identically. Newly amended rule 1.170(f) provides: "When a pleader fails to set up a counterclaim or *cross-claim* through oversight, inadvertence or excusable neglect or when justice requires,

162. *Id.* (dictum).

163. FLA. R. CIV. P. 1.130(b).

164. *Fidelity & Cas. Co. v. L.F.E. Corp.*, 382 So. 2d 363 (Fla. 2d DCA 1980) (complaint allowed to stand when exhibits revealed that defendant was a "volunteer" and therefore subject to liability for his negligence).

165. 383 So. 2d 1175 (Fla. 4th DCA 1980).

166. *Id.* at 1178.

the pleader may set up the counterclaim or *cross-claim* by amendment with leave of the court."¹⁶⁷ Previously, the rule applied only to omitted counterclaims.

In *Hilton Casinos, Inc. v. First National Bank*,¹⁶⁸ the District Court of Appeal, Third District, considered whether a third-party defendant's cross-claim against the plaintiff satisfied rule 1.180¹⁶⁹ by applying the analysis federal courts use in determining the sufficiency of a compulsory counterclaim under rule 13(a) of the Federal Rules of Civil Procedure. First, the court noted that just as rule 1.180 requires a third party's cross-claim to be connected to the subject matter of the original complaint, rule 1.170(a)¹⁷⁰ requires a compulsory counterclaim to arise "out of the transaction or occurrence that is the subject matter of the opposing party's claim."¹⁷¹ Then, observing that the wording of the Florida and federal counterclaim rules was identical, the court turned to a federal district court case for the following four-step analysis:

1. Are the issues of fact and law raised by the claim and counterclaim largely the same?
2. Would *res judicata* bar a subsequent suit on defendant's claim absent the compulsory counterclaim rule?
3. Will substantially the same evidence support or refute plaintiff's claim as well as defendant's counterclaim?
4. Is there any logical relation between the claim and the counterclaim?¹⁷²

Applying this test to the facts before it, the court found the third-party defendant's claim unrelated to the subject matter of the complaint. Accordingly, the Third District reversed the trial court's order denying the plaintiff's motion to dismiss the third party's cross-claim.

C. Amending the Pleadings

Florida has a liberal policy regarding the amendment of pleadings "in order that causes may be tried on their merits and justice may be achieved."¹⁷³ Courts should resolve all doubts in favor of

167. FLA. R. CIV. P. 1.170(f) (emphasis added).

168. 380 So. 2d 1061 (Fla. 3d DCA 1980).

169. FLA. R. CIV. P. 1.180.

170. FLA. R. CIV. P. 1.170(a).

171. 380 So. 2d at 1062.

172. *Id.* at 1063 (quoting *United States v. Taylor*, 342 F. Supp. 715, 717 (D. Kan. 1972)).

173. *Singh v. Tolz*, 380 So. 2d 1326, 1329 (Fla. 4th DCA 1980) (quoting *Enstrom v.*

allowing amendments, except when parties abuse the privilege.¹⁷⁴ For example, an attorney who consciously disregards a court's order to file an amended pleading abuses the privilege. This situation occurred in *Singh v. Tolz*,¹⁷⁵ in which the trial court dismissed the original complaint and ordered the plaintiff's attorney to file amended pleadings within twenty days. The attorney, a newly hired associate, failed to do so. Instead, he attempted to comply with the order after the defendant had moved for a dismissal and entry of final judgment. Even then, the associate merely refiled the original complaint. The trial court granted the defendant's motion to dismiss. On appeal, the plaintiff's new attorney argued that the failure to file an amended pleading was excusable neglect because the associate's supervising attorney was ill and unavailable during the crucial phase of the litigation. Nevertheless, the District Court of Appeal, Fourth District, affirmed the dismissal, concluding that the plaintiff's original attorney consciously disregarded the order of the trial court when he failed to file an amended complaint.¹⁷⁶

When a party requests permission to amend a pleading, the trial court must consider the timing of the motion to amend. Two recent cases indicate that a trial court may properly refuse to allow the amendment of pleadings late in the trial.¹⁷⁷ In *Pan American Bank v. Osgood*,¹⁷⁸ the District Court of Appeal, Third District, noted that a trial court is "in the best position to assess the timeliness and possible disruption and prejudice resulting from the injection of a new issue at that [late] state of the proceedings."¹⁷⁹ Conversely, if a timely filed amended pleading raises a genuine issue of fact, Florida's liberal policy compels a court to accept the revised pleading.¹⁸⁰

The Supreme Court of Florida amended rule 1.190(a), which controls amendments to pleadings, in 1980.¹⁸¹ The previous version of the rule provided that "if a motion or pleading has been served

Dixon, 354 So. 2d 1251 (Fla. 4th DCA 1978)).

174. 380 So. 2d at 1329.

175. *Id.*

176. *Id.*

177. *Martinez v. Clark Equip. Co.*, 382 So. 2d 878 (Fla. 3d DCA 1980) (motion to amend complaint to include new count for breach of implied warranty properly denied when made nineteen months after trial began); *Pan Am. Bank v. Osgood*, 383 So. 2d 1095 (Fla. 3d DCA 1980) (trial court properly denied defendant's motion to amend answer that sought to introduce new and complex issues at late stage of litigation).

178. 383 So. 2d 1095 (Fla. 3d DCA 1980).

179. *Id.* at 1098.

180. *Fox v. Perry*, 382 So. 2d 1251, 1253 (Fla. 3d DCA 1980); see FLA. R. Civ. P. 1.190.

181. FLA. R. Civ. P. 1.190(a) (amended in 391 So. 2d 165, 167 (Fla. 1980)).

in response to a prior pleading and a party does not plead or move in response to the amended pleading, the original response shall be considered as pleaded to the amended pleading."¹⁸² According to the Committee Note,¹⁸³ the court deleted this clause in order to restore the decision in *Scarfone v. Denby*,¹⁸⁴ which had held that a defendant's response to the plaintiff's original pleadings is not an answer to the plaintiff's amended complaint.¹⁸⁵ This deletion parallels both federal and earlier Florida practice by requiring a response to each amended pleading.¹⁸⁶

Rule 1.190(c) provides that, for statute of limitations purposes, an amended pleading relates back to the date of the original pleading if "the claim . . . arose out of the conduct, transaction or occurrence set forth . . . in the original pleading."¹⁸⁷ The language of this rule, however, is difficult to reconcile with the rationale that the District Court of Appeal, Third District, followed in *Daniels v. Weiss*.¹⁸⁸ In *Daniels*, the original complaint set forth a malpractice claim against two doctors. The trial court later permitted the plaintiff's wife to add a derivative claim for loss of consortium. On appeal, the Third District reversed and held, *inter alia*, that the trial court had erred in permitting the amendment.¹⁸⁹ Under a liberal reading of rule 1.190(c), the Third District should have permitted the amendment because the wife's claim arose out of the conduct set forth in the original complaint. The court, however, stated that "[a]n amendment to the pleadings does not relate back to the date the original complaint was filed if the amendment states a new cause of action."¹⁹⁰ Without mentioning the ordinarily liberal policy underlying the rule, the court held that

182. FLA. R. CIV. P. 1.190(a) (1966) (amended 1980).

183. FLA. R. CIV. P. 1.190(a), Committee Note (1980).

184. 156 So. 2d 694 (Fla. 2d DCA 1963).

185. *Id.* at 697.

186. FLA. R. CIV. P. 1.190(a), Committee Note (1980). The Committee Note also points out that "[t]he adoption of Rule 1.500 requiring notice of an application for default after filing or serving of any paper eliminates the need for the [last] clause" of subdivision (a). In addition, the note states that this amendment will aid in simplifying the court file under the doctrine of *Dee v. Southern Brewing Co.*, 146 Fla. 588, 1 So. 2d 562 (1941), which held that by filing an amended pleading, the original pleading serves no further purpose in the record. FLA. R. CIV. P. 1.190(a), Committee Note (1980).

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

188. 385 So. 2d 661 (Fla. 3d DCA 1980).

189. *Id.* at 663.

190. *Id.* (emphasis added). The court extrapolated this principle from *Cox v. Seaboard Coast Line R.R.*, 360 So. 2d 8 (Fla. 2d DCA 1978), in which the court refused to construe FLA. R. CIV. P. 1.190(c) liberally in considering whether an amendment to the pleadings related back to the date of the complaint.

"[a]lthough a claim for loss of consortium is a derivative cause of action, it nevertheless is a separate action."¹⁹¹ Thus, the Third District improperly construed the rule, which only requires that amendments arise "out of the conduct, transaction or occurrence set forth" in the original pleading.¹⁹²

V. ACTIONS

A. *Extraordinary Writs*

In 1980, the Supreme Court of Florida repealed the rules of civil procedure dealing with writs of certiorari,¹⁹³ mandamus,¹⁹⁴ and constitutional stay.¹⁹⁵ These extraordinary remedies are still available, but are now governed by the Florida Rules of Appellate Procedure.¹⁹⁶ The court also repealed rule 1.627,¹⁹⁷ which governed trust accountings.

B. *Injunctions*

The 1980 revisions extensively amended the rule governing injunctions,¹⁹⁸ and created a new rule regarding proceedings against sureties on judicial bonds.¹⁹⁹ The amendments to rule 1.610, which governs injunctions, primarily reflect existing case law and conform the rule to the provisions of rule 65 of the Federal Rules of Civil Procedure.²⁰⁰

Perhaps the most significant change in rule 1.610 was the creation of a new subsection authorizing courts to grant temporary restraining orders without notice.²⁰¹ Previously, rule 1.610 only provided for preliminary or permanent injunctions, either of which could be granted without notice under certain circumstances.²⁰² Now, however, injunctions may not issue "without notice to the

191. 385 So. 2d at 663.

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

193. *In re* Rules of Civil Procedure, 391 So. 2d 165, 177 (Fla. 1980) (repealing Fla. R. Civ. P. 1.640, 3 FLA. STAT. 107 (1969)).

194. *Id.* (repealing Fla. R. Civ. P. 1.660, 3 FLA. STAT. 107 (1969)).

195. *Id.* (repealing Fla. R. Civ. P. 1.680, 3 FLA. STAT. 108 (1969)).

196. FLA. R. APP. P. 9.010, .030(c), .100.

197. Fla. R. Civ. P. 1.637, 253 So. 2d 404, 411-12 (Fla. 1971) *repealed by In re* Rules of Civil Procedure, 391 So. 2d 165, 177 (Fla. 1980).

198. FLA. R. CIV. P. 1.610.

199. FLA. R. CIV. P. 1.625.

200. FLA. R. CIV. P. 1.610, Committee Note.

201. FLA. R. CIV. P. 1.610(b).

202. *See* FLA. R. CIV. P. 1.610(a)-(b) (1969) (amended 1980).

adverse party."²⁰³

To obtain a restraining order, the movant must show by affidavit or verified pleading that he will suffer immediate and irreparable injury if required to give notice to the adverse party.²⁰⁴ In addition, the movant's attorney must file a certificate detailing any efforts that the movant has made to notify the opposing party and the reasons why notice should not be required.²⁰⁵ The trial court may not consider matters outside of the affidavit or verified pleading unless the opposing party appears at the hearing. If the court grants the order ex parte, the order must "define the injury, state why it may be irreparable, give the reasons why the order was granted without notice," and indicate the date and hour of entry.²⁰⁶ The order will automatically expire ten days after entry unless extended for an additional ten days upon a showing of good cause or the consent of the opposing party.²⁰⁷

Parties generally file motions for a temporary restraining order and a preliminary injunction simultaneously. If a court issues a temporary restraining order without notice, the court must hear the motion for preliminary injunction "at the earliest possible time and [the motion] shall take precedence over all matters except older matters of the same character."²⁰⁸ The opposing party may move for a modification or dissolution of the restraining order upon giving three days' notice to the party who obtained the order. The court must entertain this motion as soon as practicable.²⁰⁹ As amended, rule 1.610 still requires parties obtaining a temporary restraining order or preliminary injunction to post a bond, but now grants trial courts the discretion to consider the public interest and dispense with the requirement if an injunction is issued in favor of a governmental entity.²¹⁰

As amended, rule 1.610 reflects the emphasis of existing Florida case law on the extraordinary nature of injunctive relief. Injunctions should be granted sparingly, cautiously, and only when the supporting reasons are stated with particularity in writing.

In *Tri-Plaza Corp. v. Field*,²¹¹ for example, the District Court

203. FLA. R. CIV. P. 1.610(a).

204. FLA. R. CIV. P. 1.610(b)(1)(A).

205. FLA. R. CIV. P. 1.610(b)(1)(B)-(C).

206. FLA. R. CIV. P. 1.610(b)(2).

207. FLA. R. CIV. P. 1.610(b)(2).

208. FLA. R. CIV. P. 1.610(b)(3).

209. FLA. R. CIV. P. 1.610(b)(4).

210. FLA. R. CIV. P. 1.610(c).

211. 382 So. 2d 330 (Fla. 4th DCA 1980) (per curiam).

of Appeal, Fourth District, considered the prerequisites to the issuance of an injunction. Reversing the trial court's grant of a temporary injunction, the Fourth District emphasized that the moving party must demonstrate irreparable harm, the absence of a legal remedy, and the insufficiency of money damages. The court also stressed the importance of a bond, declaring that it is "impermissible to grant a temporary mandatory injunction without requiring bond in the absence of evidence showing financial inability to obtain bond."²¹² Conceding that the decision to grant or deny a temporary injunction is within the trial court's discretion, the court observed that this discretion must be tempered by an analysis of the above prerequisites. "The issuance of a temporary injunction is an extraordinary and drastic remedy which should be granted sparingly and with caution, only after the moving party has proven sufficient facts entitling it to relief."²¹³

The District Court of Appeal, Third District, has added an additional prerequisite to the grant of an injunction. In *Fredericks v. Blake*,²¹⁴ a taxpayer sought to enjoin state approval of preliminary tax assessments in Dade County. After he filed the complaint but before a hearing was held on the matter, the state approved the tax rolls, thus rendering the need for injunctive relief moot. Although the Third District affirmed the trial court's dismissal of the complaint on mootness grounds, the court remarked that an injunction should not issue when "confusion and disorder" resulting in possible public injury outweighs an individual's right to seek relief.²¹⁵ The court further explained that an injunction would have deprived local taxing authorities of the timely and orderly receipt of revenues and would have prevented the executive director of the State Department of Revenue from executing his statutorily defined duties.²¹⁶ These detriments outweighed any harm suffered by the movant and would justify denying injunctive relief.

As previously noted, rule 1.610 makes the posting of a bond a prerequisite of injunctive relief.²¹⁷ In 1980, the Supreme Court of Florida adopted rule 1.625 to permit parties to assert claims against sureties on judicial bonds by motion.²¹⁸ Although the rule

212. *Id.* at 331.

213. *Id.*

214. 382 So. 2d 368 (Fla. 3d DCA 1980).

215. *Id.* at 371.

216. *Id.*

217. See note 210 and accompanying text *supra*.

218. FLA. R. Civ. P. 1.625.

provides an alternative to independent actions against sureties, obligees may still file an independent action.²¹⁹ The new rule requires sureties to provide a service address when posting bond and thus submit themselves to the jurisdiction of the court. If a party seeks to enforce a surety's liability by motion, he may serve the motion by mailing it to the address provided by the surety. The rule also provides for default and preserves the right to a jury trial.²²⁰

C. *Declaratory Judgments*

Several appellate court cases have critically examined the character and proper scope of actions for declaratory relief. Among the issues considered were the nature of the declaratory remedy,²²¹ the right to trial by jury in declaratory actions,²²² and the legal effect of a dismissal of a complaint for declaratory relief.²²³

In *Cherry v. Bronson*,²²⁴ a tenured college professor who had received a notice of dismissal sought an administrative hearing in accordance with the provisions of the faculty handbook. He also sought to disqualify the college president from acting as a hearing examiner, alleging bias. When the president refused to recuse himself, the professor filed an action for damages and equitable relief, and for a declaration of his rights under the handbook provisions. The trial court dismissed the claim, citing the professor's failure to exhaust his administrative remedies.

The District Court of Appeal, Fifth District, reversed, observing that "[d]eclaratory judgments are appropriate to afford parties relief from insecurity and uncertainty with regards to rights or legal relationships."²²⁵ The court adopted the following standard of review:

The test recognized in this state of whether or not a complaint will give rise to a proceeding under the Declaratory Judgment Act inquires whether or not the party seeking a declaration shows that he is in doubt or is uncertain as to the existence or non-existence of some right, status, immunity, power or privilege and has an actual, practical and present need for a declaration.²²⁶

219. FLA. R. CIV. P. 1.625, Committee Note.

220. FLA. R. CIV. P. 1.625.

221. *Cherry v. Bronson*, 384 So. 2d 169 (Fla. 5th DCA 1980).

222. *Cooley v. Cody*, 377 So. 2d 796 (Fla. 1st DCA 1979).

223. *Government Employees Ins. Co. v. Anta*, 379 So. 2d 1038 (Fla. 3d DCA 1980).

224. 384 So. 2d 169 (Fla. 5th DCA 1980).

225. *Id.* at 170 (citing *Jones v. Howland*, 369 So. 2d 438 (Fla. 3d DCA 1979)).

226. *Id.* (quoting *Hialeah Race Course v. Gulfstream Racing Ass'n*, 210 So. 2d 750, 752

The court recognized that one must ordinarily exhaust all administrative remedies before commencing a court action, but added that this policy applies only when adequate administrative remedies are available.²²⁷ The court then found that the administrative remedies authorized by the faculty handbook did not assure a fair hearing by impartial judges, and ruled that a declaratory action was the proper vehicle for determining the petitioner's rights. The court did, however, affirm the trial court's dismissal of the portions of the complaint that sought damages and specific performance because those issues were premature.²²⁸

In *Cooley v. Cody*,²²⁹ the District Court of Appeal, Third District, considered whether the plaintiff was entitled to a jury trial in an action for declaratory relief. The plaintiff had challenged certain deeds, alleging that they were ineffective because the grantor was incompetent, and unduly and fraudulently influenced by the defendants to execute the deeds. The complaint demanded a jury trial on all triable issues.²³⁰ Before trial, the defendants moved for an adjudication of the plaintiff's right to a jury trial, claiming that the suit was an equitable action to rescind a deed and, therefore, carried no right to trial by jury. Nonetheless, the court submitted the question of the deed's validity to the jury.

The District Court of Appeal, First District, reversed and remanded, stating that the trial court had the discretion to submit appropriate factual issues to the jury, but this discretion did not extend to issues of fact traditionally within the province of equity.²³¹ The court found that the claim "premised on the rescission of deeds on the grounds of incompetency and undue influence was clearly grounded in equity."²³² The trial court had thus committed reversible error by submitting the entire matter to the jury for a general verdict.²³³

In *Government Employees Insurance Co. v. Anta*,²³⁴ the District Court of Appeal, Third District, considered whether a trial court's dismissal of a complaint for declaratory relief represented a ruling on the merits. Following an automobile accident, Mr. and

(Fla. 4th DCA 1968)).

227. 384 So. 2d at 170.

228. *Id.*

229. 377 So. 2d 796 (Fla. 1st DCA 1979).

230. *Id.* at 797.

231. *Id.* (citing *Berg v. New York Life Ins. Co.*, 88 So. 2d 915 (Fla. 1956)).

232. 377 So. 2d at 797.

233. *Id.* at 798.

234. 379 So. 2d 1038 (Fla. 3d DCA 1980) (per curiam).

Mrs. Anta had settled with the other party's insurance carrier by executing a general release in return for \$10,000. The Antas then filed a claim against their own carrier, Government Employees Insurance Co. ("GEICO"), for underinsured motorist's coverage. GEICO denied coverage, claiming that the release executed by the Antas had also released GEICO from liability. The parties to the release subsequently agreed to declare it null and void on the ground of mutual mistake because of the effect the release had on the Antas' underinsured motorist claim. The Antas also returned the \$10,000 they had received. GEICO then filed a complaint seeking a declaratory judgment as to the legal effect of the release and the subsequent agreement to set the release aside. The trial court dismissed the complaint without explanation. On appeal, the Third District reversed. In response to the Antas' contention that the dismissal represented the trial court's ruling on the merits of GEICO's claim, the Third District stated:

Unlike other actions, a motion to dismiss a petition for declaratory judgment does not go to the merits but goes only to the question of whether or not the plaintiff is entitled to a declaration of rights—not to whether or not he is entitled to a declaration in his favor. . . . In spite of the fact that appellant, in his motion to dismiss, raised an issue on the merits, a ruling by the trial court on the merits at that time was premature. A ruling on the merits should not be made until after final hearing where the parties have full opportunity to present evidence in support of their respective positions.²³⁵

The court found that in ruling on a motion to dismiss a declaratory judgment action, a trial court may determine only whether the movant has stated a proper claim for relief. The court then concluded that the question of the validity of the release and the effect of the subsequent agreement were proper subjects for a declaratory action, because a determination of those issues would affect the insurer's legal rights and relations, and thus its liability.²³⁶ It was therefore improper for the trial court to consider the merits of the claim on a pretrial motion to dismiss for failure to state a claim for declaratory relief.

235. *Id.* at 1039 (quoting *Mills v. Ball*, 344 So. 2d 635, 638 (Fla. 1st DCA 1977) (citations omitted)).

236. 379 So. 2d at 1040.

VI. PARTIES

A. *In General*

Rule 1.210 of the Florida Rules of Civil Procedure²³⁷ specifies what parties may sue, both generally and in representative capacities. Prior to the 1980 amendments, the rule had four subdivisions: (a) parties generally, (b) infants or incompetents, (c) trustees as representatives of beneficiaries, and (d) parties in actions to execute trusts of a will.²³⁸ The Supreme Court of Florida repealed the latter two subdivisions in 1980 after statutory changes made them obsolete.²³⁹

B. *Joinder*

Subsection (a) of rule 1.210, which describes the various parties that may be joined in an action, provides in part that "[a]ll persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs and any person may be made a defendant who has or claims an interest adverse to the plaintiff."²⁴⁰ *Clemons v. Flagler Hospital, Inc.*²⁴¹ raised the interesting question whether one can join a defendant's insurance company as an adverse party when the statute of limitations has run with respect to the insured. In *Clemons*, the plaintiff had filed a malpractice suit against a hospital within the limitations period. Five years later he filed a second amended complaint, which joined the hospital's liability insurance carriers as defendants. The trial court dismissed the claims against the insurance carriers on the ground that the statute of limitations had expired. The District Court of Appeal, Fifth District, reversed, holding that the insurance carriers could be joined at any stage of the proceedings.²⁴²

237. FLA. R. CIV. P. 1.210.

238. FLA. R. CIV. P. 1.210(c)-(d), 3 FLA. STAT. 85.86 (1969).

239. *In re Florida Rules of Civil Procedure*, 391 So. 2d 165, 167 (Fla. 1980); see FLA. STAT. § 737.402(2)(z) (1981), which empowers trustees to prosecute and defend actions regardless of the conditions established in FLA. R. CIV. P. 1.210. FLA. STAT. § 733.212 (1981) provides a means of eliminating the interest of an heir at law who is not a beneficiary under the will, obviating the need for former Fla. R. Civ. P. 1.210(d), 3 FLA. STAT. 86 (1969). The Committee Note to the 1980 amendment also points out that "[t]o the extent that an heir at law is an indispensable party to a legal proceeding concerning a testamentary trust, due process requires notice and an opportunity to defend, so the rule would be unconstitutionally applied." FLA. R. CIV. P. 1.210, Committee Note.

240. FLA. R. CIV. P. 1.210(a).

241. 385 So. 2d 1134, 1136 (Fla. 5th DCA 1980).

242. *Id.* Florida common law permits the joinder of an insurance carrier in an action against its insured on the theory that the insurer is the "real party in interest" within the

Moreover, a plaintiff's right under rule 1.210(a) to sue an insurance carrier directly does not change the established rule that a cause of action against the carrier does not arise until the entry of judgment against the insured. Since the statute of limitations had not yet begun to run against the defendant carriers,²⁴³ their joinder could not be barred. The court noted that this doctrine did not "create or affect any substantive rights or privileges,"²⁴⁴ because joinder is a procedural, not substantive right.

C. Indispensable Parties

*Fulmer v. Northern Central Bank*²⁴⁵ illustrates the interaction of rule 1.210(a)²⁴⁶ and the indispensable party doctrine. In *Fulmer*, the personal representative of an estate sought to void the decedent's *inter vivos* transfers of assets to a trust. The trial court dismissed the action because it had no jurisdiction over the trust, its assets, or its beneficiaries, all of which were located in another state. On appeal the District Court of Appeal, Second District, affirmed in part, but not on jurisdictional grounds. Rather, because the beneficiaries were indispensable parties under Florida law,²⁴⁷ and because, as nonresidents, the court could not subject them to its jurisdiction, the suit was subject to dismissal under rule 1.140(b) for the failure to join indispensable parties.²⁴⁸ The trial court erred in dismissing the claim with prejudice,²⁴⁹ however, because the failure to join an indispensable party is not an adjudication on the merits under rule 1.420(b).²⁵⁰

VII. CLASS ACTIONS

The Supreme Court of Florida's comprehensive revision of rule 1.220 in 1980 considerably broadened the scope and availability of class actions.²⁵¹ Although the new rule resembles rule 23 of

meaning of FLA. R. Civ. P. 1.210(a). *Shingleton v. Bussey*, 223 So. 2d 713 (Fla. 1969); see *Beta Eta House Corp. v. Gregory*, 237 So. 2d 163 (Fla. 1970).

243. 385 So. 2d at 1135.

244. *Id.* at 1136 (citing *Markert v. Johnston*, 367 So. 2d 1003 (Fla. 1978)).

245. 386 So. 2d 856 (Fla. 2d DCA 1980).

246. FLA. R. Civ. P. 1.210(a).

247. 386 So. 2d at 858 (citing *Byers v. Beddow*, 106 Fla. 166, 142 So. 894 (1932)).

248. 386 So. 2d at 858.

249. *Id.* FLA. R. Civ. P. 1.420(b) provides that any dismissal not provided for under the rule, "other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication on the merits."

250. FLA. R. Civ. P. 1.420(b).

251. FLA. R. Civ. P. 1.220 (amended in 391 So. 2d 165, 168-69 (Fla. 1980)).

the Federal Rules of Civil Procedure,²⁵² it differs from the federal rule in several respects. For example, subsections (a) and (b) of rule 1.220²⁵³ clarify both the prerequisites to class representation and the claims and defenses a class can maintain. In addition, subsection (c), which the supreme court borrowed in large part from the local rules of the United States District Court for the Southern District of Florida,²⁵⁴ provides detailed pleading requirements designed to facilitate the administration of class actions.²⁵⁵ Finally, subsection (d) prescribes stricter and more detailed notice requirements than those set out in the federal rule.²⁵⁶ Rule 1.220 parallels the federal provisions that establish a schedule for determining issues, allow class members to "opt out," authorize subclasses, and set forth notice and hearing requirements for court-approved dismissals or compromises of class claims.²⁵⁷

In 1980 the supreme court also renumbered the rule governing class actions brought by condominium associations, and expressly exempted the associations from the requirements of rule 1.220.²⁵⁸ The court had adopted the condominium class action rule in 1977 in *Avila South Condominium Association, Inc. v. Kappa Corp.*²⁵⁹ In that case, the court invalidated a statute²⁶⁰ that permitted condominium associations to sue on behalf of unit owners in matters of common interest. By attempting to define the proper parties to a lawsuit, the legislature had impermissibly invaded "the exclusive

252. FED. R. CIV. P. 23.

253. FLA. R. CIV. P. 1.220(a)-(b).

254. S.D. FLA. R. 19.

255. FLA. R. CIV. P. 1.220(c) requires: (1) the designation "Class Representation" in the caption of the pleadings, (2) specific references to the provisions of subsection (b) relied upon by the class, (3) an explanation of the common questions of law and fact, (4) the pleading of particular facts giving rise to the class claim, (5) the approximate number in the class, (6) a definition of the class, and (7) the facts and circumstances giving rise to the application of a subsection (b) provision.

256. Compare FLA. R. CIV. P. 1.220(d) with FED. R. CIV. P. 23(c).

In 1979, the District Court of Appeal, Second District, held that procedural due process does not require a class representative to notify all class members of stipulations entered into for settlement purposes. *Scott v. Walker*, 378 So. 2d 828, 829 (Fla. 2d DCA 1979). Although notice may not be constitutionally mandated, the notice requirements of FLA. R. CIV. P. 1.220(d)(2) have somewhat emasculated this holding. The Supreme Court of Florida rejected proposed FLA. R. CIV. P. 1.222, authorizing shareholder derivative actions similar to FED. R. CIV. P. 23.1, on the ground that the proposed rule would be "incompatible with substantive and decisional law regarding the nature of derivative actions." *In re Rules of Civil Procedure*, 391 So. 2d 165, 165 (Fla. 1980).

257. FLA. R. CIV. P. 1.220(d)-(e).

258. See FLA. R. CIV. P. 1.221.

259. 347 So. 2d 599 (Fla. 1976).

260. FLA. STAT. § 718.111(2) (1977).

prerogative" of the supreme court to adopt rules of procedure.²⁶¹ Nonetheless, to avoid a potential constitutional problem and provide condominium owners with a dispute-settlement mechanism, the court adopted the text of the invalidated statute as a rule of procedure.²⁶²

The following year, the Civil Procedure Rules Committee unsuccessfully urged the supreme court to modify the rule adopted in *Avila*,²⁶³ arguing that the rule was unnecessary under the existing rules and statutory framework.²⁶⁴ The committee had also argued that the new rule would "force litigation upon unwilling members of a class which is contrary to the precepts of a traditional class action."²⁶⁵ The supreme court rejected this analysis also, noting that in a number of instances since the adoption of the rule, trial judges had required class representatives to notify putative class members, thus permitting the class members to "opt out."²⁶⁶ Although this practice is not inconsistent with either the old or the new rules,²⁶⁷ the absence of an express opting out provision may be significant because of a defendant's ability to counterclaim against the class. A class member might inadvertently waive the right to opt out without realizing that he was a party.

Despite controversy and dissatisfaction, the rule announced in *Avila* survived the 1980 amendment in essentially its original form.²⁶⁸ The condominium class action rule, however, has been used infrequently, and only one district court of appeal decision dealt with the rule in 1980. In *Kohl v. Bay Colony Club Condominium*,²⁶⁹ the District Court of Appeal, Fourth District, ruled that in class actions, a court has jurisdiction over the putative class members for all purposes, including the entertainment of counter-

261. 347 So. 2d at 608.

262. *Id.*

263. *In re* Rule 1.220(b), Florida Rules of Civil Procedure, 353 So. 2d 95, 95 (Fla. 1977).

264. The committee had argued that the statute merely created a substantive "capacity" to sue in the condominium association, a right properly created by the legislature, and that FLA. R. Civ. P. 1.220(b) was superfluous. The committee further argued that FLA. R. Civ. P. 1.220(a) would determine an association's standing to maintain an action. 353 So. 2d at 96. The court conceded that the legislature had the power to grant a substantive right, but emphasized that the court was solely responsible for the procedural vehicle by which the right could be asserted.

265. 353 So. 2d at 97.

266. *Id.*

267. Fla. R. Civ. P. 1.220(b), 347 So. 2d 599, 608 (Fla. 1977); FLA. R. Civ. P. 1.221.

268. FLA. R. Civ. P. 1.221.

269. 385 So. 2d 1028 (Fla. 4th DCA 1980).

claims, until the members request exclusion from the class.²⁷⁰

VIII. DISCOVERY

A. Scope

The language of rule 1.280(b) of the Florida Rules of Civil Procedure²⁷¹ provides that “[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action . . . [or] appears reasonably calculated to lead to the discovery of admissible evidence.”²⁷² The requirements of relevancy and reasonableness, however, allow the judiciary considerable discretion in setting the bounds of the discovery process.

For example, in *Equifax v. Cooper*,²⁷³ the District Court of Appeal, Fifth District, vacated a trial court’s order to produce documents that was supported by nothing more than speculation of counsel.²⁷⁴ The court observed that the discovery request did not satisfy the requisites of relevance and reasonableness.²⁷⁵ The plaintiff in *Equifax* had sought discovery of three surveillance films and a report that had been prepared by an agency investigating the plaintiff. Although the plaintiff was the subject of the investigations, the investigations were not connected with the litigation. The court reasoned that, even though the report pertained to the plaintiff, this was not a sufficient connection, standing alone, to warrant intrusion of the issue into the case, and that “[a]ny other rule would transform every lawsuit into a fishing expedition, . . . seriously imped[ing] the orderly and expeditious disposition of litigation.”²⁷⁶

The work-product privilege contained within rule 1.280(b)(2) also constrains the scope of the discovery process. The provision of the rules allowing a party to discover material prepared for trial tempers the privilege when the party needs the materials to prepare his case and cannot otherwise obtain equivalent material without undue hardship.²⁷⁷ In *Equifax*, a third party had initiated the investigation for a different lawsuit. The court refused to venture beyond the literal language of the rule and extend the scope of

270. *Id.* at 1029.

271. FLA. R. CIV. P. 1.280(b).

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

273. 380 So. 2d 514 (Fla. 5th DCA 1980).

274. *Id.* at 515.

275. *Id.*

276. *Id.* at 516.

277. FLA. R. CIV. P. 1.280(b)(2).

discovery in contravention of the work-product privilege to situations in which the parties have an interest in other, but related, litigation.²⁷⁸ To come within the ambit of the work-product privilege, a party must show that the materials reflect "some indication of personal thought, views, knowledge, or evaluation by the attorney, litigant, or agent."²⁷⁹ Thus, the privilege would not extend to a third party's documents or papers in the custody of an attorney, party, or agent until trial.

In *Colonial Penn Insurance Co. v. Blair*,²⁸⁰ a plaintiff who claimed the work-product privilege objected to the defendant's request for the transcript of a traffic court proceeding concerning the accident involved in the litigation. The plaintiff's attorney had a court reporter attend the traffic hearing and record selected testimony, including that of one of the defendants. In holding the transcript discoverable as trial preparation material, the court reasoned that the plaintiff had the only transcript of the traffic court proceeding. Moreover, the defendants could not obtain the transcript in another manner.²⁸¹ Observing that memory is a poor substitute for documented statements made soon after the accident, the court also emphasized the defendants' need for the transcript to prepare their defense.²⁸²

One particularly troublesome area in which the courts have difficulty in defining the bounds of reasonable inquiry is the discovery of a defendant's financial worth when a plaintiff is seeking punitive damages. The Supreme Court of Florida finally addressed this issue when it settled a conflict between the First and Second District Courts of Appeal in *Tennant v. Charlton*.²⁸³ The Second District in *Tennant* had concluded there was no reason to place the financial worth of the party in a special discovery category. All documents indicating financial resources, including tax returns and business statements, were subject to discovery when punitive dam-

278. 380 So. 2d at 515. The plaintiff sought discovery of surveillance films made by an investigatory agency that a third party had retained. The defendants apparently wanted to bring these materials within the scope of FLA. R. Civ. P. 1.280(b)(2) although the films were available from another source. The court, however, refused to extend the rule and held that the requirements of FLA. R. Civ. P. 1.280(b)(1) must be satisfied before the work-product rule becomes operative. *Id.*; cf. *Howard Johnson's Motor Lodges, Inc. v. Baranov*, 379 So. 2d 114 (Fla. 1st DCA 1979) (the existence, but not necessarily the contents, of surveillance films and information discoverable).

279. *Colonial Penn Ins. Co. v. Blair*, 380 So. 2d 1305, 1306 (Fla. 5th DCA 1980).

280. 380 So. 2d 1305 (Fla. 5th DCA 1980).

281. *Id.* at 1306.

282. *Id.*

283. 377 So. 2d 1169 (Fla. 1979), *aff'g* 365 So. 2d 418 (Fla. 2d DCA 1978).

ages were properly sought. If necessary, the trial judge could limit the discovery process under rule 1.280 to protect a party if the request is annoying, embarrassing, oppressive, or unduly burdensome.²⁸⁴ Conversely, the First District took the position that discovery of tax returns and profit and loss statements should be denied.²⁸⁵ Asserting that these documents do not accurately reflect a party's true financial worth, the court concluded that a properly authenticated financial statement is more accurate.²⁸⁶

In accordance with the Second District's position, the supreme court held that the discovery of a party's financial resources in punitive damage cases should not be limited to a sworn statement of current assets and liabilities.²⁸⁷ In support of its holding, the court observed that:

[O]ne party frequently minimizes his financial ability to respond when it is an issue in a law suit, while the other party often has a tendency to inflate that same financial ability. Even under oath a party often seems to view another party's financial resources as great or small in direct proportion to the benefit which will accrue to that party. Thus, it is the height of naiveté to suggest that a sworn statement of one's net worth must be accepted as the final word on that important subject. The search for forgotten or hidden assets is of the essence of the discovery process.²⁸⁸

The supreme court also agreed with the Second District that the trial courts should protect a party from harassment and overly burdensome inquiry and limit the discovery of financial resources by issuing a protective order under rule 1.280(c).²⁸⁹ In support of its holding, the court stated that

[t]he trial court should keep in mind that in most punitive damages cases, at the time plaintiffs are seeking discovery of defendants' financial resources, there has not yet been a judicial determination of the defendants' liability. If plaintiffs were allowed unlimited discovery of defendants' financial resources in cases where there is no actual factual basis for an award of punitive damages, the personal and private financial affairs of defendants would be unnecessarily exposed and, in some cases, the

284. *Charlton v. Tennant*, 365 So. 2d 418 (Fla. 2d DCA 1978).

285. *Tallahassee Democrat, Inc. v. Pogue*, 280 So. 2d 512 (Fla. 1st DCA 1973).

286. *Id.*

287. 377 So. 2d at 1170.

288. *Id.* (quoting *Donahue v. Herbert*, 355 So. 2d 1264, 1265 (Fla. 4th DCA 1978)).

289. FLA. R. Civ. P. 1.280(c).

threat of such exposure might be used by unscrupulous plaintiffs to coerce settlements from innocent defendants. In determining whether defendants' motion for protective order under rule 1.280(c) is "for good cause shown," the trial court may consider, among other things, whether or not an actual factual basis exists for an award of punitive damages.²⁹⁰

Evidently, mere allegations of a cause of action entitling a party to demand punitive damages will no longer suffice to justify the discovery of a party's financial resources.

The determination whether a court should limit discovery by issuing a protective order is a question of fact that must be considered on a case-by-case basis. In *Union Fidelity Life Insurance Co. v. Seay*,²⁹¹ the plaintiff requested the insurance company to produce all records concerning the denial of a certain type of claim, with no limitation regarding the time period or number of claims. The District Court of Appeal, Second District, held that the trial court abused its discretion when it denied petitioner's motion for a protective order, and quashed the trial court's order. The court also observed that the proper procedure in these situations is for the party opposing discovery to select an appropriate representative to be deposed in Florida pursuant to rule 1.310(b)(6).²⁹² If necessary or appropriate, the party can then secure the discovery of the records at a reasonable time and place.²⁹³

Another consideration relevant to the reasonableness of a production request is whether the nature of the documents or their proposed use is predicated on an existing cause of action. If a cause of action does not clearly exist, a litigant may only discover materials that are likely to resolve the question. For example, in *Sunshine Sound Enterprises v. Williams*,²⁹⁴ the District Court of Appeal, Third District, reversed the trial court's order directing the defendant to produce all of the documents the plaintiff would need to conduct an accounting of the matters that formed the subject of her complaint. Noting that the trial court had failed to determine

290. 377 So. 2d at 1170.

291. 378 So. 2d 1268 (Fla. 2d DCA 1979). Compliance with the request would have required the production of 45,000 policies that were stored on computer software in Pennsylvania. *Id.* at 1269.

292. The rule provides that when a party names a corporation as a deponent and identifies, with reasonable particularity, the matters to be examined, the corporation shall designate a representative to testify about matters known or reasonably available to the corporation. FLA. R. CIV. P. 1.310(b)(6).

293. 378 So. 2d at 1269.

294. 382 So. 2d 430 (Fla. 3d DCA 1980).

whether any right to an accounting existed, the court held that it was premature to order the production of documents pertaining to the accounting itself.²⁹⁵

One example of the public policy limitations on the scope of discovery occurs in the context of medical mediation proceedings and malpractice actions. Section 768.40(4) of the Florida Statutes shields from civil discovery requests the records of a medical review committee²⁹⁶ that has the authority to examine negligence claims against providers of health services.²⁹⁷ The statute also prohibits persons who attend a committee hearing from subsequently testifying about the proceedings. This statutory immunity does not, however, extend to information that is available from other sources, nor does it extend to persons who have knowledge independent of the committee hearings.²⁹⁸ Nevertheless, public policy may sometimes prohibit discovery of this kind of information even if the statutory privilege does not apply.

For example, in *Segal v. Roberts*,²⁹⁹ the plaintiff in a medical malpractice action sought discovery of the entire file of an ad hoc hospital committee that had previously evaluated the conduct, skill, and ability of the defendant-doctor in matters unrelated to the plaintiff's action. The District Court of Appeal, Fourth District, found section 768.40(4) inapplicable because the statute only prohibits discovery if the cause of action asserted in the complaint arose out of a matter that the committee has evaluated.³⁰⁰ Nonetheless, the court refused to allow discovery as a matter of public policy, stating that "[t]he arguments in favor of confidentiality of the records and proceedings of a medical review committee are so compelling that discovery should be allowed only in the most necessitous circumstances."³⁰¹ Thus, when the statute is not applica-

295. *Id.* at 431.

296. FLA. STAT. § 768.40(1) (1981) defines a medical review committee as:

a committee of a state or local professional society of health care providers or of a medical staff of a licensed hospital or nursing home, provided the medical staff operates pursuant to written bylaws that have been approved by the governing board of the hospital or nursing home, which committee is formed to evaluate and improve the quality of health care rendered by providers of health service

297. Included in the definition of health care providers are licensed physicians, podiatrists, osteopaths, dentists, chiropractors, and pharmacists. *Id.*

298. FLA. STAT. § 768.40(4) (1981).

299. 380 So. 2d 1049 (Fla. 4th DCA 1979).

300. *Id.* at 1052.

301. *Id.* Judge Schwartz in *Dade County Medical Ass'n v. Hlis*, 372 So. 2d 117, 120 (Fla. 3d DCA 1979), indicated that these arguments are based on an overwhelming public

ble, a party may obtain discovery of medical review committee files only upon a "showing of 'exceptional necessity' or 'extraordinary circumstances.'"³⁰²

B. *Depositions and Other Devices*

In 1980 the Supreme Court of Florida revised the procedures governing depositions and other discovery devices to bring them in line with current needs and actual practices. These revisions are indicative of the judiciary's concern that litigation has become increasingly complex and expensive.

Subsection (d) of rule 1.290,³⁰³ which dealt with depositions *de bene esse*, was repealed because the existing rules have made these depositions obsolete.³⁰⁴ The supreme court also revised rule 1.400 to grant the public the right to examine depositions.³⁰⁵ As amended, the rule states: "Unless otherwise ordered by the court, (1) any deposition may be opened and examined by any person

interest in keeping hospital staff meetings confidential. Confidentiality fosters the flow of ideas and advice. Fear of disclosure, in the event of a malpractice suit, hinders the objectives of these meetings.

302. *Dade County Medical Ass'n v. Hlis*, 372 So. 2d 117, 121 (Fla. 3d DCA 1979) (quoting *Bredice v. Doctors Hosp.*, 50 F.R.D. 249, 250-51 (D.D.C. 1970)).

303. The supreme court repealed Fla. R. Civ. P. 1.290(d), effective January 1, 1981. See 391 So. 2d 165, 170 (Fla. 1980). This provision allowed a person to take the deposition of himself or another person, regarding a matter cognizable in any court of the state, if loss of that person's testimony was threatened because of advanced age, illness, or if the person was about to leave the state. Under these circumstances a person would not have to comply with the petition and notice requirements of FLA. R. Civ. P. 1.290(a). See FLA. R. Civ. P. 1.290 (prior to 1980 amendment).

304. FLA. R. Civ. P. 1.290, Committee Note; see FLA. R. Civ. P. 1.280, .310. One of the changes proposed by the Civil Procedure Rules Committee of The Florida Bar called for an amendment to FLA. R. Civ. P. 1.310 to allow for telephone depositions. The proposed amendment provided in pertinent part:

A party may take a deposition by telephone. If necessary to assure the adequate right of examination of the deponent, the court may require that the deposition be taken in the presence of the deponent. The notice shall designate the manner of recording and preserving the deposition. The court may require that the deposition be taken by stenographic means if necessary to assure that the deposition will be accurately recorded and properly preserved. A party or the witness may nevertheless arrange to have a stenographic transcription at his own initial expense.

CIVIL PROCEDURE RULES COMMITTEE, THE FLORIDA BAR, PROPOSED AMENDMENTS AND REVISIONS TO FLORIDA RULES OF CIVIL PROCEDURE FOR CYCLE ENDING JULY 1, 1980, at 28-29 (March 19, 1980) [hereinafter cited as PROPOSED AMENDMENTS].

Although the court rejected the proposal, it is likely that a change is forthcoming, since the court referred the matter back to the committee for study and the drafting of an entirely new rule. The court directed the committee to submit its proposal "as soon as practicable" for consideration. *In re* Rules of Civil Procedure, 391 So. 2d 165, 165 (Fla. 1980).

305. FLA. R. Civ. P. 1.400.

under the supervision of the clerk or (2) the clerk may unseal the deposition and file it with the other papers in the court file."³⁰⁶ The purpose of this amendment is to conform the rule with actual practice.³⁰⁷

The supreme court adopted rule 1.351 to permit the production of "documents and things" without a deposition.³⁰⁸ This rule should eliminate the unnecessary expenditure of lawyers' time in deposing records custodians. The rule prohibits production, however, if a party objects. The requesting party will have to serve a notice of deposition and subpoena duces tecum under rule 1.310.³⁰⁹

Judicial decisions interpreting the unamended rules have made changes in other discovery procedures. For example, *Simons v. Jorg*³¹⁰ involved a paternity action in which the issue was whether the court could compel the putative father to submit to the recently developed Human Leukocyte Antigens ("HLA") blood test³¹¹ under rule 1.360(a).³¹² The District Court of Appeal, Second District, had quashed the trial court's original order granting the plaintiff's motion to compel the defendant to submit to the blood test, on the ground that discovery is permissible only on matters reasonably calculated to lead to admissible evidence. Nothing in the record indicated that the HLA test results would be admissible or even lead to admissible evidence.³¹³ On remand the plaintiff again moved to compel the defendant to submit to the blood test and, at the hearing, introduced the testimony of a pathologist dem-

306. FLA. R. CIV. P. 1.400.

307. FLA. R. CIV. P. 1.400, Committee Note. Previously the rule only permitted parties to examine the depositions in the presence of the clerk. Compliance with this requirement was clearly impractical in counties with large caseloads.

308. FLA. R. CIV. P. 1.351 (amended in 391 So. 2d 165, 171-72 (Fla. 1980)).

309. FLA. R. CIV. P., Committee Note; see FLA. R. CIV. P. 1.310.

310. 384 So. 2d 1362 (Fla. 2d DCA 1980).

311. The HLA test involves tissue typing of white blood cells and, unlike traditional blood grouping tests, yields higher probabilities of paternity. For a discussion of the HLA test, see Terasaki, *Resolution by HLA Testing of 1,000 Paternity Cases Not Excluded by ABO Testing*, 16 J. FAM. L. 543 (1978).

312. The rule permits discovery by physical and mental examination:

When the mental or physical condition, including the blood group, of a party or of a person in the custody or under the legal control of a party is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce the person in his custody or legal control for examination. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions and scope of the examination and the person or persons by whom it is to be made.

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

313. 375 So. 2d 288, 289 (Fla. 2d DCA 1979).

onstrating the accuracy of the HLA test.³¹⁴ Based on this uncontradicted testimony, the trial court granted the motion despite the defendant's objection that the test results would not be admissible as evidence. The Second District affirmed, holding:

Even if this were true, the possible inadmissibility of the test results would not be sufficient to prevent discovery. Discovery is permissible with respect to any matter that is relevant to the subject matter of the pending action, where the information sought is reasonably calculated to lead to the discovery of admissible evidence. Relevant evidence is evidence tending to prove or disprove a material fact

. . . [Plaintiff] adequately established that HLA test results may have substantial probative value and may be relevant in this action to establish paternity. The test results, if admitted in evidence, could have a tendency to prove the fact of paternity, which is the central issue in controversy in this case. Therefore, we agree with the trial court that good cause was shown to compel [defendant] to submit to the blood test.³¹⁶

Although the court held that the plaintiff had shown good cause to compel the defendant to submit to the HLA test, the court refused to speculate whether the test results could in fact be admitted into evidence and, if so, what weight the trier of fact should give to this medical evidence.³¹⁶ Thus, with medical and technological advances, the discovering party not only has the burden of showing that the information sought is reasonably calculated to lead to the discovery of admissible evidence,³¹⁷ but also must establish the validity or scientific acceptance of the information through expert testimony.

Another significant discovery device recently validated by judicial construction is Florida's version of the Uniform Foreign

314. The testimony of the pathologist was substantially as follows:

The HLA test is not the typical ABO blood grouping test which is in general use to prove nonpaternity. The HLA testing is a more sophisticated procedure which involves tissue typing of the white blood cells and results in far higher probabilities of paternity than those yielded by any of the traditional blood grouping tests. With HLA testing, if a male is not excluded as the father, the probability of his being the father is usually over 90%. In 16% of the cases, the probability exceeds 99%. These probability figures can be increased substantially when HLA testing is combined with red cell antigen testing.

384 So. 2d at 1362-63 (footnote omitted).

315. *Id.* at 1363 (citations omitted).

316. *Id.*

317. *Id.*

Depositions Act ("UFDA").³¹⁸ The UFDA is designed to facilitate the depositions of witnesses who are involved in actions in the United States, but reside in foreign jurisdictions. In 1980 the District Court of Appeal, Fifth District, interpreted the UFDA in *Travelers Indemnity Co. v. Hill*.³¹⁹ In *Hill*, the defendant filed a motion pursuant to the UFDA for the appointment of a commissioner to take the deposition of a material witness who resided in Ohio. Even though opposing counsel did not object or file a motion for a protective order, the trial court summarily denied the defendant's motion. On appeal, the Fifth District quashed the trial court's denial of the order as a departure from the essential requirements of the law, and set forth the procedure for taking a foreign deposition when both the forum and foreign jurisdictions have enacted the UFDA.³²⁰ A party must first secure the appointment of a commissioner by a Florida court and then apply to the foreign court for the necessary process to secure the witness's attendance.³²¹ The Fifth District strongly suggested that upon request trial courts should routinely appoint a commissioner, unless the adverse party provides valid reasons for denying the request.³²²

C. Sanctions for Refusal to Comply with Discovery Orders

During 1980, the Supreme Court of Florida directed the Civil Procedure Rules Committee to continue evaluating discovery practice and procedure, including sanctions.³²³ Concurrent with this review, several of the district courts of appeal sought to determine the circumstances in which trial courts should invoke the harsh measures of striking pleadings and entering default judgments. At first glance, the districts are seemingly divided over which situations reasonably require the application of severe remedies. A care-

318. Whenever any mandate, writ or commission is issued out of any court of record in any other state, territory, district, or foreign jurisdiction, or whenever upon notice or agreement it is required to take the testimony of a witness or witnesses in this state, witnesses may be compelled to appear and testify in the same manner and by the same process and proceeding as may be employed for the purpose of taking testimony in proceedings pending in this state.

FLA. STAT. § 92.251(2) (1981).

319. 388 So. 2d 648 (Fla. 5th DCA 1980).

320. As of this writing, sixteen jurisdictions have enacted the Uniform Foreign Depositions Act: Florida, Georgia, Louisiana, Michigan, Nebraska, Nevada, Ohio, Oklahoma, Oregon, Panama Canal Zone, Pennsylvania, South Dakota, Tennessee, Virgin Islands, Virginia, and Wyoming. See FLA. STAT. ANN. § 92.251 (West Supp. 1982).

321. 388 So. 2d at 650.

322. *Id.*

323. *In re* Rules of Civil Procedure, 391 So. 2d 165, 165-66 (Fla. 1980).

ful reading of the cases, however, reveals that a consistent and uniform rule is emerging.

In *Ferrante v. Waters*,³²⁴ the District Court of Appeal, Fourth District, affirmed a trial court's decision to strike the pleadings of a nonresident defendant who, despite a court order, had failed to answer interrogatories, and had not responded to two subsequent inquiries from her attorney. The court conceded that the sanction was severe but indicated that striking pleadings was appropriate in those extreme circumstances which evidence a "deliberate and contumacious disregard of the court's authority."³²⁵ The Fourth District noted that it was within the trial court's discretion to levy this sanction and remarked, "Irrespective of whether her failure came as the result of a deliberate decision to disregard the court's order, or simply from a negligent abandonment of the lawsuit in which she had been served and had filed answer, . . . such conduct . . . amply justifies the action of the trial court."³²⁶

Appearing to display a more lenient position, the District Court of Appeal, Third District, held in *Santuoso v. McGrath & Associates, Inc.*,³²⁷ that a trial judge had abused his discretion by entering a default judgment against a defendant who had disobeyed a court order to submit to a second deposition. The court reasoned that "[e]ven in a situation where notice is given to the defendant for the purpose of imposing sanctions, the record must be clear that such a severe sanction is authorized."³²⁸ The court then noted that of all the sanctions available under rule 1.380 of the Florida Rules of Civil Procedure for failure to make discovery, the "striking of pleadings, entry of default, and dismissal of an action are the most drastic among them and ordinarily will not be resorted to for the purpose of punishing or penalizing a party."³²⁹ After examining the facts of the case, the Third District concluded that they did not justify the entry of a default judgment.

In reaching its conclusion, the *Santuoso* court relied on some of the same authority that the Fourth District had used in *Fer-*

324. 383 So. 2d 749 (Fla. 4th DCA 1980).

325. *Id.* at 751 (quoting *Hart v. Weaver*, 364 So. 2d 524 (Fla. 2d DCA 1978) and *Swindle v. Reid*, 242 So. 2d 751 (Fla. 4th DCA 1970)); *accord*, *Herold v. Computer Components Int'l, Inc.*, 252 So. 2d 576 (Fla. 4th DCA 1971) (sanction designed for bad faith and willful disregard of, or gross indifference to, a court order).

326. 383 So. 2d at 751.

327. 385 So. 2d 112 (Fla. 3d DCA 1980).

328. *Id.* at 113.

329. *Id.* (citing *Leatherby Ins. Co. v. Jones*, 332 So. 2d 139 (Fla. 3d DCA 1976) and *Hurley v. Werly*, 203 So. 2d 530 (Fla. 2d DCA 1967)).

rante to justify levying a severe sanction.³³⁰ Despite the difference in results, however, the two cases taken together suggest that harsh measures are justified when the failure to make discovery amounts to either willful disregard of the court's authority or gross negligence, or if noncompliance has substantially prejudiced a party.³³¹ The *Ferrante* court, for example, emphasized the defendant's willful disregard of her counsel's efforts to contact her, while the court in *Santuoso* pointed to several factors that could explain the defendant's noncompliance with the discovery order. Moreover, the *Santuoso* court objected only to the severity of the specific sanction levied, and expressly stated that a lesser sanction might be appropriate.³³²

The asserted justification for the party's noncompliance with discovery orders was also relevant in *Storre v. Shults*.³³³ In *Storre*, the District Court of Appeal, Second District, quashed an order striking the pleadings of a defendant who had disobeyed an order compelling discovery while he sought review of the denial of his motion for a protective order. The Second District concluded that the assertion of "a legal right cannot constitute grounds to strike the pleadings of a litigant."³³⁴ The court intimated, however, that the remedy might be appropriate in a "case of flagrant or deliberate disregard of the court's authority, [if] the court made a finding of willful refusal to comply with its order."³³⁵

The readiness of the Fourth District to levy harsh sanctions for the failure to comply with discovery procedures seems a likely harbinger of future decisions. An examination of the proposals pending before the Civil Procedure Rules Committee reveals that mandatory awards of attorney's fees and other more serious sanctions are under careful consideration and soon may be adopted by the Supreme Court of Florida.³³⁶

330. See, e.g., *Turner v. Anderson*, 376 So. 2d 899 (Fla. 2d DCA 1979); *Travelers Ins. Co. v. Rodriguez*, 357 So. 2d 464 (Fla. 2d DCA 1978) (severe sanctions should be imposed only in extreme circumstances for flagrant disobedience).

331. 385 So. 2d at 113.

332. *Id.* at 114.

333. 379 So. 2d 682 (Fla. 2d DCA 1980).

334. *Id.* at 683.

335. *Id.* at 683 n.1.

336. See CIVIL PROCEDURE RULES COMMITTEE, THE FLORIDA BAR, REPORT OF SUB-COMMITTEE ON ABUSIVE DISCOVERY (May 12, 1981).

IX. DISMISSALS

A. *Voluntary Dismissals*

Courts continue to interpret literally the provisions of rule 1.420(a) governing voluntary dismissals: a plaintiff has an absolute right to take a voluntary dismissal at any time before a hearing on a motion for summary judgment, retirement of the jury, or submission of the case to the court in a nonjury action.³³⁷ The District Court of Appeal, Second District, recently reaffirmed this position in *Ambassador Insurance Co. v. Highlands General Hospital*,³³⁸ in which the insurance company sued the hospital to recover premiums on an insurance policy. The hospital moved to dismiss on the ground that the plaintiff, a foreign corporation, was not qualified to do business in the state. The trial court dismissed the complaint without prejudice and allowed the plaintiff sixty days within which to register with the Department of State. The corporation made no effort to qualify within the sixty-day period, but two years later filed a notice of voluntary dismissal without prejudice. The trial court granted the hospital's motion to strike the notice. The Second District reversed on appeal, stating that "[e]ven though [the plaintiff] made no showing that it had ever taken the steps necessary to qualify, the court never entered an order of dismissal. Consequently, the case remained pending, and [the plaintiff] had the absolute right to file a voluntary dismissal."³³⁹

Once a plaintiff voluntarily dismisses an action, however, he cannot proceed in a second lawsuit based on the same claim until he pays the costs awarded in the first lawsuit. In *Field v. Nelson*,³⁴⁰ the District Court of Appeal, Second District, considered whether the trial court had the discretion under rule 1.240(d) to defer the collection of costs assessed in a previous action that the plaintiff had voluntarily dismissed. After the plaintiff in *Field* filed a second complaint, the defendants filed a motion for payment of the costs assessed in the initial action and a motion to stay the second action until the plaintiff satisfied the order. The trial judge ordered the plaintiff to pay the costs but deferred collection until the conclusion of the second suit. On appeal, the Second District held that under rule 1.420(d) the trial judge did not have the discretion either to defer the collection of costs or to refuse a motion to stay

337. FLA. R. CIV. P. 1.420(a)(1).

338. 383 So. 2d 254 (Fla. 2d DCA), *review denied*, 389 So. 2d 1110 (Fla. 1980).

339. 383 So. 2d at 256.

340. 380 So. 2d 547 (Fla. 2d DCA 1980).

the second action pending payment.³⁴¹

B. *Dismissal for Failure to Prosecute*

Rule 1.420(e) of the Florida Rules of Civil Procedure, which governs dismissals for failure to prosecute,³⁴² has been a constant source of concern to the courts and the Civil Procedure Rules Committee.³⁴³ Rule 1.420(e) presently requires the dismissal of any action

in which it appears on the face of the record that no activity . . . has occurred for a period of one year . . . unless a stipulation staying the action is approved by the court or a stay order has been filed or a party shows good cause in writing . . . why the action should remain pending.³⁴⁴

The focal point of the continuing controversy over the rule is the issue whether nonrecord, as well as record, activity can toll the rule's one-year time period. Notwithstanding the repeated efforts of the Supreme Court of Florida to lay this question to rest,³⁴⁵ the district courts of appeal continue to read meaning into the rule's language that is neither present nor intended.

Before 1976 trial courts considered both record and nonrecord activity in determining whether to dismiss an action for want of prosecution.³⁴⁶ In 1976, however, the supreme court amended rule 1.420(e) to eliminate nonrecord activity as a basis for tolling the rule's one-year time period.³⁴⁷ As amended, rule 1.420(e) permitted courts to consider only activity that "appears on the face of the

341. The court noted that FLA. R. Civ. P. 1.420(d) is almost a verbatim adaptation of FED. R. Civ. P. 41(d). The sole difference is that the federal rule provides that the trial judge *may* stay the proceedings while the Florida rule provides that the trial judge *shall* stay the proceedings. 380 So. 2d at 547-48. In failing to adhere to rule 1.420(d), the trial judge had "frustrated the purpose behind the rule and deviated from [its] mandatory language." *Id.* at 548.

342. FLA. R. Civ. P. 1.420(e) originated from FLA. STAT. § 45.19(1) (1965) (repealed 1967).

343. The Supreme Court of Florida has amended FLA. R. Civ. P. 1.420(e) three times since 1966. See *In re* Rules of Civil Procedure, 391 So. 2d 165, 173 (Fla. 1980); *In re* The Florida Bar, Rules of Civil Procedure, 339 So. 2d 626, 629 (Fla. 1976); *In re* Florida Rules of Civil Procedure, 211 So. 2d 206, 207 (Fla. 1968).

344. FLA. R. Civ. P. 1.420(e).

345. See note 330 *supra*.

346. See, e.g., *Musselman Steel Fabricators, Inc. v. Radziwon*, 263 So. 2d 221 (Fla. 1972) (defense counsel mailed copies of exhibits to plaintiff's counsel); *Dukes v. Chemicals, Inc.*, 277 So. 2d 298 (Fla. 2d DCA), *cert. denied*, 283 So. 2d 560 (Fla. 1973) (plaintiff's counsel made oral discovery request).

347. FLA. R. Civ. P. 1.420(e), Committee Note (1976).

record."³⁴⁸ The amendment retained the "good cause" defense to dismissals, but presumably only to permit evidence of nonrecord activity related to extraordinary events that occurred immediately before the end of the one-year period. The rule now countenances only those events that actually prevent record activity, such as the illness or death of an attorney or party.³⁴⁹ Nevertheless, the District Courts of Appeal for the Second and Fourth Districts have broadly construed the good cause exception to justify considering ordinary nonrecord activity, effectively rewriting the plain language of rule 1.420(e).

In *American Eastern Corp. v. Henry Blanton, Inc.*,³⁵⁰ the Second District liberally interpreted the 1976 amendment to rule 1.420(e), concluding that the purpose of the amendment was merely "to eliminate *most* nonrecord activity of the type recognized prior to the amendment as a basis to establish good cause"³⁵¹ Relying on the retention of the good cause defense in the 1976 amendment, and on the Fourth District case of *F.M.C. Corp. v. Chatman*,³⁵² the Second District receded from the position it had taken in a previous case in which it had strictly construed rule

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

349. The committee note to the 1976 amendment to FLA. R. CIV. P. 1.420(e) that appears in THE FLORIDA BAR, FLORIDA RULES OF CIVIL PROCEDURE 45 (1981) explains the purpose of the amendment as follows:

Subdivision (e) is amended to eliminate nonrecord activity as a basis for retaining the action on the docket. The last sentence is added to preclude dismissal before one year on the basis of inherent power. The good cause requirement remains to cover extraordinary situations, such as illness or death immediately before the expiration of the one year when activity would have been undertaken in the absence of the extraordinary circumstance.

Id. The committee note, as it appeared in *In re The Florida Bar, Rules of Civil Procedure*, 339 So. 2d 626 (Fla. 1976), says only that "[s]ubdivision (e) has been amended to prevent the dismissal of an action for inactivity alone unless one year has elapsed since the occurrence of activity of record. Non-record activity will not toll the one year time period." *Id.* at 629 (emphasis in original).

350. 382 So. 2d 863 (Fla. 2d DCA 1980).

351. *Id.* at 865 (emphasis added). The defendants had conceded their liability on a promissory note. Relying on defense counsel's repeated representations that the defendants would pay their obligation, the plaintiff had delayed moving for entry of final judgment.

352. 368 So. 2d 1307 (Fla. 4th DCA), *cert. denied*, 379 So. 2d 203 (Fla. 1979). In *F.M.C. Corp.*, the Fourth District reasoned that the failure to consider nonrecord activity "would render the excerpt from the rule 'unless a party shows good cause,' mere surplusage." *Id.* at 1308 (ellipses omitted). The court concluded, however, that nonrecord conferences between the plaintiff's attorney, his client, and potential witnesses were not sufficient activity to constitute good cause. Rather, "good cause must include contact with the opposing party and some form of excusable conduct or happening which arises other than by negligence or inattention to pleading deadlines." *Id.* (emphasis in original).

1.420(e).³⁵³ The court in *American Eastern* did suggest that the "standard in determining whether particular nonrecord activity constitutes good cause must be set high,"³⁵⁴ and that a party would now be required to show "a compelling reason to avoid dismissal where there has been no record activity."³⁵⁵ Nonetheless, both *American Eastern* and *F.M.C. Corp.* construe rule 1.420(e) too liberally because they fail to limit the good cause exception to extraordinary circumstances that prevent record activity.

Barnes v. Ross,³⁵⁶ on the other hand, may represent the type of situation contemplated by the 1976 amendment's retention of the good cause exception. In *Barnes* the District Court of Appeal, Third District, held that a disabling injury that had prevented a sole practitioner from practicing law for one-third of the year constituted good cause to deny a motion to dismiss one of the practitioner's cases for want of prosecution.³⁵⁷ The court, however, relied on a series of earlier decisions that did not detail the extent of the injuries and illnesses,³⁵⁸ as well as *American Eastern*³⁵⁹ and *F.M.C.*

353. In *Sainer Constructors, Inc. v. Pasco County School Board*, 349 So. 2d 1212 (Fla. 2d DCA 1977), the Second District stated that under the 1976 amendment to FLA. R. Civ. P. 1.420(e), nonrecord activity could not be a good cause defense against dismissal. *Id.* at 1214 (dictum).

354. 382 So. 2d at 865.

355. *Id.* The court listed a number of occurrences that would not constitute "good cause" under the rule's new standard:

Thus, some examples of nonrecord activity formerly accepted as good cause which will no longer suffice to avoid dismissal for want of prosecution are: defense counsel's mailing to plaintiff's counsel of photographic copies of exhibits, *Musselman Steel Fabricators, Inc. v. Radziwon*, 263 So.2d 221 (Fla. 1972); the furnishing of a medical report by plaintiffs in accordance with defendants' specific directions, *Eddings v. Davidson*, 302 So.2d 155 (Fla. 1st DCA 1974); a verbal request by plaintiff's counsel to produce certain logs and records, *Dukes v. Chemicals, Inc.*, 277 So.2d 298 (Fla. 2d DCA), *cert. denied*, 283 So.2d 560 (Fla. 1973); and correspondence between the attorneys requesting cancelled checks and check stubs, *Whitney v. Whitney*, 241 So.2d 436 (Fla. 2d DCA 1970), *cert. denied*, 245 So.2d 88 (Fla. 1971).

Id. at 865 n.2.

356. 386 So. 2d 812 (Fla. 3d DCA 1980).

357. *Id.* at 814. The practitioner was not, however, disabled *immediately* before the expiration of the one-year time period. For this reason, his injury probably would not constitute good cause under a strict reading of FLA. R. Civ. P. 1.420(e). Evidence showing that the defense counsel failed to return the attorney's telephone calls may have influenced the court, although it expressly declined to decide whether the nonrecord activity constituted good cause. *Id.* at 814 n.3.

358. *Chrysler Leasing Corp. v. Passacantilli*, 259 So. 2d 1 (Fla. 1972); *Douglas v. Eiriksson*, 347 So. 2d 1074 (Fla. 1st DCA), *cert. denied*, 353 So. 2d 674 (Fla. 1977); *Eli Einbinder, Inc. v. Miami Crystal Ice Co.*, 317 So. 2d 126 (Fla. 3d DCA 1975).

359. 382 So. 2d 863 (Fla. 2d DCA 1980); see text accompanying notes 337-42 *supra*.

Corp.³⁶⁰

Although controversy still exists in Florida regarding the non-record activity that will toll rule 1.420(e), the courts agree that trial judges do not have the discretion to dismiss actions for failure to prosecute when there has been any record activity directed towards the disposition of pending actions within one year.³⁶¹ Before 1976, the district courts of appeal had recognized an inherent power in trial judges to control their dockets and to dismiss a case for lack of prosecution, even if the one-year period had not run.³⁶² The 1976 amendment, however, limited the court's discretion by barring dismissals for inactivity alone, unless there was no *record* activity for one year.³⁶³ Likewise, it also seems well-settled that the activity of record need not be by the plaintiff.³⁶⁴ Rather, activity by any party is sufficient to toll the time period if it is an affirmative act directed towards the disposition of the case and not "a mere passive effort."³⁶⁵

In 1980 the supreme court again amended rule 1.420(e) to permit courts to file a stay order or approve a stipulation staying an action when it would be appropriate for an inactive case to remain pending for more than a year.³⁶⁶ This amendment removes the need for reliance on the good cause exception to rectify the kind of inequity that the court addressed in *Estate of Mills v. Florida In-*

360. 368 So. 2d 1307 (Fla. 4th DCA 1979).

361. *Bair v. Palm Beach Newspapers, Inc.*, 387 So. 2d 517, 518 (Fla. 4th DCA 1980).

362. *See, e.g., Reddish v. Forlines*, 207 So. 2d 703 (Fla. 1st DCA 1968):

The rule does not mean nor should it be so construed to hold, that the trial court, in the exercise of a sound discretion, is without power or jurisdiction to dismiss an action under proper circumstances because of the failure of plaintiff to prosecute it with due diligence, even though affirmative action has been taken in the case within a period of one year prior to its dismissal.

Id. at 706. *See also Shalabey v. Memorial Hosp.*, 253 So. 2d 712 (Fla. 4th DCA 1971); *Maloy v. Bristow*, 138 So. 2d 801 (Fla. 3d DCA 1962).

363. Since 1976, FLA. R. Civ. P. 1.420(e) has precluded courts from considering a motion to dismiss for failure to prosecute before a year of record inactivity has elapsed.

364. *See Barnes v. Ross*, 386 So. 2d 812 (Fla. 3d DCA 1980). In *Barnes*, the court observed that any record activity "will automatically preclude a dismissal for failure to prosecute." *Id.* at 814 n.3. Furthermore, "almost total inactivity is countenanced under the rule." *Id.* at 814. For a discussion of *Barnes*, see notes 343-47 and accompanying text *supra*.

365. *Harris v. Winn-Dixie Stores, Inc.*, 378 So. 2d 90, 93 (Fla. 1st DCA 1979). It should be noted that courts have the power to examine record activity to determine whether the activity is calculated to lead to the case's disposition or is merely a token effort to avoid dismissal for failure to prosecute. *Id.* at 94. *See also Biscayne Constr. Co. v. Metropolitan Dade County*, 388 So. 2d 329 (Fla. 3d DCA 1980) (issuance of third-party summons sufficient to preclude dismissal); *Bair v. Palm Beach Newspapers, Inc.*, 387 So. 2d 517 (Fla. 4th DCA 1980) (court-approved stipulation authorizing submission of amended complaint held sufficient to preclude dismissal although complaint never filed).

366. FLA. R. Civ. P. 1.420(e) (amended in 391 So. 2d 165, 173 (Fla. 1980)).

urance Guaranty Ass'n.³⁶⁷ In *Mills*, the defendant moved under rule 1.420(e) to dismiss the plaintiff's action for contribution. The trial judge denied the motion on the ground that the plaintiff did not need to pursue the contribution action until the court determined the underlying claim.³⁶⁸ The contribution claim was later transferred to a second judge, who dismissed the case because it had been inactive for over a year. The District Court of Appeal, Third District, reversed, concluding that the plaintiff's reliance on the first judge's ruling was good cause and excused the record inactivity.³⁶⁹ The 1980 amendment to rule 1.420(e) enables courts to prevent this kind of situation from arising and to save the good cause defense for extraordinary occurrences.

In summary, rule 1.420(e) is intended to require the dismissal of any action that a plaintiff has failed to prosecute through an affirmative act of record for a period of one year, unless the court has entered a stay order or an extraordinary event has occurred toward the end of the one-year period. Future cases will resolve the question whether the courts will adhere to the purpose of the rule, or whether the Second and Fourth Districts'³⁷⁰ broad construction will prevail.

X. PRETRIAL

Rule 1.440(b) permits a party to "file and serve notice that the action is at issue and ready to be set for trial."³⁷¹ The notice must specify whether or not a jury is to try the case and must estimate the length of the trial. As amended in 1980, subsection (b) also requires that the notice specify whether the trial will be on the original pleadings or on pleadings filed under rule 1.110(h) subsequent to the entry of final judgment.³⁷²

Once the case is set for trial, a court may enter a pretrial order

367. 378 So. 2d 301 (Fla. 3d DCA 1980).

368. *Id.* at 302.

369. *Id.*

370. See text accompanying notes 350-55 *supra*.

371. FLA. R. CIV. P. 1.440(b). "An action is at issue after any motions directed to the last pleading served have been disposed of or, if no such motions are served, 20 days after service of the last pleading." FLA. R. CIV. P. 1.440(a). The court cannot conduct a pretrial conference until the action is at issue. FLA. R. CIV. P. 1.200(a).

372. FLA. R. CIV. P. 1.440(b). The supreme court added subdivision (h) to rule 1.110 in 1971 to cover situations usually arising in divorce judgment modifications, supplemental declaratory relief actions, or trust accountings in which the proceedings subsequent to final judgment raise issues of fact requiring supplemental pleadings. FLA. R. CIV. P. 1.110(h), Committee Note.

requiring the parties to exchange a catalog containing the names and addresses of all witnesses the parties intend to call.³⁷³ In the absence of a specific order, however, neither party must file a catalog and the trial court cannot exclude a party's witness.³⁷⁴ Similarly, a trial court has no authority to prevent an unlisted impeachment witness from testifying if the court's pretrial order requiring the exchange of witness lists specifically excludes the identification of impeachment witnesses.³⁷⁵ In these circumstances, if the witness's testimony involves a critical issue in the case, the exclusion of the testimony constitutes reversible error.³⁷⁶

XI. CONTINUANCES

Prior to the 1980 revisions to the Florida Rules of Civil Procedure, rule 1.460 required parties to move for a continuance in writing³⁷⁷ "before or at the time the case is set for trial."³⁷⁸ As amended in 1980, the rule now permits parties to request a continuance whenever necessary, and authorizes oral motions if the parties are before the court.³⁷⁹ Any motion must, however, set forth all of the facts entitling the movant to the continuance. If based on the nonavailability of a witness, the motion must disclose when the witness will be available.³⁸⁰

Two 1980 appellate court decisions demonstrate the broad discretion afforded trial judges who rule on motions requesting a con-

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

374. See *Lanai Dev. Corp. v. Berry*, 373 So. 2d 441 (Fla. 3d DCA 1979). *But cf.* *Fuller v. Rinebolt*, 382 So. 2d 1239 (Fla. 4th DCA 1980) (trial court has broad discretion in determining whether to allow a witness to testify when opposing party did not have prior notice of witness's identity).

375. *Mall Motel Corp. v. Wayside Restaurants, Inc.*, 377 So. 2d 41 (Fla. 3d DCA 1979). In *Mall Motel*, the pretrial order provided, in part, that the "[p]arties shall furnish opposing counsel with the written list containing the names and addresses of all witnesses intended to be called for trial, except those used for impeachment." *Id.* at 43.

376. *Id.* at 43-44 (citing FLA. STAT. § 59.041 (1977)); *Lanai Dev. Corp. v. Berry*, 373 So. 2d at 442 (Fla. 3d DCA 1979).

377. FLA. R. CIV. P. 1.460(b), 3 FLA. STAT. 100 (1969).

378. FLA. R. CIV. P. 1.460(a), 3 FLA. STAT. 100 (1969). The committee note to the 1980 amendment indicated that FLA. R. CIV. P. 1.460(a) was necessary when the procedures for placing a case on a trial calendar were different. The law revision committee made the change because the courts had tended to disregard the former rule. FLA. R. CIV. P. 1.460, Committee Note.

379. FLA. R. CIV. P. 1.460. The supreme court also deleted subsection (c), which had provided that "[n]o continuance shall be granted for any longer time than the ends of justice require." FLA. R. CIV. P. 1.460(c), 3 FLA. STAT. 100 (1969).

380. FLA. R. CIV. P. 1.460.

tinuance based on the nonavailability of witnesses.³⁸¹ This is especially true if the moving party fails to proffer the unavailable witness's expected testimony. In *Barclay v. Rivero*,³⁸² the defendants moved for a continuance moments before the trial began because their expert medical witness was scheduled to operate and would not be available until the next day. The trial court denied the motion but granted a brief recess to enable the defendants to determine if the witness would be available sooner. The defendants informed the court that the doctor could appear around noon, but later reported that the doctor had to perform emergency surgery and could not appear until later that afternoon. The court then suggested that the defendants obtain a firm commitment from the doctor, because it was not possible to delay the trial "on a maybe."³⁸³ When the doctor could not make the requested commitment, the trial court denied the defendants' last request for a continuance. The District Court of Appeal, Third District, affirmed, concluding that the order was not an abuse of discretion or a denial of due process.³⁸⁴

In *Fuller v. Rinebolt*,³⁸⁵ the defendant had subpoenaed a policeman to testify at the trial. During the trial, the witness became ill and had to leave the courthouse. Because of the witness's absence, the defendant moved for a mistrial. The trial court denied the motion and the defendant appealed, arguing that the court should have treated his motion for a mistrial as one for a continuance. The District Court of Appeal, Fourth District, disagreed be-

381. *Barclay v. Rivero*, 388 So. 2d 321 (Fla. 3d DCA 1980); *Fuller v. Rinebolt*, 382 So. 2d 1239 (Fla. 4th DCA 1980).

382. 388 So. 2d at 321.

383. *Id.* at 322. The defendants' oral motion for a continuance, however, complied with FLA. R. Civ. P. 1.460, to the extent the motion indicated when the defendants believed the witness would be available. The appellate court noted that the defendants stated in their original motion that the doctor was scheduled for surgery in the early afternoon. This cast doubt on the defendants' subsequent assertion that the doctor was responding to an emergency at that time. *Id.* at 322 n.3. This factor alone should not have been dispositive because the defendant may have been merely relating to the court information received from the hospital. Moreover, the court noted the defendants' failure to compel the doctor's appearance. *Id.* at 322 n.5. This factor also should have been immaterial because the doctor was supposed to have been performing an operation.

384. The defendants' failure to make a proffer at the trial of the witness's expected testimony was a key factor in the appellate court's decision to affirm. The court stated that "[i]f a party wants the critical nature of the excluded testimony to be a factor in measuring whether the trial court abused its discretion, then it is incumbent upon the party to make an in-trial proffer. . . . [I]n the absence of a threshold showing of error, harm is irrelevant." *Id.* at 322 n.7. Accordingly, the trial court's decision to disregard the substance of the doctor's expected testimony was proper.

385. 382 So. 2d 1239 (Fla. 4th DCA 1980).

cause even if "the motion for mistrial was the equivalent of a motion for continuance," the trial court did not abuse its discretion.³⁸⁶ The defendant had not proffered the witness's expected testimony, nor had he "made [any] showing on appeal that such a proffer would have revealed evidence . . . not otherwise available."³⁸⁷ If the denial of a motion for a continuance has not unduly prejudiced the rights of a movant, the appellate courts probably will not upset the trial court's ruling.

XII. SUMMARY JUDGMENT

The courts are to grant a motion for summary judgment if the pleadings, discovery, and affidavits on file show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law.³⁸⁸ The burden is on the movant to demonstrate through admissible evidence that summary judgment is proper.³⁸⁹ The court must resolve all factual questions in favor of the nonmoving party and deny the motion if a disputed fact is material.³⁹⁰

Because an affirmative defense raises an issue of fact, a party moving for summary judgment must conclusively refute the defense in order to prevail.³⁹¹ Conversely, a movant who raises an affirmative defense in a motion for summary judgment must have previously raised the defense in his answer.³⁹²

No court should grant summary judgment for the nonmoving

386. *Id.* at 1240.

387. *Id.* at 1241.

388. FLA. R. Civ. P. 1.510(c).

389. *Arlen Realty, Inc. v. Penn Mut. Life Ins. Co.*, 386 So. 2d 886 (Fla. 1st DCA 1980).

390. *Squitieri v. Aetna Cas. & Sur. Co.*, 382 So. 2d 730, 731 (Fla. 5th DCA 1980). The Fifth District reversed the trial court's entry of summary judgment because the judge had decided genuine issues of material fact. Commenting on the difficulty of obtaining summary judgment in personal injury cases, the court stated:

[s]cores of cases . . . can be cited as authority for the proposition that summary judgments are rarely upheld in personal injury cases because the nature of those cases involve disputes of fact almost invariably. While we see few summary judgments awarded in personal injury cases we find many properly entered in other areas of the law such as mortgage foreclosures, suits on notes or contracts and other cases founded upon written instruments where there are no genuine disputes over material issues of fact.

Id.

391. *First Independent Bank v. Stottlemeyer & Shoemaker Lumber Co.*, 384 So. 2d 952, 954 (Fla. 2d DCA 1980).

392. *Danford v. City of Rockledge*, 387 So. 2d 968, 969-70 (Fla. 5th DCA 1980) (motion for summary judgment cannot raise affirmative defenses of res judicata or release if not raised in answer).

party at a hearing noticed to consider the movant's motion for summary judgment.³⁹³ A trial court cannot enter a final summary judgment for the plaintiff when the defendant has a pending counterclaim.³⁹⁴ In the latter situation, a trial court may select one of two alternatives: (1) it can enter partial summary judgment for the plaintiff and then take evidence on the counterclaim, or (2) it can enter final summary judgment on the complaint and stay execution pending the resolution of the counterclaim.³⁹⁵

Parties seeking or opposing summary judgment may submit affidavits to prove or disprove the existence of a genuine issue of material fact. Rule 1.510(e) provides that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to matters stated therein."³⁹⁶ Accordingly, affidavits that are based primarily on speculation, surmise, and conjecture,³⁹⁷ on information and belief rather than personal knowledge,³⁹⁸ or on the statements and work product of other people,³⁹⁹ are legally insufficient to support or create a disputed issue of fact in opposition to a motion for summary judgment.

Rule 1.510(c) requires that the parties serve supporting affidavits twenty days before the hearing on a motion for summary judgment. Nevertheless, in *Northside Bank v. LaMelle*,⁴⁰⁰ the court held that the failure to comply with the rule was immaterial when the same evidence was already before the court through depositions. Moreover, the court noted that the nonmoving party had failed to file opposing affidavits.⁴⁰¹

393. *Allen v. Metropolitan Dade County*, 386 So. 2d 301, 302 (Fla. 3d DCA 1980).

394. *Reliance Forwarding Co. v. Nilson Van & Storage*, 387 So. 2d 513, 513 (Fla. 5th DCA 1980).

395. *Id.*

396. FLA. R. Civ. P. 1.510(e).

397. *Morgan v. Continental Cas. Co.*, 382 So. 2d 351, 353 (Fla. 3d DCA 1980) (affidavits recounting decedent's previous experiences piloting private aircraft).

398. *Campbell v. Salman*, 384 So. 2d 1331, 1333 (Fla. 3d DCA 1980) (trial court should have ignored defense attorney's affidavit based on his information and belief regarding affirmative defense of compromise and settlement).

399. *Florida Power Corp. v. Zenith Indus. Co.*, 377 So. 2d 203, 204 n.1 (Fla. 2d DCA 1979).

400. 380 So. 2d 1322, 1323 (Fla. 3d DCA 1980).

401. *Id.*

XIII. TRIALS

A. Nonjury Trials

There is no constitutional or statutory provision in Florida granting an absolute right to be heard at the close of a nonjury civil trial. Nevertheless, it may still be an abuse of discretion for a court to deny a party the opportunity to present oral argument at the close of trial in certain circumstances. In *Pan American Engineering Co. v. Poncho's Construction Co.*,⁴⁰² for example, after both sides rested, the trial court granted the plaintiff fifteen days to file a memorandum of law and summary of the evidence, and gave the defendant fifteen days to reply. The trial court further stated that either party could submit a written request for oral argument. The plaintiff never submitted a memorandum of law and the defendant, therefore, never replied. Since the defendant's reply—his opportunity to be heard—was contingent on the plaintiff's actions, oral argument never occurred. The District Court of Appeal, Fifth District, held that "[h]aving first announced that the parties would be given an opportunity to present memoranda of law and summaries of the evidence, it was error for the court to proceed without further opportunity for [defendant] to be heard."⁴⁰³

B. Jury Trials

In a jury trial, the trial judge has broad discretion to direct counsel during closing argument.⁴⁰⁴ The appellate courts will not reverse a judge for his directions absent some showing of an abuse of discretion.⁴⁰⁵ Trial judges also have the discretion to submit issues to the jury that the parties did not raise in the pleadings. In *Dysart v. Hunt*,⁴⁰⁶ the District Court of Appeal, Third District, examined whether the trial judge had properly submitted to the jury a question of monetary damages not raised in the pleadings. The plaintiff in *Dysart* had prevailed in a replevin action, and then challenged the trial judge's ruling striking that portion of the ver-

402. 387 So. 2d 1052 (Fla. 5th DCA 1980).

403. *Id.* at 1054. In framing its holding, the court noted that in nonjury civil cases, federal courts have recognized that final argument is a privilege within the court's discretion and not a right. *See, e.g., Yep v. Immigration & Naturalization Serv.*, 318 F.2d 841 (7th Cir. 1963); *Peckham v. Family Loan Co.*, 262 F.2d 422 (5th Cir. 1954).

404. *Beaches Hosp. v. Lee*, 384 So. 2d 234 (Fla. 1st DCA 1980).

405. *Id.* at 238.

406. 383 So. 2d 259 (Fla. 3d DCA 1980).

dict awarding money damages. The Third District affirmed even though the claim for money damages was neither raised in the pleadings nor tried by the express or implied consent of the parties.⁴⁰⁷ The district court stated, "We commend and encourage this practice, which, if we disagreed (as we do not) with the court's ruling on the merits of the issue, would have permitted the final resolution of the case without a second trial or a second appeal."⁴⁰⁸

Rule 1.431(g) of the Florida Rules of Civil Procedure allows a party to move for an order authorizing interviews with jurors to determine whether the verdict is subject to legal challenge. The motion must identify each juror to be interviewed and the grounds for challenging the verdict.⁴⁰⁹

In two opinions, the District Court of Appeal, Fifth District, defined the scope of the juror interview as well as the scope of the trial judge's discretion in supervising the interviews. In *Kirkland v. Robbins*,⁴¹⁰ the defendants, in addition to filing a motion for remittitur or in the alternative for a new trial, moved to interview the jury to determine whether the jurors had considered improper evidence. The trial judge denied the defendant's motion to interview the jurors, but was concerned about the lack of proof of the cause of the injury in the case.⁴¹¹ He therefore personally conducted two separate juror interviews after he had dismissed the jury and used these interviews as the basis for his denial of the defendants' motions for remittitur or a new trial. The Fifth District first affirmed the trial judge's denial of the motion to interview, stating:

If a verdict is pronounced in the presence of all jurors which presumptively has satisfied the enlightened conscience of each of them, it is against public policy to inquiry [*sic*] into the motives and influences by which their deliberations were governed. . . . Thus, inquiry is proper only in such cases involving matters *extrinsic* to the verdict such as arrival at the verdict by lot or quotient, improper contact with a juror or misconduct of a juror; investigation of the subjective decision-making process of the jury is not permissible. . . .

In the case before us, counsel moved to interview the jury based in part on an alleged consideration of improper evidence

407. *Id.* at 260.

408. *Id.* at 260 n.1.

409. FLA. R. Civ. P. 1.431(g).

410. 385 So. 2d 694 (Fla. 5th DCA 1980).

411. Plaintiff sought, *inter alia*, to recover damages for a bowel and bladder condition allegedly stemming from an automobile accident. The plaintiff's inadequate proof of causation troubled the trial judge. *Id.* at 695.

of injuries. This allegation concerns the decision making process of the jury and therefore, inquiry was not permissible.⁴¹²

The court also held, however, that the trial judge erred in basing his decision to deny the defendants' motion for remittitur or a new trial on post-trial interviews with members of the jury. The court reasoned that:

After the jury has returned its verdict and has been discharged and separated, it cannot be recalled to alter or amend its verdict since the jury members lose their separate identity as a jury and are subject to extra trial influences Thus, for the same reasons, it would appear that a juror's recall of the jury deliberations would also be unreliable and should not be allowed to influence the judge in his determination of the correctness of the verdict.⁴¹³

The court found that the juror interviews influenced the trial judge's decision not to grant the motions for remittitur or new trial, and consequently ordered a new trial on the issue of damages.

In *Sentinel Co. v. Edwards*,⁴¹⁴ the Fifth District found that a trial judge's inherent power to control judicial proceedings includes supervisory power over juror interviews. The issue arose when a jury in a wrongful death action returned a verdict for the defendant, the City of Kissimmee. The plaintiff, a newspaper publisher, then filed a motion to interview the jurors, asserting that during trial an alternate juror had said that the publisher would lose because the jury feared that a verdict against the city would result in increased utility rates. The trial judge ordered an interview of the alternate juror and subsequently announced *sua sponte* that he would close the courtroom to the press and the public. The publisher appealed, contending that the closure order violated its fundamental first amendment right of access to a judicial proceeding, and that rule 1.431(g) of the Florida Rules of Civil Procedure⁴¹⁵ entitled the press to notice and a hearing before the court could restrict such access.⁴¹⁶

412. *Id.* at 695-96 (citations omitted). See also *Swan v. Wisdom*, 386 So. 2d 574 (Fla. 5th DCA 1980) (trial court properly denied permission to interview jurors regarding plaintiff's allegation that jury, which found plaintiff 90% negligent, reversed liability percentages).

413. 385 So. 2d at 696 (citations omitted).

414. 387 So. 2d 367 (Fla. 5th DCA 1980).

415. FLA. R. Civ. P. 1.431(g).

416. 387 So. 2d at 369.

Recognizing the case as one of first impression,⁴¹⁷ the Fifth District stated that rule 1.431(g) does not entitle the press to notice and a hearing before the closure of a civil post-trial hearing concerning juror interviews.⁴¹⁸ The court then noted that although the press and public do have a common-law right of access to judicial proceedings, a trial court has the inherent power to control the conduct of its proceedings.⁴¹⁹ Included within that power, the court reasoned, is the right to close juror interviews that might disclose jury deliberations. The court stated that:

The rule limiting juror interviews is founded upon the sound policy of preventing litigants or the public from invading the privacy of the jury room. . . . Rule 1.431(g), Florida Rules of Civil Procedure, does not give the trial court additional authority to close juror interviews, but sets out the heretofore inherent discretion to control juror interview proceedings.⁴²⁰

In this case, however, the court concluded that closure was unwarranted because the alternate juror had not been privy to any jury deliberations.⁴²¹

XIV. VERDICTS

If the court submits to a jury two or more issues that could decide the case, it will be impossible to identify which issues formed the basis of the jury's general verdict. To avoid this uncertainty, counsel may request a special verdict.⁴²² If the court submits a general verdict form to the jury, counsel may object in order to preserve the point for appeal. If, however, counsel has neither requested a special verdict nor objected to the submission of a general verdict form to the jury, then under the "two-issue rule," a

417. *Id.* at 370.

418. *Id.* at 372-73.

419. The court resolved the right to access issue from a discussion of *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979), which held that the trial court has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity in a criminal case. Thus, judges may exclude the press and public without violating the sixth amendment's guarantee of a public trial. See *State ex rel. Miami Herald Publishing Co. v. McIntosh*, 340 So. 2d 904 (Fla. 1977) (trial court's order restraining pretrial publicity in securities fraud case quashed as unconstitutional); *State ex rel. Gore Newspaper Co. v. Tyson*, 313 So. 2d 777 (Fla. 4th DCA 1975) (trial judge may not conduct closed divorce proceeding when sole justification is parties' aversion to publicity).

420. 387 So. 2d at 374.

421. *Id.* at 375.

422. *Colonial Stores, Inc. v. Scarbrough*, 355 So. 2d 1181, 1186 (Fla. 1978).

general verdict cannot be reversible error.⁴²³

The two-issue rule, which the Supreme Court of Florida adopted in *Colonial Stores, Inc. v. Scarbrough*,⁴²⁴ provides that as long as the court properly submitted any of the issues to the jury, the reversal of a general verdict is improper because the appellant cannot demonstrate prejudice.⁴²⁵ The supreme court recently reaffirmed the viability of the two-issue rule in *Whitman v. Castlewood International Corp.*⁴²⁶ In *Whitman* the trial court had instructed the jury on two alternative theories of liability—negligence and agency. The jury then returned a general verdict without identifying the basis of its verdict. The district court of appeal ruled that the general verdict was improper because the evidence did not support the agency theory. On appeal, the Supreme Court of Florida quashed the district court decision and remanded for reconsideration in light of the two-issue rule set forth in *Colonial Stores*.⁴²⁷ If, on remand, the district court found that the negligence theory was sufficient to sustain the verdict, the two-issue rule would preclude the reversal of the general verdict because the appellant would be “unable to establish that he has been prejudiced.”⁴²⁸

Although a party's failure to properly and timely object to the submission of a general verdict form to the jury will preclude him from raising this issue on appeal, the party's failure to object to a verdict that is contrary to law will not foreclose appellate review. Such a verdict constitutes fundamental error that goes to the ultimate merits of the cause of action.⁴²⁹ In *Keyes Co. v. Sens*,⁴³⁰ the jury found a realty firm and three of its employees jointly liable, yet it apportioned compensatory and punitive damages among them. The District Court of Appeal, Third District, reversed, concluding that the verdicts and the judgment were contrary to law in two respects: Because the jury found that the defendants were jointly liable, the verdict was against all of them and compensatory damages could not be apportioned. Since the defendant realty firm was liable under the doctrine of respondeat superior, its liability for compensatory damages could not exceed the compensatory

423. 355 So. 2d 1181 (Fla. 1978).

424. *Id.*

425. *Id.* at 1186.

426. 383 So. 2d 618 (Fla. 1980).

427. *Id.* at 619.

428. *Id.* at 619-20.

429. *Keyes Co. v. Sens*, 382 So. 2d 1273, 1275-76 (Fla. 3d DCA 1980).

430. *Id.* at 1273.

damages assessed against its employees.⁴³¹

The Third District explained the right to appellate review in this case by distinguishing verdicts based on a fundamental error from verdicts based on a procedural error.⁴³² Fundamental error affects the merits of the cause of action and therefore mandates reversal on appeal.⁴³³ Procedural error, on the other hand, does not mandate reversal because of the policy in favor of simplifying the work of trial courts and limiting the scope of review.⁴³⁴

XV. MOTION FOR NEW TRIAL

Under Florida case law, a trial judge must grant a new trial if the verdict is against the manifest weight of the evidence. A new trial is also appropriate if extraordinary considerations or misleading evidence have unduly influenced the jury.⁴³⁵ A trial judge, however, has broad discretion in determining whether those factors exist⁴³⁶ because he is best able to understand how the jurors reached their ultimate decision.⁴³⁷

Accordingly, a "reasonableness" standard limits the scope of review of a trial court's grant or denial of a new trial.⁴³⁸ In *Baptist Memorial Hospital, Inc. v. Bell*,⁴³⁹ the Supreme Court of Florida held that the trial judge did not abuse his discretion when he granted a new trial on the issue of damages. The court upheld the trial judge's decision that the verdict was grossly excessive, even though reasonable men might have reached different conclusions.⁴⁴⁰ The court stated:

431. *Id.* at 1275. The court did note, however, that it is legally permissible to assess different punitive damages against each of the defendants. *Id.*

432. *Id.* at 1276.

433. *Id.*

434. 355 So. 2d at 1186.

435. *Wackenhut Corp. v. Canty*, 359 So. 2d 430, 434 (Fla. 1978); *Cloud v. Fallis*, 110 So. 2d 669, 673 (Fla. 1959); *Haindel v. Paterno*, 388 So. 2d 235, 236-37 (Fla. 5th DCA 1980).

436. *Baptist Memorial Hosp., Inc. v. Bell*, 384 So. 2d 145, 146 (Fla. 1980); *Castlewood Int'l Corp. v. LaFleur*, 322 So. 2d 520, 522 (Fla. 1975); *Cloud v. Fallis*, 110 So. 2d at 673.

437. 384 So. 2d at 146.

438. *Miller v. Dade County*, 382 So. 2d 851, 852 (Fla. 3d DCA 1980) (decision to grant a new trial affirmed because inflammatory statements concerning matters outside the record may have influenced verdict); *Mahan v. Parliament Ins. Co.*, 382 So. 2d 402, 404 (Fla. 4th DCA 1980) (denial of motion for new trial affirmed because trial judge found that witness had not committed perjury, despite allegations to the contrary).

439. 384 So. 2d 145 (Fla. 1980).

440. The trial judge concluded that the following factors warranted a new trial:

- (1) the size of the verdict was grossly excessive and shocked the conscience of the court;
- (2) the verdict was contrary to the manifest weight of the evidence;
- (3) the jury considered matters outside the record, including the amount of taxes

In reviewing this type of discretionary act of the trial court, the appellate court should apply the reasonableness test to determine whether the trial judge abused his discretion. If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion. . . . [T]he ruling should not be disturbed in the absence of a clear showing that it has been abused⁴⁴¹

In order to facilitate appellate review, the trial court must articulate the specific grounds that justified granting a new trial.⁴⁴² If a party appeals from an order that does not identify the specific grounds, Florida Rule of Civil Procedure 1.530(f) provides that the appellate court must direct the trial court to enter an appropriate order.⁴⁴³ Although the rule does not address the question, Florida appellate decisions indicate that trial judges must also specify the reasons for denying motions for new trials.⁴⁴⁴

A trial court's failure to act *sua sponte* to correct harmless errors committed during the trial that counsel has overlooked is not a ground for a new trial.⁴⁴⁵ It is the attorneys' function to call the court's attention to the error during the trial. This affords the trial court an opportunity to rectify the problem promptly and obviates the need for a new trial.⁴⁴⁶ In *Saunders v. Smith*,⁴⁴⁷ the District Court of Appeal, Fourth District, carried this rationale a step further. During *voir dire* examination, the trial court sustained the plaintiff's objections to the defense counsel's prejudicial remarks. Nevertheless, the plaintiff made no timely request for curative in-

which might have to be paid on the jury verdict, the amount of attorney's fees, and the amount of other costs and expenses; and (4) plaintiff's counsel had made an improper "Golden Rule" argument in his closing argument.

Id. at 145. For another case discussing when a jury damage award should be modified, see *Daniels v. Weiss*, 385 So. 2d 661 (Fla. 3d DCA 1980).

441. 384 So. 2d at 146 (citation omitted).

442. FLA. R. CIV. P. 1.530(f); see *Wackenhut Corp. v. Canty*, 359 So. 2d 430, 435 (Fla. 1978); *Haindel v. Paterno*, 388 So. 2d 235, 237 (Fla. 5th DCA 1980).

443. FLA. R. CIV. P. 1.530(f).

444. See, e.g., *Action Fire Safety Equip. Co. v. Biscayne Fire Equip. Co.*, 383 So. 2d 969, 973 (Fla. 3d DCA 1980) (denial of motion for new trial based on new evidence not reviewable because trial court failed to indicate whether the evidence would change jury's verdict or was merely cumulative or impeaching).

445. *Diaz v. Rodriguez*, 384 So. 2d 906 (Fla. 3d DCA 1980) (attempt to raise court's error after trial is untimely, even though error allegedly kept relevant evidence from jury); *Bishop v. Watson*, 367 So. 2d 1073 (Fla. 3d DCA 1979) (plaintiff's failure to object to defendant's remarks and trial court's failure to admonish defendant or instruct jury to disregard remarks was not legal basis to set aside verdict and grant a new trial).

446. *Diaz v. Rodriguez*, 384 So. 2d at 907.

447. 382 So. 2d 1254 (Fla. 4th DCA 1980).

structions or a mistrial. After entering judgment for the defendant, the trial court granted the plaintiff's motion for a new trial because the court should have stricken the *voir dire* statements. The Fourth District reversed and remanded with instructions to reinstate the jury verdict, holding:

The court below felt that it had erred in not acting on its own motion to strike the improper statements to which it had already sustained an objection. We find this to be an unreasonable view of the responsibility of the trial court. The failure on the part of counsel to ask for curative instructions, request a mistrial, or to move for a new venire constituted intentional trial tactics, mistakes of which are not to be cured upon appeal simply because they backfired.⁴⁴⁸

Florida Rule of Civil Procedure 1.530(b) provides in part that a losing party can serve a motion for a new trial within ten days after the jury's rendition of the verdict or the entry of judgment in a nonjury action.⁴⁴⁹ Moreover, rule 1.090(b) prohibits a trial court from extending the time for making a motion.⁴⁵⁰ The court does have the discretion, however, to permit a party to amend a timely motion in order to state new grounds for a new trial.⁴⁵¹

XVI. JUDGMENTS

Rule 1.010 of the Florida Rules of Civil Procedure mandates that the rules "be construed to secure the just, speedy and inexpensive determination of every action."⁴⁵² In furtherance of this emphasis on efficiency, rule 1.442 encourages defendants to settle meritorious claims and shifts the financial burden of proceeding to trial to the claimant if the defendant makes an appropriate offer.⁴⁵³ Specifically, rule 1.442 authorizes the defendant to serve an offer of judgment ten or more days before the trial begins.⁴⁵⁴ The rule can thus be a useful device for the pretrial disposition of cases.

The 1980 revision to rule 1.442 goes beyond the efficiency pur-

448. *Id.* at 1255-56. One judge dissented, stating that the plaintiff's failure to request a curative instruction or move for a mistrial should not have prevented the trial judge from granting a new trial if improper considerations had influenced the jury. *Id.* at 1257.

449. The ten-day time limit of FLA. R. Civ. P. 1.530(b) also applies to motions for a rehearing.

450. See *Feinberg v. Feinberg*, 384 So. 2d 1304 (Fla. 4th DCA 1980).

451. FLA. R. Civ. P. 1.530(b).

452. FLA. R. Civ. P. 1.010.

453. *Wisconsin Life Ins. Co. v. Sills*, 368 So. 2d 920, 922 (Fla. 1st DCA 1979).

454. FLA. R. Civ. P. 1.442.

pose of rule 1.010 and furthers the "just" determination of every action by providing that "[a]n offer of judgment shall not be filed unless accepted or until final judgment is rendered."⁴⁵⁵ This requirement avoids the possibility that a unilateral offer of judgment filed before trial will bias a judge. The amended rule also exempts from its coverage certain domestic relations matters related to divorce, alimony, nonsupport, or child custody.⁴⁵⁶ Because the nature of domestic matters, especially child custody cases, makes it difficult to determine whether an offer of judgment would be more favorable to the claimant,⁴⁵⁷ rule 1.442 appropriately does not apply to these matters.

Rule 1.580 also serves the dual goals of efficiency and justice. This rule, which sets forth the procedures for a writ of possession, was substantially reworded in 1980 to eliminate the anachronistic distinction between writs of assistance and possession. This distinction has not been meaningful since the consolidation of law and equity in Florida, and its retention until 1980 was merely an oversight.⁴⁵⁸ The most significant change in rule 1.580, however, is the shifting of the burden of proof of entitlement in third-party claims. In a seemingly more equitable approach, the burden shifts from the person causing the execution of the writ to the third party who is in possession of the property and is contesting the execution of the writ.⁴⁵⁹

One rule of procedure that clearly promotes the speedy and inexpensive determination of actions is rule 1.160, which authorizes a court clerk to grant motions and applications for entering defaults and other process.⁴⁶⁰ To prevent injustice, however, this rule must be adhered to literally.⁴⁶¹ In *Ferlita v. State*,⁴⁶² the District Court of Appeal, Second District, addressed the issue of whether "substantial compliance" with the provisions of section 903.27 of the Florida Statutes,⁴⁶³ which authorizes the clerk of the court to enter judgments against bail bondsmen, was sufficient to justify the clerk's entry of judgment. The court analogized the entry of judgment under section 903.27 to a clerk's capacity to enter

455. FLA. R. CIV. P. 1.442.

456. FLA. R. CIV. P. 1.442, Committee Note.

457. FLA. R. CIV. P. 1.442, Committee Note.

458. FLA. R. CIV. P. 1.580, Committee Note.

459. FLA. R. CIV. P. 1.580, Committee Note.

460. FLA. R. CIV. P. 1.160.

461. See *Ferlita v. State*, 380 So. 2d 1118, 1119 (Fla. 2d DCA 1980).

462. 380 So. 2d 1118 (Fla. 2d DCA 1980).

463. FLA. STAT. § 903.27 (1979) (amended 1981).

default judgments. Noting that a clerk acts "in a purely ministerial capacity and has no discretion to pass upon the sufficiency of documents presented for filing,"⁴⁶⁴ the court concluded that "literal adherence is required when a statute spells out the steps to be taken before the clerk of the court is authorized to enter a judgment."⁴⁶⁵

A case that illustrates the interrelationship between the Florida Rules of Civil Procedure and the Florida Rules of Appellate Procedure is *Dibble v. Dibble*.⁴⁶⁶ In *Dibble* the District Court of Appeal, Third District, considered whether the definition of "rendition" under appellate rule 9.020(g) applies to civil procedure rule 1.530(b) so as to alter the time requirements for a motion for rehearing. Rule 9.020(g) defines "rendition" as "the filing of a signed, written order with the clerk of the lower tribunal."⁴⁶⁷ This definition, which contains no recording requirement, is in apparent conflict with rule 1.530(b), which requires a party to serve a motion for rehearing "not later than 10 days after . . . the *entry of judgment*."⁴⁶⁸ The court held that the definition does alter the time requirements of rule 1.530(b), and therefore a motion for rehearing not served within ten days after judgment is untimely. In so holding, the court stated that the absence of a specific definition of "entry" in either set of rules necessitates reliance on the supreme court's definition of "rendition" in appellate rule 9.020(g).⁴⁶⁹ The court further stated that "[t]his result is required by the doctrine that rules promulgated by the supreme court which deal with the same subject matter should be construed together and in the light of each other."⁴⁷⁰ Accordingly, rendition occurs when a party files a final judgment with the clerk of the court, and this filing may be equated with an entry.

The form of rules of procedure, as well as their substance, can contribute to the efficient and inexpensive determination of a cause of action. The 1980 amendment to rule 1.570, which governs the enforcement of judgments, exemplifies the Civil Procedure Rules Committee's goal of attaining clarity of form and structure.⁴⁷¹ Although substantively the same, the rule has been divided into four subsections and amended, as the Committee Note ex-

464. 380 So. 2d at 1119.

465. *Id.*

466. 377 So. 2d 1001 (Fla. 3d DCA 1979).

467. FLA. R. APP. P. 9.020(g).

468. FLA. R. CIV. P. 1.530(b) (emphasis added).

469. 377 So. 2d at 1003.

470. *Id.*

471. FLA. R. CIV. P. 1.570.

pressly states, for the purpose of making it more readily understood.⁴⁷²

XVII. RELIEF FROM JUDGMENT, ORDER, OR DECREE

Once an order becomes final, a court cannot amend, alter, or modify its provisions unless authorized by statute or rule.⁴⁷³ One such rule is rule 1.540 of the Florida Rules of Civil Procedure. A party may move for relief from a final judgment, order, or decree under rule 1.540(a) on the ground of clerical mistake,⁴⁷⁴ or under 1.540(b) on the ground of mistake, inadvertence, surprise, excusable neglect, fraud, or newly discovered evidence.⁴⁷⁵ The rule contemplates errors such as the honest and inadvertent mistakes that courts and parties make in the ordinary course of litigation.

Subsection (a) provides relief from clerical mistake by authorizing the court to correct technical errors in the record that are not the fault of the moving party or the result of judicial error. Relief therefore is proper when the court has incorrectly dated an order⁴⁷⁶ or failed to assess costs.⁴⁷⁷ Relief is inappropriate, however, when the asserted error is substantive. In *McKibben v. Fujarek*,⁴⁷⁸ for example, the plaintiffs had initially filed two actions in different countries, and then voluntarily dismissed one of the actions with prejudice. Over a year later, in an attempt to avoid the res judicata effect of the dismissal, the plaintiffs moved to amend the notice to delete the words "with prejudice," claiming that they had included the words in the notice inadvertently.⁴⁷⁹ The trial court granted the plaintiffs leave to amend. On appeal, the District Court of Appeal, Fourth District, quashed the amended notice after concluding that rule 1.540(a) only authorizes a court to correct technical errors that result from an accidental oversight or omission.⁴⁸⁰ Not only

472. FLA. R. CIV. P. 1.570, Committee Note.

473. *De Filippis v. De Filippis*, 378 So. 2d 325, 327 (Fla. 4th DCA 1980). A court does, however, retain the power to alter the time and manner of enforcement. *Id.*

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

475. FLA. R. CIV. P. 1.540(b). Subsection (b) also permits relief when "the judgment or decree is void; . . . the judgment or decree has been satisfied, released or discharged or a prior judgment or decree upon which it is based has been reversed or otherwise vacated or it is no longer equitable that the judgment or decree should have prospective application."

476. *Bartlett & Sons Co. v. Pan-American Studios, Inc.*, 144 Fla. 531, 198 So. 195 (1940).

477. *Winters v. Parks*, 91 So. 2d 649 (Fla. 1956).

478. 385 So. 2d 724 (Fla. 4th DCA 1980).

479. *Id.*

480. *Id.* at 725. The trial court's action exceeded the power conferred by the rule when it went beyond the mere correction of a technical error and actually modified the substance

was there no evidence of a technical error, but the requested revision would actually modify the substance of the order. Since the error was substantive rather than technical, relief under rule 1.540(a) was inappropriate.⁴⁸¹

Mistakes other than clerical errors and omissions can be remedied under rule 1.540(b). Thus, relief is proper when the court has inadvertently signed an incorrect order or has entered final judgment under the mistaken belief that the defendant is in default.⁴⁸² Conversely, courts have denied relief when the request is based on a substantive mistake of fact made by a witness during testimony,⁴⁸³ when a party has failed to comprehend the effect of service of process,⁴⁸⁴ and when a subsequent change in the substantive law might justify an affirmative defense that was not raised in the pleadings.⁴⁸⁵

Trial judges have broad discretion in determining whether the facts of a case justify relief under subsection (b) of rule 1.540, and reversal requires a showing of gross abuse of discretion.⁴⁸⁶ In *Church v. Strickland*,⁴⁸⁷ for example, the District Court of Appeal, Fifth District, affirmed a trial court's order setting aside a summary judgment on the ground that defense counsel's neglect was excusable and thus warranted relief under rule 1.540(b). In *Church* the defendant retained a new attorney after his first attorney died midway through the litigation. The second attorney relied on the first attorney's handwritten notations indicating that certain allegations in the complaint had been denied when, in fact, the defendant had admitted them in the answer. The trial court found that

of the record.

481. As the court noted, the proper device for obtaining relief from mistake, inadvertence, or excusable neglect of counsel is FLA. R. Civ. P. 1.540(b). Relief, however, may not be obtained more than one year from the date of entry of the judgment, decree, or order. In contrast, relief under FLA. R. Civ. P. 1.540(a) may be obtained at any time. FLA. R. Civ. P. 1.540(b) would have precluded the plaintiffs from obtaining relief, because they filed their motion to amend more than one year after the entry of the order of dismissal with prejudice. Counsel probably sought relief under 1.540(a) as his only avenue. The court properly denied relief, but overlooked this important point. *Id.* at 725.

482. *Viking Gen. Corp. v. Diversified Mortgage Inv.*, 387 So. 2d 983, 985 (Fla. 2d DCA 1980).

483. In *Viking* the court stated that a diligent party may always obtain relief pursuant to "newly discovered evidence" as provided by Rule 1.540(b)(2), but that "the necessary finality of litigation prohibits . . . a second chance at proof they had available in the first instance but overlooked . . ." *Id.* at 986.

484. *John Crescent, Inc. v. Schwartz*, 382 So. 2d 384, 386 (Fla. 4th DCA 1980).

485. *Ellis Nat'l Bank v. Davis*, 379 So. 2d 1310 (Fla. 1st DCA 1980).

486. *Church v. Strickland*, 382 So. 2d 419, 421 (Fla. 5th DCA 1980).

487. *Id.*

the second attorney's error constituted excusable neglect and set aside the summary judgment it had entered in favor of the plaintiff. Noting that excusable neglect is a question of fact, the court stated:

A motion filed under Florida Rules of Civil Procedure 1.540 is addressed to the sound discretion of the trial court. . . . It is the duty of the trial court, not the appellate court, to make the determination whether the facts constitute excusable neglect, mistake, or inadvertence within the rules. . . . This discretion is of the broadest scope.⁴⁸⁸

One judge dissented, however, finding the attorney's neglect so egregious as to preclude relief from the judgment.⁴⁸⁹

488. *Id.* at 420.

489. *Id.* at 421.