

# University of Miami Law Review

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Volume 31  
Number 4 1976 *Developments in Florida Law*

Article 6

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9-1-1977

## Civil Procedure

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# CIVIL PROCEDURE\*

JEFFREY S. TANEN\*\*

*The author surveys and discusses recent decisions, rule changes and legislation concerning various aspects of Florida Civil Procedure. The topics dealt with include jurisdiction, venue, class actions, parties, discovery, judgments, summary judgment, jury trials, jury instructions and dismissal.*

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\* The decisions surveyed in this article appear in volumes 306 through 336 of the Southern Reporter, Second Series. In addition, the survey covers laws enacted by the 1974 and 1975 sessions of the Florida legislature.

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## I. COURTS, JUDGES, AND ATTORNEYS

### A. Court Administration

The amendment to Florida Rule of Civil Procedure 1.020 provides that it is the duty of every judge to rule upon every matter submitted to him within a reasonable amount of time. Any matter that is held under advisement for more than sixty days must be reported to the chief judge of the circuit at the end of that calendar month.<sup>1</sup>

### B. Jurisdiction of the Courts

A trial court's jurisdiction over a case generally divests when a final judgment has been rendered.<sup>2</sup> In *Chipola Nurseries, Inc. v. Division of Administration*<sup>3</sup> plaintiff and defendant stipulated to a final judgment. Defendant was awarded sums for condemnation of its properties. The "final" judgment, however, did not include interest "which . . . together with attorneys' fees and costs of these proceedings will be further set by this court"<sup>4</sup> as provided by law. On January 15, 1975, about six months after the final judgment, the court entered a partial judgment as to costs. The parties then attempted to stipulate to interest, but were unable to agree. Finally, on January 28, 1976, defendant filed a motion for an order assessing interest.

The trial court held that it did not have jurisdiction to hear the defendant's motion. On appeal, plaintiff-appellee contended that the trial court had lost jurisdiction during the lapse between the entry of "final" judgment and the filing of defendant-appellant's motion for an order assessing interest. Plaintiff-appellee's contention was that the assessing of interest should be treated like the taxing of costs and therefore must be taxed within a reasonable time after final judgment. Since the adjudication of interest was delayed beyond a reasonable time, jurisdiction was lost. However, the District Court of Appeal, First District, disagreed and stated: "Costs arise out of the litigation itself and are not a claim or part of a claim which forms the basis for the suit."<sup>5</sup>

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1. *In re The Florida Bar*, Rules of Civil Procedure, 339 So. 2d 626 (Fla. 1976).

2. *Alderman v. Puritan Dairy, Inc.*, 145 Fla. 292, 294, 199 So. 44, 45 (1940).

3. 335 So. 2d 617 (Fla. 1st Dist. 1976).

4. *Id.* at 618.

5. *Id.* See *Roberts v. Askew*, 260 So. 2d 492 (Fla. 1972).

The court noted that the mere labeling of the judgment as "final" did not make it such unless, in fact, it was a final judgment—leaving nothing further for judicial determination. Since the question of interest was left for future determination, judicial labor was not at end. Thus, the trial court had jurisdiction to assess interest.

During the survey period, two cases arose involving jurisdictional amount. Florida Statutes sections 26.012(2)(a) and 34.01 (1975) set this amount at \$2,500.00 for the circuit court. In *Columbus Mills, Inc. v. Dionne*<sup>6</sup> plaintiff filed suit in circuit court. Defendant counterclaimed for damages, but the counterclaim did not meet the \$2,500.00 jurisdictional prerequisite. The trial court therefore dismissed the counterclaim. On appeal, the District Court of Appeal, Second District, held that a defendant may assert a counterclaim for damages in a sum less than the court's ordinary jurisdictional minimum. In *PTS of Gainesville, Inc. v. Olivetti Corp.*<sup>7</sup> plaintiff and defendant entered into two contracts. Each contract contained a provision for attorneys' fees in the event of default. Plaintiff sued for breach of contract, in circuit court alleging damages of \$1,950.00 on one contract, damages of \$1,086.00 on the other, and attorneys' fees on both. Plaintiff claimed the jurisdictional amount by virtue of its \$1,950.00 claim, plus reasonable attorneys' fees. The District Court of Appeal, First District, agreed:

Attorney's fees which are expressly promised are as much a part of the amount involved in the suit for the purpose of determining the jurisdiction as are the principal and interest. *Ring v. Merchants' Broom Co.*, 1914, 68 Fla. 515, 67 So. 132. The test for determining jurisdiction of the circuit court is the amount claimed and put into controversy in good faith.<sup>8</sup>

### C. *Forum Non Conveniens*

Although a court may have jurisdiction over a cause, it may, upon application by a party, choose not to exercise it.<sup>9</sup> The test for applying the doctrine of forum non conveniens is two-pronged. Con-

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6. 328 So. 2d 467 (Fla. 2d Dist. 1976).

7. 334 So. 2d 324 (Fla. 1st Dist. 1976).

8. *Id.* at 325.

9. See *Adams v. Seaboard Coast Line RR*, 224 So. 2d 797 (Fla. 1st Dist. 1969). Forum non conveniens sometimes is used to transfer cases because of inconvenient forum under Florida Statute section 47.122 (1975).

venience is not the determinative criterion. It is necessary that the cause of action arise in a jurisdiction outside Florida and that the parties are nonresidents.<sup>10</sup> Thus, in an action filed in Florida by Florida residents to recover for injuries arising out of the collision of an automobile with a truck in New Mexico, the doctrine was inapplicable, and the Florida residents were not denied access to their own state courts.<sup>11</sup>

#### D. Judges

The District Court of Appeal, Third District, has held recently that in the absence of special circumstances such as mistake or fraud perpetrated upon a court, a successor judge does not have authority to set aside a discretionary order which had been entered by his predecessor on the same facts. In *City of Miami Beach v. Chadderton*<sup>12</sup> an order compelling discovery was entered requiring the plaintiff to produce requested information within one month. The order provided that if the plaintiff failed to do so, the action would be dismissed with prejudice. Plaintiff did not comply but the successor judge refused to dismiss. Usually, sanctions under Florida Rule of Civil Procedure 1.380 are invoked by a two-step process: (1) an order compelling discovery and (2) an order of sanctions upon failure to comply with the discovery. As the dissent indicated, the successor judge may have been within the general rule of not modifying or reversing the final order of a predecessor in that the order in question might be considered only the first order compelling discovery and therefore, only interlocutory in nature.<sup>13</sup> However, the majority considered his refusal to dismiss with prejudice, as ordered by his predecessor, to be error.

#### E. Costs

Taxing costs involves the exercise of discretion by the trial judge. In *Miller Yacht Sales, Inc. v. Scott*<sup>14</sup> the prevailing party was awarded the costs of taking depositions. In affirming the award, the District Court of Appeal, Fourth District, held that the test for

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10. *Morgan v. Ande*, 313 So. 2d 86 (Fla. 4th Dist. 1975).

11. *Killingsworth v. Montgomery Ward & Co.*, 327 So. 2d 50 (Fla. 2d Dist. 1976).

12. 306 So. 2d 558 (Fla. 3d Dist. 1975).

13. *Id.* at 560.

14. 311 So. 2d 762 (Fla. 4th Dist. 1975).

allowing costs is not whether the depositions were actually offered in evidence or used extensively in impeachment of witnesses, but whether they served a useful purpose. The court reasoned that this test will foster the reasonable and judicious use of the discovery process by affording judges the opportunity to deny an allowance of costs for excessive depositions, although used at trial, or read into the record for purposes of impeachment.

#### F. Attorneys

Rule 1.030 has been amended to require that all pleadings filed by an attorney, or by a party representing himself, include the telephone number of the person filing the pleading.<sup>15</sup>

### II. JURISDICTION OVER THE PERSON

#### A. In General

The District Court of Appeal, Second District, has held that service on a husband by leaving process at the home with his wife is valid regardless of whether the husband actually received knowledge of the service.<sup>16</sup> The standard is whether, at the time of service, circumstances were such that it could be presumed that knowledge of the service would be brought to his attention.

A recent opinion involved defendants who were engaged in a joint venture.<sup>17</sup> The court reasoned that a joint venture is not a legal entity in the same sense as a partnership, even though the distinction is often blurred<sup>18</sup> and held that service of process on one member of the joint venture was not sufficient to confer jurisdiction on another member.

#### B. Substitute Service

Florida Statutes section 48.031 (1975) provides that service of process may be perfected by leaving it at the party's place of abode with "some person of the family over fifteen years of age." In order to qualify as "some person of the family," kinship by blood or marriage is not necessary.<sup>19</sup> It is sufficient that service is made upon a

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15. *In re* The Florida Bar, Rules of Civil Procedure, 339 So. 2d 626 (Fla. 1976).

16. *Barnett Bank v. Folsom*, 306 So. 2d 186 (Fla. 2d Dist 1975).

17. *Elting Center Corp. v. Diversified Title Corp.*, 306 So. 2d 542 (Fla. 3d Dist. 1975).

18. *Id.*

19. *Pyles v. Beall*, 37 Fla. 557, 20 So. 778 (Fla. 1896).

person who has some permanency of abode on the premises. However, in *Couts v. Maryland Casualty Co.*,<sup>20</sup> service of process was insufficient where it was made upon a mother-in-law who was only visiting for a few days. The court in *Couts* distinguished *Sangmeister v. McElnea*<sup>21</sup> where the "person of the family" requirement was met by serving a relative who was visiting for four months.

### C. Personal Service

Florida Statutes section 48.193 (1975) describes certain acts which subject persons to the jurisdiction of the courts of this state. Included are causes of action arising from the ownership, use, or possession of any real property within the state. In *Griffin v. Zinn*<sup>22</sup> a plaintiff had obtained a judgment in Ohio on a note against an Ohio defendant. Plaintiff filed an action in Florida to enforce the Ohio judgment. The complaint described real estate in Florida owned by defendant and plaintiff submitted an affidavit stating that defendant had promised to pay the note out of the Florida property. The District Court of Appeal, Third District, held the complaint insufficient to meet the long arm requirements of section 48.193. In order to have in personam jurisdiction under that section, there must be a direct affiliation or nexus between the basis of the controversy and the Florida property, as where a plaintiff claims damages resulting from the negligent maintenance of Florida property owned by a nonresident. The Ohio judgment had no such direct affiliation to the Florida property. The court indicated that plaintiff might have been able to initiate a quasi in rem action, but he failed to do so.

### D. Constructive Service

In a recent dissolution action,<sup>23</sup> service of process was effected pursuant to Florida Statutes sections 49.10(1)(b), 49.11, and 49.12 (1975), whereby notices of dissolution proceedings were posted in three prominent places in the county of residence of the defendant-wife. Notice was also mailed to her last known address. At trial, the husband moved for a default. This motion was denied on the ground

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20. 306 So. 2d 594 (Fla. 2d Dist. 1975).

21. 278 So. 2d 675 (Fla. 3d Dist. 1973).

22. 318 So. 2d 151 (Fla. 2d Dist. 1975).

23. *Sheppard v. Sheppard*, 329 So. 2d 1 (Fla. 1976).

that service of process was insufficient because the service statute, section 49.10(1)(b), was deemed unconstitutional by the trial judge. The Supreme Court of Florida reversed, and held that due process does not prohibit a state from devising a constitutional method for service of process where personal service is unduly expensive for an indigent party in a dissolution proceeding. The court found that the procedure utilized was reasonably designed and calculated to provide actual notice of the lawsuit, and therefore was constitutional.

In *Risman v. Whittaker*<sup>24</sup> the District Court of Appeal, Fourth District, held that service of process by the Florida long arm statutes, sections 48.193 and 48.194, is an alternative to service of process by publication under Florida Statutes section 49.021. Even though section 49.021 provides that "[w]here *personal service of process cannot be had*, service of process by publication may be had upon any party, natural or corporate, known or unknown,"<sup>25</sup> the long arm statute is not mandatory because it uses the word "may." The court reasoned that the policy behind the long arm statute is to afford the citizens of the state a forum for causes of action arising from activities of nonresidents within the state. It is not designed to make more difficult or limit the exercise of the rights of Florida plaintiffs. Further, it would be more time consuming and expensive to achieve in personam jurisdiction by personal service upon nonresidents under the long arm statute when compared to in rem jurisdiction by service by publication. Thus, Florida plaintiffs are free to use either method "depending upon the practicabilities and the kind of jurisdiction they [wish] to obtain."<sup>26</sup>

### III. VENUE

In *Florida Forms, Inc. v. Barkett Computer Services, Inc.*,<sup>27</sup> plaintiff sued defendant in Orange County, Florida, the principal place of plaintiff's business, to recover money owed on a note. Defendant's principal place of business was in Dade County, Florida. Upon motion by defendant, the cause was transferred to Dade County. On appeal, the Fourth District reversed. Although the election of venue is with plaintiff, the burden of pleading and proving

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24. 326 So. 2d 213 (Fla. 4th Dist. 1976).

25. FLA. STAT. § 49.021 (1975)(emphasis added).

26. 326 So. 2d at 214.

27. 311 So. 2d 730 (Fla. 4th Dist. 1975).



that venue is improper or should be changed is upon defendant. Although the note did not specify the place of payment, "[i]n the absence of an agreement as to the place of payment it is implied that payment is to be made where the payee resides or has an established place of business."<sup>28</sup> Therefore, the cause of action accrued in Orange County and venue was proper in that county. In addition, defendant lacked good reason for a change of venue.

#### IV. ACTIONS

During the survey period, numerous cases arose involving complaints, counterclaims, cross claims, third party complaints, and defenses. However, the most significant decisions involved class actions, and this section will deal only with them.

In *Paulino v. Hardister*<sup>29</sup> the District Court of Appeal, Second District, decided a question of res judicata as it related to actions against class defendants. If the parties who represent the defendant class are adequate representatives, absent members of the class are bound by the judgment in the class action. In determining whether the representative was adequate, the court considered that: (1) the representative conducted a vigorous defense including certiorari to the Supreme Court of Florida and the United States Supreme Court; (2) all defenses which reasonably might have been available to defeat the claims of plaintiffs against all members of the class were raised; and (3) defendant was represented by competent counsel.

In *Paulino* plaintiff sought to enjoin all residents who had mobile homes in a certain subdivision from keeping them on the premises. The joined class of defendants were the "'legal owners of or parties who have equitable interests in certain lots within' the subdivision and were said to have placed mobile homes on the lots 'for the purpose of rental, for sale . . . and for use as residences in direct violation of the restrictive covenants attaching to said lots.'"<sup>30</sup> Only named defendant members of the class were served with process. One of the members of the class defended actively against the action and the trial court ordered the class defendants to remove

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28. *Id.* at 731. *Accord*, *First Int'l Realty Inv. Corp. v. Cochran*, 314 So. 2d 214 (Fla. 3d Dist. 1975).

29. 306 So. 2d 125 (Fla. 2d Dist. 1975).

30. *Id.* at 127.

trailers and mobile homes from the subject premises.

The court stated that a determination of whether unknown class defendants were represented adequately was largely a matter of notice. Thus, the "case present[ed] a classic confrontation between the principles inherent in an effective class action and those applicable to constitutional due process."<sup>31</sup> The Second District suggested that with regard to further class actions against defendant class members the court should determine whether the named members of the class adequately represent the interests of the absent members. Inherent in a positive determination is a finding that the notice given to absent members of the class increases the likelihood that those parties appearing on behalf of the class will adequately represent the interests of the class.

The court should determine how notice of the suit may best be given to absent members of the class. One possible method might be written notice to all ascertainable members of the class, or under the circumstances, the court might decide that publication or some other kind of notice will be sufficient. The cost of this notice should be born initially by the party seeking relief against the class.

The court also stated that if an absent member makes a timely request for joinder as an additional named party, the joinder should be liberally granted. In the event an absent member of the class does not know of the pending suit, and judgment is entered, the member should be able to attack the court's conclusion, pursuant to a Rule 1.540(b)(1) motion for relief on the ground that the named members were not adequate class representatives. The basis for the 1.540 motion would be surprise.

Finally, if the court concludes that the named parties are adequate representatives of the class, all other matters decided in the suit would be *res judicata*.

While indicating these guidelines for future decisions, the court did not need to follow them in the instant case. It held that the class defendants were represented adequately since the class representative presented all the pertinent evidence and pursued all possible avenues of relief. Consequently, the judgment against the class was affirmed.

In *Rosenwasser v. Frager*<sup>32</sup> the District Court of Appeal, Third

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31. *Id.*

32. 307 So. 2d 865 (Fla. 3d Dist. 1975). See *Harrell v. Hess Oil & Chem. Corp.*, 287 So.

District, held that it was *per se* inappropriate for condominium owners to bring a class action against a developer for compensatory and punitive damages on the basis of alleged fraudulent misrepresentations. The unit owners sought to avoid a ninety-nine year recreational lease on the ground that they were fraudulently induced to enter into it. The alleged misrepresentation was made in a written brochure describing lakeside swimming, sandy beaches and courtesy bus service, none of which was provided.

The class action allegation was stricken from the complaint and the cause remanded to the trial court. Subsequently, plaintiff filed a motion for leave to join additional parties. This was granted, and thirty condominium unit owners were joined as plaintiffs, each asserting fraud and deceit. Each plaintiff's claim was based upon a separate and independent purchase agreement. In reviewing an interlocutory appeal of the joinder, the Third District affirmed.<sup>33</sup> The court reasoned that multifariousness occurs when distinct and disconnected subjects or causes are joined in the same complaint, or when parties, either defendants or plaintiffs, who have no common interest in the subject matter litigation, are joined in the same litigation. In the instant case, all the plaintiffs were condominium unit owners in the same condominium complex. It was developed by the same defendant and all the sales contracts contained identical provisions relating to the recreational lease. It is interesting to note that although the condominium unit owners initially could not maintain the suit as a class action, they were allowed to maintain it on the same claim by all joining in as plaintiffs.

## V. PARTIES

Rule 1.260(c) provides:

In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.

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2d 291 (Fla. 1973); *Osceola Groves v. Wiley*, 78 So. 2d 700 (Fla. 1955); *Equitable Life Assurance Soc'y of the United States*, 275 So. 2d 568 (Fla. 3d Dist. 1973).

33. *Rossenwasser v. Frager*, 322 So. 2d 640 (Fla. 3d Dist. 1975).

In *Schmidt v. Mueller*<sup>34</sup> plaintiff sued defendants for real estate commissions and for interference with his contractual relationship. During the nonjury trial, plaintiff alluded to having incorporated his real estate business and having assigned his business assets to that corporation. Defendants moved to dismiss on the ground that the new corporation was not before the court as a party-plaintiff, and therefore the real party in interest was not represented. This motion was granted. In the order of dismissal it was noted that the plaintiff had made an oral motion to substitute the newly formed corporation but the court ruled that the motion was too late. On appeal, the Second District reversed. Since Rule 1.260(c) specifically provides for continuance of the action or substitution of the proper party in situations like the one at bar, it was error to dismiss. This was especially clear because there was no showing by defendant that prejudice would have resulted from a continuance or substitution. The court reasoned that had defendant been so prejudiced, the rules are sufficiently flexible to allow a court to grant further relief by way of continuance or further discovery.

In *Rader v. Otis Elevator Co.*<sup>35</sup> plaintiff was injured on a hospital elevator in Jacksonville. He sued the hospital, alleging negligent maintenance of the elevator. The hospital, in turn, filed a third-party complaint against the elevator company. Prior to trial, the hospital and plaintiff settled the claim. The hospital and the elevator company went to trial on the third party complaint and the elevator company was exonerated. Subsequently, the original plaintiff sued the elevator company for negligent maintenance of the elevator. The trial court entered a final summary judgment against plaintiff, holding that the issue of liability as to the elevator company had previously been submitted to the jury in the form of the third-party claim by the hospital against the elevator company.

On appeal, the District Court of Appeal, First District, reversed. The court reasoned that since Rule 1.180 permits, but does not require, a plaintiff to assert a claim against a third party defendant, the original plaintiff could bring an action against the elevator company after the third party action had been litigated. The court stated clearly that

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34. 335 So. 2d 630 (Fla. 2d Dist. 1976).

35. 327 So. 2d 857 (Fla. 1st Dist. 1976).

[u]ntil [Rule 1.180] is amended to require, and not merely permit, the assertion of a plaintiff's claim against a third party defendant which arises out of the transaction in issue between plaintiff and defendant, estoppel must be predicated on a judgment between adversaries, not merely on an opportunity to litigate.<sup>36</sup>

Therefore, the subsequent assertion of the plaintiff's claim against the prior third-party defendant, although arising out of the identical transaction in issue in the prior action, did not give rise to estoppel or res judicata in the subsequent litigation.

In 1975, the legislature adopted Florida Statutes section 768.134(1)<sup>37</sup> which in relevant part provides: "Furthermore, in any civil medical malpractice action, the trial on the merits shall be conducted without any reference to insurance, insurance coverage, or joinder of an insurer as a co-defendant in the suit."

The legislature's intent in enacting this section, according to the Supreme Court of Florida in *Carter v. Sparkman*,<sup>38</sup> was "to bar only 'any reference' to the joinder of insurers rather than the joinder itself."<sup>39</sup> The court also stated that rules governing references to insurance or insurers during the course of a trial are procedural matters. To the extent that the legislature attempted to control such references during the course of trial, it acted beyond its power because only the court, not the legislature, may adopt rules of procedure. Nevertheless, the court held that in view of the wisdom of continuing the policy expressed in the statute, it would adopt Rule 1.450(e) as a new rule of procedure for all medical malpractice trials, conducted or in process under the medical malpractice statute. Rule 1.450(e) states: "In any civil medical malpractice action, the trial on the merits shall be conducted without any reference to insurance, to insurance coverage, or to the joinder of an insurer as co-defendant in the suit."<sup>40</sup>

## VI. DISCOVERY

### A. Scope

In *Brown v. Bridges*<sup>41</sup> a recent District Court of Appeal, Second

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36. *Id.* at 858.

37. Renumbered to FLA. STAT. § 768.47(1)(1977).

38. 335 So. 2d 802 (Fla. 1976), cert. denied, 97 S.Ct. 741 (1977).

39. *Id.* at 806.

40. *Id.*

41. 327 So. 2d 874 (Fla. 2d Dist. 1976).

District, case, the issue before the court was whether plaintiff could compel the defendant to submit to a videotaped deposition wherein defendant would be required to demonstrate karate maneuvers which he had been teaching plaintiff when she was injured. Defendant was compelled to demonstrate the maneuvers in question because they were relevant to the transaction. "While it is true that the demonstration process may not precisely reenact petitioner's instructional techniques, that argument is more properly related to the use of the deposition at trial and to the limited uses which respondents can make of videotape prior to trial."<sup>42</sup>

It is interesting to compare *Brown* to the District Court of Appeal, Third District's decision in *Florida Keys Boys Club, Inc. v. Pelekis*.<sup>43</sup> The latter case involved allegations that a signature on a deed was a forgery. Plaintiff moved, pursuant to Rules 1.350 and 1.280 to have Defendant write, fifteen times with each hand, the various signatures which he allegedly had forged. The trial court's order compelling this discovery was reversed by the Third District. The court held that the rules for discovery do not authorize a court to order a defendant to manufacture his signature for purposes of litigation. The trial court should have required defendant to produce samples of his signature made prior to the litigation. "The process of forced manufacturing of specimens in the hope that one of them will afford a basis for a claim of forgery is not contemplated by our rules of discovery."<sup>44</sup>

Rule 1.310(b)(4) has been amended to allow the taking of a deposition by videotape at the same time that a stenographic transcription is being taken. Furthermore, courts "may adopt a standard order governing the use of videotape depositions which may be automatically applicable, upon the giving of notice of taking any videotape deposition unless modified upon the application of any party."<sup>45</sup> The amended rule also provides that the court shall order the manner of recording, preserving, and filing such depositions to insure that they are accurate and trustworthy.<sup>46</sup>

In *Spencer v. Beverly*,<sup>47</sup> the issue was whether surveillance pho-

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42. *Id.* at 875.

43. 327 So. 2d 804 (Fla. 3d Dist. 1976).

44. *Id.* at 806.

45. *In re The Florida Bar*, Rules of Civil Procedure, 339 So. 2d 626 (Fla. 1976).

46. *Id.*

47. 307 So. 2d 461 (Fla. 4th Dist. 1975).

tographs taken of plaintiff after a personal injury action had been commenced were discoverable and did not represent the work product of counsel. In *Spencer* plaintiff propounded eight interrogatories pertaining to surveillance movies of plaintiff which had been taken by the defendant. Defendant answered the first interrogatory and acknowledged that he had taken surveillance. However, defendant objected to the remaining interrogatories which requested that he state what activities of the plaintiff were portrayed in the surveillance movies. Defendant claimed a work product exemption from answering the interrogatories on the ground that he intended to use the movies solely for impeachment purposes. The trial court held that where a party reasonably anticipates that he may use surveillance movies for impeachment, the films should be subject to discovery.

In concurring with the per curiam denial of certiorari, one judge noted: "If matter is to be introduced into evidence, it is not privileged as work product."<sup>48</sup> The main question before the court was the difference between impeachment evidence which is not subject to discovery, and discoverable substantive evidence which relates directly to the plaintiff's injuries and damages. Thus, the following guide was suggested in the special concurring opinion: "If a party possesses material he expects to use as evidence at trial, that material is subject to discovery."<sup>49</sup> The rationale behind this guide is that the discovery rules were enacted to eliminate surprise, to encourage settlement, and to assist in arriving at the truth. The opinion also noted that photographs and movies generally are not considered work product.

## B. *Discovery Devices*

### 1. INTERROGATORIES TO PARTIES

Rule 1.340(e) has been changed to avoid duplication of papers in court files. Specifically, it is no longer necessary to file with the court a copy of interrogatories served on a party. All that is necessary is an executed certificate of service, or an attached notice that the interrogatories have been served, "giving date of service, the number of interrogatories served, and the name of the party to

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48. *Id.* at 462 citing *Surf Drugs, Inc. v. Vermette*, 236 So. 2d 108 (Fla. 1970).

49. *Id.*

whom they were directed. When the original interrogatories have been completed by the answering party, they shall be filed . . ." with the court.<sup>50</sup>

## 2. DEPOSITIONS

In *Colonnades, Inc. v. Vance Baldwin, Inc.*<sup>51</sup> the plaintiff offered into evidence the deposition of a nonparty witness whose testimony was material to plaintiff's case. The trial court allowed the deposition into evidence on the basis that the witness stated within the deposition that he was a resident of Birmingham, Alabama, and that he did not expect to be in Florida and more particularly, West Palm Beach, the site of the trial, on the date of the trial. Defendant objected, arguing that only sworn evidence, independent of the deposition itself, would be sufficient to satisfy the requirement that the witness will not be available for trial and that the witness is more than one hundred miles from the place of trial. On appeal, the District Court of Appeal, Fourth District, held that there must be a finding by the court that the required predicate has been shown. However, since the trial court judge has discretion as to the source, nature, and sufficiency of the facts which he may consider, the sworn testimony contained within the deposition was sufficient for this purpose.

## 3. REQUEST FOR ADMISSIONS

The use of requests for admissions can be a very effective tool. In *Creel v. Government Employees Insurance Company*<sup>52</sup> defendant insurance company propounded requests for admissions to plaintiff who failed to respond within the thirty day period set forth in Rule 1.370. Subsequently, defendant moved for entry of a summary judgment. Prior to the hearing on the motion for summary judgment, plaintiff failed to move the court to withdraw or amend the admissions on the grounds of excusable neglect or some other basis. Instead, plaintiff attempted to controvert the admissions by filing an affidavit prepared by his attorney three days before the hearing on the motion for the summary judgment. The court held: "It is our

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50. *In re The Florida Bar, Rules of Civil Procedure*, 339 So. 2d 626, 628 (Fla. 1976).

51. 318 So. 2d 515 (Fla. 4th Dist. 1975).

52. 313 So. 2d 772 (Fla. 3d Dist. 1975), *rev'd on other grounds*, 336 So. 2d 1170.



view, however, that the plaintiff was unfortunately 'hoist with his own petard.' We hold that the appellant's explanation is insufficient to justify his failure to comply with Rule 1.370; and, therefore, the facts as admitted support the summary judgment rendered by the trial court."<sup>53</sup>

Recently, the following certified question was presented before the District Court of Appeal, First District: "Must a response to a request for admission made pursuant to Rule 1.370, . . . be signed and sworn to by the responding party, or is the unsworn signature of the responding party's attorney sufficient?"<sup>54</sup> The court held that a request for admissions may be signed only by the attorney. The party need not sign it. Furthermore, the attorney's signature need not be sworn. Although the former rule provided that a response must be signed and sworn to by the party, this requirement has been omitted from Rule 1.370 and the court reasoned by implication that the dropping of this requirement supported its decision.

### C. Sanctions

In *Trustees of Chase Manhattan Mortgage & Realty Trust v. Sailboat Apartment Corp.*<sup>55</sup> a mortgage and realty trust was sued for failure to fund a building project. During the course of the litigation and pursuant to Rule 1.380, plaintiff moved for sanctions against the defendant for failure to answer its propounded interrogatories. The predicate for the motion was substantially as follows:

1. Interrogatories were propounded on January 22, 1975.
2. On January 30, 1975, defendant trustees moved for a protective order which was denied on February 11, 1975.
3. On February 14, 1975, defendants filed a motion for a thirty day extension of time to respond to the interrogatories. Pursuant to stipulation the court extended the time for the defendants to respond to March 20, 1975.
4. On February 23, 1975, after the stipulation, defendants filed a motion for reconsideration of the order of February 11, 1975.
5. At the same time, defendants filed a blanket objection to all of the interrogatories, asserting that an individual agent be ap-

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53. *Id.* at 773.

54. *Florida Fish Distrib., Inc. v. Norwegian Caribbean Lines, Inc.*, 328 So. 2d 240 (Fla. 1st Dist. 1976).

55. 323 So. 2d 654 (Fla. 3d Dist. 1976).

pointed to answer all of the interrogatories, an argument previously rejected by the court.

6. On March 11, 1975, plaintiff filed a motion to strike pleadings for noncompliance with the court's order of February 11th and noticed same for March 14, 1975. By agreement of counsel, this motion was never argued.

7. On March 19, 1975, the court denied defendant's motion for rehearing, reconsideration, and protective order. Thereafter, counsel for defendants received from plaintiffs an extension until March 24th, 1975, to answer interrogatories.

8. On March 26, 1975, defendants filed another motion for extension of time, asserting that a good faith effort was being made to assemble the information. They set that motion for extension of time before the court on April 1, 1975.

9. On March 27, 1975, plaintiff filed a motion to strike the pleadings, arguing that defendants' continued delaying tactics were predicated upon two prejudgment hopes, a change in the usury laws, and divestment of the trust's assets.

10. This motion to strike was noticed for hearing on April 1, 1975. At the hearing, an order denying the extension of time to answer interrogatories was entered and defendants were given until April 3, 1975, in which to provide full sets of answers.

11. On April 3, 1975, plaintiff's motion to strike was heard before the court. The court then ordered that "under all the circumstances of this case, defendant's conduct has been flagrant and inexcusable and the sanctions provided by Rule 1.380(b) are appropriate." The court thereupon struck the pleadings of Chase Manhattan Mortgage & Realty Trust.

On appeal the District Court of Appeal, Third District, held that the general rule with regard to sanctions is that they must be applied only in extreme circumstances where *willful* noncompliance with the court's order is shown by the record. The court found that the record did not show a willful disregard of the trial court's orders, and reversed.

## VII. DISMISSAL

### A. *Voluntary*

Rule 1.420(a)(1) provides:

An action may be dismissed by plaintiff without order of court (i) by serving or during trial, by stating on the record, a notice of dismissal at any time before a hearing on motion for summary

judgment, or if none is served or if such motion is denied, before retirement of the jury in a case tried before a jury, or before submission of a nonjury case to the court for decision.

In *Fears v. Lunsford*<sup>56</sup> after plaintiff had put on her case, and outside of the presence of the jury, the judge announced his intention to direct a verdict in favor of defendant. At that point, plaintiff took a voluntary dismissal. The judge entered an order approving the voluntary dismissal, but dismissed the suit with prejudice. Upon plaintiff's appeal the District Court of Appeal, First District, affirmed. The Supreme Court of Florida reversed, holding that even though the judge had announced a directed verdict in favor of defendant, the announcement had not been made in front of the jury, and therefore it was improper for the trial court to dismiss the cause with prejudice. The court followed the letter of the rule which provides that a plaintiff has an absolute right to take a voluntary dismissal prior to the submission of the case to the jury.

Justice England, dissenting, noted that Rule 1.420 provides that, in a nonjury case, a voluntary dismissal may only be taken prior to the submission of the case to the court for a decision. He found no apparent difference between that aspect of the Rule and the instant case.<sup>57</sup> A point had been reached where the fact-finding process was separated from the court's domain of pronouncing the law. The effect of the court's decision, Justice England argued, was to give the plaintiff an opportunity to relitigate an issue which was already tried and found wanting as a matter of law. Justice Overton concurred in the decision, but disagreed with the rule as it is written, because of the result which it allowed.<sup>58</sup>

### B. *Failure to Prosecute*

Rule 1.420(e) has been amended to prevent dismissal on the court's own motion for mere inactivity, unless one year has lapsed since the occurrence of activity of record. Nonrecord activity is no longer sufficient to toll the one year period.<sup>59</sup>

Prior to the aforementioned rule change, it generally was recognized that any action, record or non-record, taken during a one year

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56. 314 So. 2d 578 (Fla. 1975), noted at 30 U. MIAMI L. REV. 1092 (1976).

57. *Id.* at 580.

58. *Id.* at 579-80.

59. *In re The Florida Bar*, Rules of Civil Procedure, 339 So. 2d 626, 629 (Fla. 1976).

period could be asserted as a basis for precluding dismissal for failure to prosecute if the action taken was intended to hasten the suit toward judgment.<sup>60</sup> However, a mere change of attorneys and the filing of a notice of appearance was insufficient action under the rules to foreclose dismissal.<sup>61</sup>

Rule 1.420(e) only requires the dismissal of the case where it has not been prosecuted towards final judgment for the requisite period of time. Once a final judgment has been entered, the rule no longer applies, even though the court has retained jurisdiction to dispose of other matters in the cause.<sup>62</sup>

*Rowley v. Bankers United Life Assurance Co.*<sup>63</sup> involved the court's inherent power to dismiss an action for failure to prosecute with due diligence.<sup>64</sup> Recognizing that courts possess this power, *Rowley* held that where a court, upon its own motion, sends out notice of hearing for a certain date, prior to the one year period, at which it may hold a final hearing if uncontested, dispose of pending motions, schedule pending matters for hearing, set the case for trial, or dismiss the case without prejudice, and the court at this hearing, dismisses the case without prejudice, such dismissal is error. The District Court of Appeal, Third District, based its holding on the lack of a "showing in the record of an *unjustified failure* by Rowley to diligently prosecute his suit."<sup>65</sup> Thus, although a court does have the inherent power to dismiss prior to the running of the one year period, there must, in addition to a lack of prosecution, be an unjustified failure to prosecute diligently. No decision has as yet determined the effect of the amended rule on the court's power.

### VIII. OFFER OF JUDGMENT

Rule 1.442 provides that at least ten days prior to trial a defendant may offer to the adverse party that a judgment be taken against him for money or property with costs then accrued. In the event that plaintiff obtains judgment, but it is not more favorable than the original offer, plaintiff must pay the costs incurred after the making of the offer. This rule, although adopted in 1972, was

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60. *St. Anne Airways Corp. v. Larotonda*, 308 So. 2d 129, 130 (Fla. 3d Dist. 1975).

61. *Id.*

62. *Ravel v. Ravel*, 326 So. 2d 223 (Fla. 2d Dist. 1976).

63. 311 So. 2d 380 (Fla. 3d Dist. 1975).

64. *See State ex rel. Crocker v. Chillingworth*, 106 Fla. 323, 143 So. 346 (1932).

65. 311 So. 2d at 381 (emphasis added).

interpreted for the first time during the survey period in three recent cases.

In *Insurance Co. of North America v. Twitty*,<sup>66</sup> defendant's offer was larger than plaintiff's award. Therefore, from the date that the offer was made, plaintiff was not entitled to recover any further costs that he incurred. In addition, the court could allow costs incurred by the defendant in taking depositions if they were useful, the costs for an attorney's fee for covering depositions in North Carolina, and the amount of costs for court reporter expenses. In the event the trial judge in his discretion on remand, granted these costs, his final order should set off those costs against those to which the plaintiff is entitled.

In the second case, *Santiesteban v. McGrath*,<sup>67</sup> the defendant made an offer of judgment to the plaintiff and the plaintiff did not obtain a judgment more favorable than the offer. After the trial, the defendant moved for an entry of an order taxing costs pursuant to Rule 1.422. The trial judge denied this motion on the basis that an assessment of costs against the plaintiff was discretionary. On appeal, the District Court of Appeal, Third District, held that

the express language of the rule leaves no doubt that reasonable costs must be awarded to the defendant where, a proper offer of judgment is made thereunder, the plaintiff does not accept the offer, and the judgment finally obtained by the plaintiff is not more favorable than the offer. The rule itself is couched in mandatory terms and is designed to induce or influence a party to settle litigation and obviate the necessity of a trial.<sup>68</sup>

In the third case, *Hernandez v. Travelers Insurance Co.*,<sup>69</sup> the defendant made an offer of judgment of \$600.00. The amount recovered by the plaintiff was \$536.00, plus interest and attorneys' fees. The District Court of Appeal, Third District, held that this judgment exceeded the \$600.00. The court reasoned that the offer of judgment in itself was dispositive of the question inasmuch as the offer was in favor of the plaintiff and her attorney and therefore, the offer was interpreted as including damages for plaintiff and attorneys' fees for her lawyer. If the offer had been made only to the

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66. 319 So. 2d 141 (Fla. 4th Dist. 1975).

67. 320 So. 2d 476 (Fla. 3d Dist. 1975).

68. *Id.* at 478.

69. 331 So. 2d 329 (Fla. 3d Dist. 1976).

plaintiff, then the court could have awarded attorneys' fees for work done up to the time of the offer of judgment. When the defendant makes an offer of judgment, it stops the running of further costs and attorneys' fees against him.

### IX. DEFAULT JUDGMENTS

Although a party may obtain a default, this default may be set aside under certain circumstances. Where a defendant alleges that it has a meritorious defense, that the default occurred due to excusable neglect, and that it is willing to proceed immediately, the default should be set aside.<sup>70</sup>

### X. SUMMARY JUDGMENTS

A motion for summary judgment now must state with particularity the grounds upon which it is based and the substantial matters of law to be argued. The committee notes to the rule change state that this requirement is to eliminate surprise and to conform the summary judgment provisions with Rule 1.140(b) regarding motions to dismiss.<sup>71</sup>

The District Court of Appeal, First District, recently held that a litigant cannot file a motion for summary judgment during the course of trial.<sup>72</sup> The court reasoned that summary judgment proceedings are essentially pretrial in character and their principal function is to avoid the time and the expense of a useless trial. When a trial is held on the merits, the trial itself becomes the best test of the parties' right to a judgment.

In *Stanley v. Bellis*<sup>73</sup> the plaintiff moved, prior to the hearing, for a continuation of the date for hearing the defendant's motion for a summary judgment. The plaintiff requested the continuation so that he might have a reasonable time to depose the out of state defendants with regard to the issue of their liability. The District Court of Appeal, Fourth District, held that where these depositions

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70. *Knight v. Gainer*, 310 So. 2d 58 (Fla. 1st Dist. 1975) (*per curiam*). See *North Shore Hosp., Inc. v. Barber*, 143 So. 2d 849 (Fla. 1962); *Metcalf v. Langston*, 296 So. 2d 81 (Fla. 1st Dist. 1975) (requiring the submission of an affidavit or other proof of the veracity of facts alleged in the motion to set aside).

71. *In re The Florida Bar*, Rules of Civil Procedure, 339 So. 2d 626, 630 (Fla. 1976).

72. *Howarth Trust v. Howarth*, 310 So. 2d 57 (Fla. 1st Dist. 1975).

73. 311 So. 2d 393 (Fla. 4th Dist. 1975).

were essential to the consideration of the motion for summary judgment, and where the court could discover no evidence that the plaintiff's counsel had been dilatory or frivolous in his efforts, it was an abuse of the court's discretion to deny the plaintiff's motion for a continuance. The court stated: "[R]emembering that plaintiff's day in court was in balance, we can perceive no reason not to extend the time for hearing for a few weeks and every reason to do so."<sup>74</sup>

## XI. JURY TRIAL

Two new paragraphs have been added to Rule 1.431. One paragraph provides that all challenges shall be addressed to the court outside the hearing of the jury in a manner selected by the court. The purpose of this rule is that the jury panel will not become aware of the nature of the challenge, the party making the challenge, or the basis of the court's ruling, if it is for cause. The other paragraph establishes a procedure for interviewing jurors. A party may move for an order permitting an interview of a juror to determine whether the verdict is subject to challenge. The motion must be served within ten days after rendition of the verdict unless good cause is shown.<sup>75</sup>

In *Gills v. Angelis*<sup>76</sup> the trial court allowed the jury to take depositions into the jury room. As a general rule this is improper.<sup>77</sup> However, in determining whether this error warrants setting aside the verdict and granting a new trial, the critical issue becomes whether the contents of the deposition are important enough to the issues of the case to require a new trial. In this particular case, the trial court granted a new trial because it determined that the depositions were significant to the issues. On appeal the District Court of Appeal, Second District, refused to substitute its judgment on the point, and upheld the trial court.

It is held generally that questions as to the right to jury trial should be resolved, if at all possible, in favor of the party seeking the jury trial since that right is protected and guaranteed by the United States and Florida Constitutions. Where a party fails to request a jury trial at the time that it should be demanded, after

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74. *Id.* at 395.

75. *In re The Florida Bar, Rules of Civil Procedure*, 339 So. 2d 626, 629 (Fla. 1976).

76. 312 So. 2d 536 (Fla. 2d Dist. 1975).

77. *Id.*

the initial responsive pleadings, the right is not waived if an amended pleading raises a new issue in the case. In effect, the time for filing a demand for jury trial is revived even though the demand may have been waived at the time of the initial responsive pleadings.<sup>78</sup>

The District Court of Appeal, Fourth District, has held that the use of the words "and demands trial by jury" in a two count complaint, at the conclusion of the second count, is sufficient to require a jury trial on both counts and on all issues because the demand was not specifically limited.<sup>79</sup> This is a very liberal interpretation of Rule 1.430 and it would probably be better practice for a party to make a short written demand for trial by jury separately or in the pleadings by specifically stating that this request applies to all issues so triable.

The District Court of Appeal, Third District, has recognized that a party may be entitled to a jury trial where only some of the issues require it.<sup>80</sup> Such is the case where a complaint is in equity and a counterclaim is in law and the issues involved are so interrelated that separate trials are not practicable. Since a jury trial is required for the action at law, it is then required for all issues.

The Supreme Court of Florida has held in *Barth v. Florida State Constructors Service, Inc.*<sup>81</sup> that "it is our view that, once a demand for jury trial has been timely made, it takes affirmative action on the part of a defendant to waive that constitutional right."<sup>82</sup> In *Barth*, a contractor and a homeowner entered into an agreement for certain repairs to be done to the homeowner's dwelling. Subsequently, the contractor filed a mechanic's lien against the premises because the homeowner, after completion of about ninety percent of the work, refused to allow the contractor back on the premises to complete the work or to collect his fee. The homeowner answered the complaint and filed a counterclaim alleging damages to the property caused by unprofessional and unworkmanlike services. The counterclaim included a demand for a jury trial. Subsequently, the case was tried by the court without a jury. The contractor had noticed the case for nonjury trial. The homeowner did not

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78. *Hollywood, Inc. v. Hollywood*, 321 So. 2d 65 (Fla. 1975).

79. *Jerome v. William A. Reid Constr., Ltd.*, 307 So. 2d 248 (Fla. 4th Dist. 1975).

80. *Napolitano v. H.L. Robertson & Assocs., Inc.*, 311 So. 2d 757 (Fla. 3d Dist. 1975).

81. 327 So. 2d 13 (Fla. 1976).

82. *Id.* at 15.



object. After losing on the claim and the counterclaim, the homeowner filed an appeal. The appellate court affirmed the lower court's decision.<sup>83</sup> The Supreme Court reversed. The court reasoned that, once demanded, a jury trial must be afforded unless affirmatively waived. Mere failure to object to the nonjury notice was insufficient.

## XII. JURY INSTRUCTIONS

Jury instructions can be very important. The failure of a court to give a particular jury instruction may constitute reversible error. The District Court of Appeal, First District, recently held that where there is a reasonable possibility that the jury could have been misled by failure to give a jury instruction, and the jury reasonably could have concluded in a different manner, then a new trial should be afforded.<sup>84</sup>

The supreme court, has as of May 1976, adopted revisions to Standard Jury Instructions in Civil Cases.<sup>85</sup>

## XIII. MOTION FOR NEW TRIAL

In *First Arlington Investment Corp. v. McGuire*<sup>86</sup> the plaintiff and the defendants stipulated to the facts at a pretrial conference. When a verdict was returned against the defendants, they appealed and alleged an issue for the granting of a new trial which was not tried by consent of the parties during trial. Nor was the issue raised at the pretrial conference. The issue was raised for the first time on the motion for new trial. The District Court of Appeal, Second District, held that since the issue was not tried effectively by consent, either express or implied, and since it was raised for the first time in the motion for new trial, the motion was properly denied.

Along the same line of reasoning, the Supreme Court of Florida recently held that the issue of comparative negligence cannot be raised for the first time on a motion for new trial or in an appellate brief.<sup>87</sup>

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83. 302 So. 2d 476 (Fla. 3d Dist. 1974).

84. *Howard v. State*, 306 So. 2d 153 (Fla. 1st Dist. 1975).

85. See FLA. STD. JURY INST. at p. vii(d).

86. 311 So. 2d 146 (Fla. 2d Dist. 1975).

87. *Bonded Transp., Inc. v. Lee*, 336 So. 2d 1132 (Fla. 1976). The decision of *Fitzsimmons v. City of Pensacola*, 297 So. 2d 107 (Fla. 1st Dist. 1974), was disapproved insofar as it conflicted with the supreme court's decision.

## XIV. RELIEF FROM JUDGMENT

In *Fiber Crete Homes, Inc. v. Division of Administration*<sup>88</sup> the losing party's petition for a new trial was denied. Subsequently, that party petitioned the court for a rehearing of the denial of its motion for new trial. Since there is no provision in the rules of civil procedure for a rehearing from a denial of the motion for new trial, the motion was denied. The proper procedure would have been an appeal. However, the trial court then proceeded upon its own motion to grant a new trial under Rule 1.540 on the authority that a court may act on its own motion under that rule. The District Court of Appeal, Fourth District, reversed and held that a court only can act on its own motion for those reasons and circumstances set forth in Rule 1.540. Since the trial court's order did not set forth the specific reasons for granting relief, it was reversed.

The Fourth District reasoned that Rule 1.540 is intended to provide relief from judgments, decrees, or orders under a limited set of circumstances. It is not intended to serve as a substitute for a new trial mechanism, nor as a substitute for appellate review of judicial error. The appellate court's review of the file indicated that the trial judge had sought to utilize the rule to correct what he perceived to be a mistaken view of law and therefore his action was improper.

It is held generally that where excusable neglect is demonstrated, a default judgment may be set aside. In *Angelini v. Mobile Home Village, Inc.*<sup>89</sup> the defendant chose to represent himself and did not appear at the final hearing, although he was given due notice. The defendant alleged that he misunderstood the phrase "or as soon thereafter as counsel may be heard," in the notice for trial and thought that it meant that the court would notify him of the time and place of trial. Such misunderstanding of the notice was not a sufficient ground to set aside the default judgment since the defendant had done nothing to ascertain the date of trial or to determine whether the trial would be continued.

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88. 315 So. 2d 492 (Fla. 4th Dist. 1975).

89. 310 So. 2d 776 (Fla. 1st Dist. 1975).