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Civil Procedure

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CIVIL PROCEDURE*

JONATHAN P. ROSE** AND JUDITH R. SCHMUKLER***

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* This article considers cases reported in vols. 201-25 So.2d.

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The 1968 amendments to the Florida Rules of Civil Procedure¹ became effective at midnight, September 30, 1968, and are applicable to all civil actions either then pending or filed thereafter.² Substantial changes in the rules will be indicated within the appropriate topic.³

I. COURTS, JUDGES, AND ATTORNEYS

A. Courts

In *General Capital Corp. v. Tel Service Co.*,⁴ the court held, *inter alia*, that when the only purpose in temporarily relinquishing jurisdiction was to enable the circuit court to review the applicability of a newly enacted statute to the case as it then existed, the circuit court had no jurisdiction to add two individual plaintiffs and enter a final amended decree substituting them as beneficiaries.⁵

When a plaintiff-wife in a divorce action sought review of the circuit court's denial of her motion to compel the defendant to return a minor child to the territorial jurisdiction of the court, her petition for certiorari was denied on the ground that the circuit court lacked jurisdiction since the child was in a foreign jurisdiction at the time of the institution of the action.⁶ By dictum the court added that even if the circuit court had jurisdiction, the plaintiff failed to demonstrate that denial of her motion was an abuse of judicial discretion.⁷

B. Judges

In a case relating to the authority of successor judges,⁸ on remand, a circuit judge entered a decree ordering that divorced spouses each pay one-half of the taxes and repairs on the marital home which had been awarded to the wife. The appellate court held that a successor judge could not order the divorced husband to bear the entire cost of repairs.⁹ This was held notwithstanding a reservation of jurisdiction contained in the decree of the former circuit judge because the reservation "applies

1. All references to rules in the text will be to the Florida Rules of Civil Procedure, unless otherwise indicated.

2. *In re* Florida Rules of Civil Procedure, 211 So.2d 206, 208 (Fla. 1968).

3. See Comment, *Current Amendments to Florida Rules*, 23 U. MIAMI L. REV. 815 (1969).

4. 212 So.2d 369 (Fla. 2d Dist. 1968).

5. *Id.* at 381.

6. *Nieburger v. Nieburger*, 214 So.2d 382 (Fla. 1st Dist. 1968).

7. *Id.* at 383-84.

8. *Bailey v. Bailey*, 204 So.2d 531 (Fla. 3d Dist. 1967).

9. *Id.*

to *future* factual situations, and not to retroactive reappraisals of prior pronouncements."¹⁰

C. Attorneys

Most of the cases in this area are related to attorney's fees and the interest thereon. In an action brought by attorneys against their clients, the circuit court denied the plaintiff's motion for a judgment n.o.v. On appeal to the First District Court of Appeal, the lower court was reversed with directions, holding that the attorneys were entitled to recover the agreed upon amounts.¹¹ On certiorari, the Supreme Court of Florida modified and affirmed the district court in holding that a client who acknowledged receipt of an attorney's bill for services and stated that he would be able to pay it as soon as he received the anticipated income was liable to the attorney for the amount acknowledged.¹²

In a case where a mortgage contained a provision that the mortgagor would pay all costs including reasonable attorney's fees which the mortgagee might incur in collection and made no distinction between attorney's fees at the trial level and on appeal, the successful mortgagee-appellees were entitled to an allowance for legal services on appeal.¹³

In *Mander v. Concreform Co.*,¹⁴ a case of first impression in Florida, the sole issue was whether attorney's fees awarded a successful workmen's compensation claimant drew interest during the time the awards were being appealed and before the fees were paid. The court held that interest on the attorney's fees awarded was not allowable in the absence of a provision authorizing such interest in the Workmen's Compensation Act.¹⁵ When an award of attorney's fees in a divorce action was reduced on appeal, however, both the trial court's allowance of interest on the reduced award from the date of the original award and its refusal to set off costs against the reduced attorney's fees were held not to be erroneous.¹⁶

II. JURISDICTION OVER THE PERSON¹⁷

The recent cases in this area are generally concerned with the issue of whether a Florida court had obtained jurisdiction over a nonresident corporation or individual.

10. *Id.* at 532.

11. *Parker v. Solar Research Corp.*, 210 So.2d 271 (Fla. 1st Dist. 1968).

12. *Solar Research Corp. v. Parker*, 221 So.2d 138 (Fla. 1969).

13. *Empress Homes, Inc. v. Levin*, 201 So.2d 475 (Fla. 4th Dist. 1967).

14. 206 So.2d 662 (Fla. 2d Dist. 1968).

15. *Id.* at 663.

16. *Novack v. Novack*, 203 So.2d 187 (Fla. 3d Dist. 1967).

17. The procedures and rules governing process and the service of process, including substituted service and constructive service, are contained in chapters 48 and 49 of the Florida Statutes (1967).

A. Activities Granting Long-Arm Jurisdiction

There have been several recent cases of prominence regarding jurisdiction over nonresident individuals carrying on varied activities in Florida. In *O'Connell v. Loach*,¹⁸ which involved an action for a real estate commission, the nonresident defendants had moved to dismiss and their motion was denied by the circuit court. On an interlocutory appeal, the case was reversed and remanded with leave to the plaintiff to amend his complaint.¹⁹ Amended pleadings and affidavits were filed. The nonresident defendants were alleged to have bought and sold property in Florida and to have listed a tract for sale with the plaintiff real estate broker. Defendants moved to dismiss for lack of jurisdiction. The motion was denied. The trial court found that the plaintiffs were engaged in a "business venture" within the statute authorizing jurisdiction over nonresidents engaged in business ventures in the state and that the claim arose out of such business venture. The trial court was affirmed on another interlocutory appeal.²⁰

In *McCarthy v. Little River Bank & Trust Co.*,²¹ an order denying the defendant's motion to quash service of process was affirmed. It was held that an individual who came to Florida to participate in the proceeds of his uncle's estate, paid an attorney in Florida to represent him, signed notes, endorsed checks, paid the balance of his uncle's account at a hospital, and withdrew the contents of his uncle's safety deposit box by signing the uncle's name, was engaged in acts for the purpose of realizing "pecuniary benefit" within the state and was therefore within the scope of the substituted service statute.²²

In *Rumsch v. DeVaney*,²³ a medical malpractice suit, the distinction made in an earlier case²⁴ between practicing the profession of medicine and engaging in business was preserved, and it was held that the statutory method of effecting constructive service of process was inapplicable to a nonresident physician.²⁵

The purported service of process in Florida on an Israeli corporation, through its president, a Canadian citizen and a resident of Texas who was not present in Florida on behalf of the corporation, was held invalid.²⁶ The corporation's only office was in England. The corporation had never transacted business in Florida, had no resident agent here, nor was it qualified to do business in Florida. In another third district case,²⁷ it was held that a foreign corporation which had entered a fran-

18. 203 So.2d 350 (Fla. 2d Dist. 1967).

19. *O'Connell v. Loach*, 194 So.2d 700 (Fla. 2d Dist. 1967).

20. *O'Connell v. Loach*, 203 So.2d 350 (Fla. 2d Dist. 1967).

21. 224 So.2d 338 (Fla. 3d Dist. 1969).

22. *Id.*

23. 218 So.2d 238 (Fla. 1st Dist. 1969).

24. *Williams v. Duval County Hosp. Auth.*, 199 So.2d 299 (Fla. 1st Dist. 1967).

25. *Accord*, *Fine v. Snyder*, 207 So.2d 695 (Fla. 3d Dist. 1968).

26. *Goffer v. Weston*, 217 So.2d 896 (Fla. 3d Dist. 1969).

27. *Kastan v. Kastan*, 222 So.2d 55 (Fla. 3d Dist. 1969).

chise agreement with a Florida land developer for the sale of Florida land in foreign countries was not engaged in a business venture in Florida²⁸ when the contracts were solicited, financed, and transacted in foreign countries.

A foreign corporation was engaged in sufficient business within the state to subject itself to service of process when it employed a person who served as regional director of the corporation's wholly owned subsidiaries in the state, directed the activities of other supervisors, visited offices of the subsidiaries, and had authority to hire and fire their managers.²⁹ Similarly, when the defendant hardware manufacturer sent its officers, engineers, and salesmen into Florida and the plaintiff's damages resulted from the sale and delivery of defective hardware, the obligation of the nonresident corporate defendant to the plaintiff was held to be sufficiently connected with the defendant's activities within the state to permit substituted service.³⁰ When the defendant corporation was doing business in the state at the time of the plaintiff's injury, substituted service under the long-arm statute was effective against it, even though at the time of such service the corporation did not maintain minimal business contacts within the state.³¹

B. *Nonresident Motor Vehicle Owners or Operators*

Nonresident motor vehicle owners or operators appoint the secretary of state as their agent for service of process in any civil action "arising out of or by reason of any accident or collision occurring within the state in which the motor vehicle is involved."³² This statute, however, is not applicable where nonresident defendants conceal their whereabouts. In such instances, mailing of notice of service on the secretary of state and a copy of process by registered mail is not necessary,³³ nor will the plaintiff's inability to file the defendant's return receipt prevent the court from acquiring jurisdiction.³⁴ When the defendants do not conceal their whereabouts, however, there must be strict compliance with the method of substituted service provided by statute.³⁵ Thus, when the plaintiff's affidavits failed to show any connection between the defendant and the address to which the plaintiff chose to send the letter containing process, the circuit court's order denying defendant's motion to quash service of process should be reversed.³⁶

The nonresident motorist's service statute, which provides for sub-

28. Engaging in business in the state constitutes an appointment of the secretary of state as an agent on whom process may be served. FLA. STAT. § 48.181(1) (1967).

29. Dickinson v. Gracy, 210 So.2d 270 (Fla. 3d Dist. 1968).

30. Hubsch Mfg. Co. v. Freeway Washer & Stamping Co., 205 So.2d 337 (Fla. 1st Dist. 1967).

31. Masters, Inc. v. Corley, 222 So.2d 465 (Fla. 3d Dist. 1969).

32. FLA. STAT. § 48.171 (1967).

33. Richardson v. Williams, 201 So.2d 900 (Fla. 2d Dist. 1967).

34. Fernandez v. Chamberlain, 201 So.2d 781 (Fla. 2d Dist. 1967).

35. FLA. STAT. § 48.161 (1967).

36. Green v. Nashner, 216 So.2d 492 (Fla. 3d Dist. 1968).

stituted service in "any civil action" arising out of an automobile accident, was interpreted to include contract actions as well as tort actions in *Marion County Hospital District v. Namer*.³⁷ Thus, that case held substituted service of process under the statute to be proper in an action by a hospital against a nonresident for services rendered in treatment of injuries received in an automobile accident in Florida.³⁸

C. Constructive Service of Process

Although substituted service on the secretary of state as provided by statute is often loosely referred to as constructive service, rule 1.070(g) clearly indicates that constructive service refers specifically to service by publication.³⁹ In a first district case, the plaintiff corporation sued a domestic corporation which had no offices, officers, or agents in the state. The cause was dismissed on the grounds that service of process by publication was improper and insufficient. On appeal, the case was reversed and remanded. The court held that where the plaintiff's attorney filed the sworn statement required by statute and indicated, after diligent search, that the current addresses of the president and resident agent of defendant were in New York, in absence of contrary proof, this was sufficient to show that personal service could not be obtained and plaintiff was entitled to use the statutory constructive service procedure by publication.⁴⁰ In *Brown v. Blake*,⁴¹ an action was brought by a resident stockholder of a closely held Florida corporation against a nonresident stockholder to determine the ownership of certain shares of stock. The defendant's motion to dismiss was denied and an interlocutory appeal was taken. The plaintiff-appellee contended that such a suit was primarily of an in rem nature, and no jurisdiction had been acquired by constructive service of process.⁴² The court concluded that the suit was a "quasi in rem proceeding" which might rest on constructive service, and it affirmed the trial court's denial of the defendant's motion to dismiss.⁴³

D. Substituted Service of Process

The defense of insufficiency of service of process is one which may be made by motion at the option of the pleader.⁴⁴ In *Viking Superior*

37. 225 So.2d 442 (Fla. 1st Dist. 1969).

38. *Id.*

39. Rule 1.070(e) also states that service by publication may be made as provided by statute, and chapter 49 of the Florida Statutes, [formerly chapter 48] governing service of process by publication, is entitled "CONSTRUCTIVE SERVICE OF PROCESS" and is separate from chapter 48 which contains, *inter alia*, the rules and procedures governing substituted service.

40. *Day-Tona Seabreeze, Inc. v. Thunderbird Operating Corp.*, 207 So.2d 59 (Fla. 1st Dist. 1968). See FLA. STAT. § 49.011 *et seq.* (1967).

41. 212 So.2d 47 (Fla. 1st Dist. 1968).

42. The primary point on appeal was one of jurisdiction that had "never been decided by a reported Florida decision." *Id.* at 49.

43. *Id.*

44. FLA. R. CIV. P. 1.140(b).

Corp. v. W.T. Grant Co.,⁴⁵ a motion to quash service of process was filed by the nonresident manufacturer along with its affidavit that it was not qualified to do business and had not transacted business in Florida. No affidavit in support of the validity of the substituted service of process on the defendant manufacturer was submitted by the plaintiff. The trial court denied the manufacturer's motion to quash service stating that his affidavits were insufficient since he was not "personally present and available for cross-examination."⁴⁶ The order was reversed and the cause remanded on an interlocutory appeal because affidavit proof is an acceptable method of supporting a motion and is not insufficient merely because of the absence of the affiant.⁴⁷ Another case ruled that to sustain the burden of showing that a situation justifies substituted service in lieu of personal service, the plaintiff must substantiate jurisdictional allegations of the complaint by affidavits or other proof.⁴⁸

III. VENUE

A. *In General*

Venue refers to the geographical area in which a defendant may be sued or tried; it differs from jurisdiction, which refers to the power of a court to hear and determine a cause.⁴⁹ The venue rules in Florida are provided for by statute.⁵⁰ Suits may generally be commenced "where defendant resides, or where the cause of action accrued, or where the property in litigation is located"⁵¹

In a divorce action, the denial of the defendant's motion to transfer to another county was affirmed on interlocutory appeal.⁵² The court held that the part of the statute providing that a suit may be brought in the county where the cause of action accrued was complied with when some of the acts alleged as grounds for a divorce occurred in the county where the action was brought.

In an action against an issuing bank on a dishonored cashier's check, the denial of a motion to dismiss for improper venue was reversed.⁵³ The court held that the statute⁵⁴ providing that actions be brought only in the county or district where a domestic corporation has or usually keeps a business office, where the cause of action accrued, or where property in litigation is located, precluded action on the dishonored cashier's check in a county other than that in which the issuing bank was located.

45. 212 So.2d 331 (Fla. 1st Dist. 1968).

46. *Id.* at 333.

47. *Id.* at 334.

48. *Hydronaut, Inc. v. Litton Systems, Inc.*, 208 So.2d 494 (Fla. 3d Dist. 1968).

49. F. JAMES, CIVIL PROCEDURE 616-619 (1965).

50. FLA. STAT. ch. 47 (1967).

51. FLA. STAT. § 47.011 (1967).

52. *Bannerman v. Bannerman*, 204 So.2d 234 (Fla. 3d Dist. 1967).

53. *Bank of Hallandale v. Joe W. Sullivan's Concrete Serv., Inc.*, 216 So.2d 260 (Fla. 3d Dist. 1968).

54. FLA. STAT. § 47.051 (1967).

The general venue statutes are not necessarily all-inclusive. They may be limited by other statutes providing civil relief under varying circumstances.⁵⁵ Thus, when a former husband sought to establish a foreign divorce decree and to modify certain provisions thereof, it was held that the question of venue was controlled by the modification statute under which the instant proceeding was filed.⁵⁶ The relevant statute fixed venue in the county where either party resided. Thus, the action was permissibly instituted in the county of the former husband's residence and the transfer of the suit to the county of the former wife's residence was improper.⁵⁷ Also, it has been held that the third-party practice rule⁵⁸ did not deprive a city from invoking its common law right to be sued only in the county in which it is located.⁵⁹

B. Change of Venue

When it appears that an action is pending in the wrong court or that an action is filed laying venue in the wrong county or district, the judge may transfer the action to the proper court in accordance with the venue statutes.⁶⁰ In *State, ex. rel. McGreevy v. Dowling*,⁶¹ the county judge's court had power to deal with probate matters; however it was an unlawful exercise of its jurisdiction to entertain a probate proceeding when the initial petition showed facts which established that venue for such proceeding was not in that county and was fixed by law in another county.⁶² In *University Federal Savings & Loan Association v. Lightbourn*,⁶³ the defendant requested a writ of certiorari to review an order denying its motion to reopen and vacate a default judgment in favor of the plaintiffs. When the Circuit Court of Broward County had entered the order, it had also granted defendant's motion for change of venue to Dade County. The Fourth District Court of Appeal transferred the defendant's petition to the third district, holding that after transfer of venue from Broward County to Dade County, the circuit court in Dade County became the only trial court possessing the power to vacate default, and thus any appellate correction would necessarily be directed to the circuit court in Dade County. Therefore, the Third District Court of Appeal had jurisdiction.⁶⁴ The power to make such a transfer is specifically authorized by the Florida Appellate Rules.⁶⁵

55. See, e.g., *Paulet v. Hickey*, 206 So.2d 29 (Fla. 2d Dist. 1968) (bastardy action).

56. FLA. STAT. § 61.14 (1967).

57. *Stewart v. Carr*, 218 So.2d 525 (Fla. 2d Dist. 1969).

58. FLA. R. CIV. P. 1.180(a).

59. *City of Bradenton v. Finley*, 208 So.2d 675 (Fla. 3d Dist. 1968).

60. FLA. R. CIV. P. 1.060.

61. 223 So.2d 89 (Fla. 3d Dist. 1969).

62. FLA. STAT. § 732.06 (1967). This is another example of a specific venue statute (governing probate) limiting the general venue statute.

63. 201 So.2d 568 (Fla. 4th Dist. 1967).

64. *Id.* Dade County is in the Third Appellate District while Broward County is in the Fourth Appellate District.

65. FLA. APP. R. 2.1(a)(5)(d).

C. *Contractual Relationships*

The defendant violated a contract to convey land to the plaintiff. The question presented was whether the plaintiff-purchaser could bring an action for specific performance of the contract in the county where the land was located rather than in the county where the defendant-vendor resided. The district court affirmed the circuit court's denial of defendant's motions to dismiss and for change of venue, holding that since the complaint indicated that real property was involved, venue was properly laid in the county where the property was located.⁶⁶

The defendant corporation executed and delivered a note to the plaintiff bank. The note was endorsed by other individual defendants. The corporation and the individual defendants resided in one county. Renewal notes were made in another county by its residents. In an action on the note,⁶⁷ the court held that the plaintiff was free to elect venue where the note was signed or where the maker resided.⁶⁸ In another action by an assignee of a debt for which there was no specific place of payment named, the court held that the assignee may bring the action in the county of the assignor's principal place of business, since by virtue of the assignment he stands in the shoes of the assignor.⁶⁹

D. *Forum Non Conveniens*

The doctrine of forum non conveniens, codified by federal statute,⁷⁰ is based on equitable considerations and is applied in the trial court's discretion to prevent the imposition upon its jurisdiction of those causes which, for the convenience of the litigants and in the interest of justice, should have been instituted in another forum.⁷¹ The general principle in Florida is that the doctrine of forum non conveniens is applicable when the cause of action arises in another jurisdiction and neither party to the action resides in Florida.⁷²

When a railroad, although a foreign corporation, maintained its principal place of business in Florida and the Federal Employers Liability Act (under which this action was brought) provided for venue at the place where a corporation has an office for transacting its customary business, it was held that the trial court abused its discretion by dismissing the action on the ground of forum non conveniens.⁷³

66. *Sales v. Berzin*, 212 So.2d 23 (Fla. 4th Dist. 1968).

67. See FLA. STAT. § 47.061 (1967) for the specific venue provisions governing promissory notes.

68. *Papy v. Munroe & Chambliss Nat'l Bank*, 204 So.2d 42 (Fla. 1st Dist. 1967).

69. *Gorham Constr. Co. v. Superior Fertilizer & Chem. Co.*, 218 So.2d 516 (Fla. 4th Dist. 1969).

70. 28 U.S.C. § 1404(a) (1964).

71. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

72. *Southern Ry. v. McCubbins*, 196 So.2d 512 (Fla. 3d Dist. 1967); *Atlantic Coast Line R.R. v. Ganey*, 125 So.2d 576 (Fla. 3d Dist. 1960).

73. *Adams v. Seaboard Coast Line R.R.*, 224 So.2d 797 (Fla. 1st Dist. 1969).

In *Ganem v. Issa*,⁷⁴ the defendant filed a motion to dismiss on grounds of forum non conveniens. The plaintiff's affidavits tended to demonstrate that the defendant was a resident of Florida, and the defendant failed to file supporting affidavits with his motion. The defendant could show no evidence in opposition to plaintiff's contention, nor could he sustain his burden of showing that a more convenient forum was available, so that prosecution in the present forum would be so impracticable or inconvenient that he would be denied a fair trial. Therefore his motion was denied.⁷⁵

In a tort action arising out of an accident in Peru, where plaintiff's decedents were not residents of the United States and had no contact with the United States, the doctrine of forum non conveniens was clearly applicable, and the action was held to have been properly dismissed.⁷⁶

The Florida Statutes were recently amended by adding section 47.122, which authorizes change of venue for the convenience of parties or witnesses or in the interest of justice.⁷⁷

IV. LIMITATION OF ACTIONS

A. *Statute of Limitations*

The basic Florida Statute dealing with limitations is section 95.11, which provides for limitations on actions other than those for the recovery of real property. The statute is clear as to the number of years within which an action must be brought. The problem is determining when a cause of action accrues, *i.e.*, what event triggers the running of the statute.

In an action by an insured against his liability insurer to recover the expenses incurred by the former in defending an action by a third party, the defendant insurer was correct in his contention that since the insurance contract was not under seal, a five-year limit applied.⁷⁸ It was held, however, that the insured's cause of action accrued when the third-party litigation ended rather than on the earlier date when the insurer denied coverage, and summary judgment for the insured was affirmed.⁷⁹

In *Barrantine v. Vulcan Materials Co.*,⁸⁰ the plaintiff's original complaint was dismissed for failure to prosecute. When the plaintiff brought suit again, the court held that the running of the four-year statute of limitations on a personal injury claim⁸¹ was not tolled during

74. 225 So.2d 564 (Fla. 3d Dist. 1969).

75. *Id.* at 565.

76. *Faulkner v. S.A. Empresa de Viaco Airea Rio Grandense*, 222 So.2d 805 (Fla. 3d Dist. 1969).

77. Fla. Laws 1969, ch. 69-83, *amending* FLA. STAT. 47.122 (1965).

78. FLA. STAT. § 95.11(3) (1967).

79. *Continental Cas. Co. v. Florida Power & Light Co.*, 222 So.2d 58 (Fla. 3d Dist. 1969).

80. 216 So.2d 59 (Fla. 1st Dist. 1968).

81. FLA. STAT. § 95.11(4) (1967).

the pendency of the plaintiff's original complaint. Thus, the time during which that action was in litigation could not be deducted from the total elapsed time in determining whether the action was barred by the statute.⁸²

A housekeeper brought an action against the executor of her deceased employer for compensation for services rendered over a period of three years, ending approximately six months before the decedent's death. The executor argued that the judgment should be limited to damages for services rendered within one year before the death by virtue of the statute which provides that suits for the recovery of wages shall be brought within one year.⁸³ The court held, however, that the plaintiff was entitled to recover for the entire value of her services, since in terms of a contract for continuous services over an indefinite period of time, the statute of limitations does not begin to run until the employment ends, at which time the cause of action accrues.⁸⁴

*Creviston v. General Motors Corp.*⁸⁵ was an action for breach of implied warranty for injuries sustained by a buyer when the door fell off his refrigerator. The Second District Court of Appeal affirmed the circuit court's dismissal of the plaintiff's complaint, based on the running of the statute of limitations⁸⁶ from the date of purchase.⁸⁷ The Supreme Court of Florida quashed and remanded, concluding that the three-year statute of limitations in an action based on implied warranty begins to run from the time the plaintiff "first discovered, or reasonably should have discovered the defect constituting the breach of warranty."⁸⁸ This holding has been applied to a similar action based on a malfunctioning glass coffee pot.⁸⁹ It should be noted that these cases involved pre-Uniform Commercial Code law.⁹⁰

B. *Res Judicata*

Similar to the statute of limitations, *res judicata* is an affirmative defense which must be pleaded.⁹¹ The broad term, *res judicata*, "covers all the ways in which a judgment in one action will have a binding effect in another."⁹² These various techniques include collateral estoppel, bar, and merger.⁹³ There have been several cases in this area during the

82. *Barrantine v. Vulcan Materials Co.*, 216 So.2d 59, 61 (Fla. 1st Dist. 1968).

83. FLA. STAT. § 95.11(7)(b) (1967).

84. *Miami Beach First Nat'l Bank v. Borbiro*, 201 So.2d 571 (Fla. 3d Dist. 1967).

85. 225 So.2d 331 (Fla. 1969).

86. FLA. STAT. § 95.11(5)(e) (1967).

87. *Creviston v. General Motors Corp.*, 210 So.2d 755 (Fla. 2d Dist. 1968).

88. *Creviston v. General Motors Corp.*, 225 So.2d 331, 333 (Fla. 1969).

89. *Hendon v. Stanley Home Prods., Inc.*, 225 So.2d 553 (Fla. 3d Dist. 1969).

90. See Uniform Commercial Code § 2-725.

91. FLA. R. CIV. P. 1.110(d). An affirmative defense not pleaded is waived. FLA. R. CIV. P. 1.140(h). See *Aufseher v. Aufseher*, 217 So.2d 868 (Fla. 3d Dist. 1969).

92. F. JAMES, CIVIL PROCEDURE 549 (1965).

93. *Id.* at 550, which explains the distinctions between these terms. The Fourth District Court of Appeal has utilized this explanation in a recent opinion. *Wacaster v. Wacaster*, 220 So.2d 914, 915-16 (Fla. 4th Dist. 1969).

survey period. In discussing these cases, the terminology of the courts will be used, bearing in mind that the courts do not always make the distinctions between the subcategories within the general concept of res judicata.

In an action challenging the constitutionality of an ordinance governing billboards, it was held that a prior ruling⁹⁴ had sustained the constitutionality of the ordinance and the plaintiff, having participated in the prior cause, was barred from pursuing this attack by the doctrine of res judicata.⁹⁵ An exception to the res judicata rule arose out of the application of Florida Statutes section 46.08⁹⁶ which prohibited the joining of an action in replevin with any other cause of action. It was held by virtue of this statute that an action by a seller against the guarantor of a conditional sales contract did not violate the rule against splitting of causes of action, notwithstanding the fact that it was commenced after the seller brought an action in replevin against the buyer.⁹⁷ Citing this second district case, the third district held that a suit by the buyer of billiard equipment for breach of oral warranty was not barred by estoppel by judgment, res judicata, or the compulsory counterclaim rule, even though the suit was commenced after the seller had already obtained final judgment in replevin against the buyer.⁹⁸ The Supreme Court of Florida later affirmed the decision of the third district.⁹⁹

In an action brought by a truck driver against a motorist for damages from a collision, the motorist filed a counterclaim to which the truck driver asserted the defense of res judicata. In a prior suit, the motorist sued the truck driver and truck owner for damages and injuries, and both defendants counterclaimed. The truck driver and motorist voluntarily dismissed their claims against each other without prejudice. The trial resulted in jury verdict and judgment was entered for the truck owner on the motorist's claim and for the motorist on the counterclaim. In the instant case, the court held the truck driver had a defense of res judicata against the motorist's counterclaim, since in the prior suit the motorist chose to fully litigate his claim against the owner but excluded the driver.¹⁰⁰ In contrast, the defenses of res judicata and estoppel by judgment were not available in a garnishment action against liability insurers of the driver and owner of an automobile, where a prior personal injury action had been brought against both, but then voluntarily dismissed against the owner. Since the action was dismissed against the owner, the

94. State *ex rel.* Boozer v. City of Miami, 193 So.2d 449 (Fla. 3d Dist. 1967).

95. Metropolitan Dade County v. E.B. Elliott Adv. Co., 214 So.2d 511 (Fla. 3d Dist. 1969). The court also applied the doctrine of stare decisis. *Id.* at 512.

96. FLA. STAT. § 46.08 (1965) provided that "replevin and ejectment shall not be joined together nor with other causes of action." The 1967 statutes do not contain this provision.

97. Goranson v. Maximo Moorings Marine Center, Inc., 204 So.2d 745 (Fla. 2d Dist. 1967).

98. Maco Supply Corp. v. Masciarelli, 213 So.2d 265 (Fla. 3d Dist. 1968).

99. Masciarelli v. Maco Supply Corp., 224 So.2d 329 (Fla. 1969).

100. Racino v. Saxon, 222 So.2d 274 (Fla. 4th Dist. 1969).

issue of permissive use was not litigated. Therefore, the driver's insurer in the present suit could not use the defenses of *res judicata* and estoppel by judgment.¹⁰¹

Res judicata and collateral estoppel preclude litigation of issues which have been conclusively answered by a court in litigation between the parties, even where the litigation was in another state.¹⁰² Thus, where several counts are alleged in a complaint, these doctrines operate only to bar the ones considered in a prior action, and not to bar a count which stands on a different footing.¹⁰³ Even the use of evidence of actions prior to a former judgment may be barred by the *res judicata* doctrine in a subsequent action.¹⁰⁴

V. PLEADINGS

A. Complaint

A complaint or any other pleading which seeks relief "must state a cause of action" and contain "a short and plain statement of the ultimate facts showing that the pleader is entitled to relief. . . ."¹⁰⁵ Mere legal conclusions are insufficient to state a cause of action unless substantiated by allegations of ultimate fact.¹⁰⁶ In determining the sufficiency of a complaint, affirmative defenses appearing on its face are to be considered for purposes of a motion to dismiss for failure to state a cause of action.¹⁰⁷ The courts employed this practice even before the effective date of the rule to that effect.¹⁰⁸

Certain matters must be specially pleaded.¹⁰⁹ For instance, when the count of a third-party complaint alleged fraud¹¹⁰ and conspiracy, but the only reference to any overt act by one third-party defendant was that it "aided and abetted in the conspiracy," the count should have been dismissed.¹¹¹ Special damages must be specifically stated or evidence as to them is inadmissible.¹¹² Thus, when building owners requested compensation for physical injury to their building, but the pleadings were silent as to the element of personal inconvenience, special damages for such inconvenience could not be recovered.¹¹³

101. *Liberty Mut. Ins. Co. v. Jozwick*, 204 So.2d 216 (Fla. 3d Dist. 1967).

102. *Puro v. Puro*, 225 So.2d 462 (Fla. 3d Dist. 1969) (prior litigation in New York).

103. *See Super Serv. Prod. Corp. v. North Store Corp.*, 214 So.2d 664 (Fla. 3d Dist. 1968).

104. *See Telford v. Telford*, 225 So.2d 165 (Fla. 2d Dist. 1969).

105. FLA. R. CIV. P. 1.110(b).

106. *Doyle v. Flex*, 210 So.2d 493 (Fla. 4th Dist. 1968).

107. FLA. R. CIV. P. 1.110(d). *See* note 91 *supra*.

108. *Douglas v. City of Dunedin*, 202 So.2d 787 (Fla. 2d Dist. 1967).

109. *See* FLA. R. CIV. P. 1.120.

110. "In all averments of fraud . . . , the circumstances constituting fraud . . . shall be stated with such particularity as the circumstances may permit." FLA. R. CIV. P. 1.120(b).

111. *General Dynamics Corp. v. Hewitt*, 225 So.2d 561 (Fla. 3d Dist. 1969).

112. FLA. R. CIV. P. 1.120(g).

113. *Bialkowicz v. Pan American Condominium No. 3, Inc.*, 215 So.2d 767 (Fla. 3d Dist. 1968).

The Supreme Court of Florida in *Ferrell Jewelers of Tampa, Inc. v. Southern Mill Creek Products Co.*¹¹⁴ adopted the third district's opinion that it is unnecessary to plead inferences or facts necessarily implied from other facts stated as to a matter peculiarly within the knowledge of an adversary.¹¹⁵ Thus, it was unnecessary for the bailor, who alleged in the complaint that property belonging to him was stored for payment of consideration in the bailee's warehouse and destroyed while in the bailee's custody and control, to allege negligence on the part of the bailee.¹¹⁶

In the last survey,¹¹⁷ the authors commented that one of the most significant additions to the 1967 Rules of Civil Procedure was the proposed forms for use in conjunction with the rules. They also opined that "the practitioner would be wise, and safe, by fully utilizing the new forms."¹¹⁸ The wisdom of their statement was borne out soon thereafter when it was held that a complaint utilizing the language of the proposed forms¹¹⁹ was sufficient to state a cause of action for divorce on the ground of extreme cruelty.¹²⁰

B. Counterclaims and Cross-Claims

A pleader must state as a counterclaim any claim against an opposing party which arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim.¹²¹ He is also permitted, but not required, to state a counterclaim not arising out of the same transaction or occurrence.¹²² The court of original jurisdiction may examine the counterclaim to determine whether, on its face, it contains allegations which state an enforceable claim,¹²³ even though such claim be permissive or compulsory,¹²⁴ and to determine whether the cause should be transferred to a court of higher jurisdiction.¹²⁵ Thus, when a lessor filed in the civil court of record to recover a money judgment and his lessee, the defendant, counterclaimed for affirmative equitable relief, exclusive jurisdiction for which was vested in the circuit court, the civil court of record committed reversible error by refusing to transfer the cause to the circuit court.¹²⁶

A cross-claim may be filed against a coparty if it arises out of the

114. 205 So.2d 657 (Fla. 1967).

115. *Adelman v. M. & S. Welding Shop*, 105 So.2d 802 (Fla. 3d Dist. 1958).

116. *Ferrell Jewelers v. Southern Mill Creek Prods. Co.*, 205 So.2d 657 (Fla. 1967).

117. *Massey & Bridges*, CIVIL PROCEDURE, 22 U. MIAMI L. REV. 449 (1968).

118. *Id.* at 463.

119. FLA. R. CIV. P. FORM 1.943 was traced in this case.

120. *Muller v. Muller*, 205 So.2d 558 (Fla. 2d Dist. 1967). See FLA. STAT. § 65.04(4) (1965).

121. FLA. R. CIV. P. 1.170(a). For one court's construction of "opposing party," see *Hall v. McDonough*, 216 So.2d 84 (Fla. 2d Dist. 1968).

122. FLA. R. CIV. P. 1.170(b).

123. State *ex rel.* *Peters v. Hendry*, 159 Fla. 210, 31 So.2d 254 (1947); *Platt v. Kenco Chem. Co.*, 132 So.2d 27 (Fla. 3d Dist. 1961).

124. State *ex rel.* *Rosenfeld v. Boyer*, 145 So.2d 547 (Fla. 1st Dist. 1962).

125. FLA. R. CIV. P. 1.170(j).

126. *Davis v. Flato*, 210 So.2d 16 (Fla. 4th Dist. 1968).

same transaction or occurrence that is the subject matter of the original claim or a counterclaim.¹²⁷ *Chappell v. Scarborough*¹²⁸ presents a question of first impression in Florida, seeking a construction of rule 1.170(g) "as it relates to the right of a defendant to file a cross-claim against a co-party on a cause of action arising out of a contract of indemnity against liability."¹²⁹ A father brought an action for the wrongful death of his child against the vendor and purchaser of an electrical services business. The sales contract between the defendants provided that the vendor would perform the remaining work under a subcontract so as to create no liability in the purchaser. This agreement was held to constitute a contract of indemnity against any liability which might be imposed on the purchaser as a result of negligent performance of his subcontract. It was further held that the purchaser's cause of action for indemnification could be brought by way of cross-claim and was not barred or postponed until judgment had been rendered against him in the original action.¹³⁰

C. Amended Pleadings

Rule 1.190 sets forth the procedures for the amendment of pleadings, stating that "leave shall be freely given when justice so requires."¹³¹ For instance, when plaintiff's counsel, appealing from the dismissal of his complaint, consented to four extensions of time as a courtesy to the defense counsel, and by the time the court filed its opinion holding that the complaint was defective but curable the statute of limitations had run, the plaintiff was entitled to amend his complaint notwithstanding the expiration of the statutory period.¹³² At any time and at every stage, "the court must disregard any error or defect in the proceedings which does not affect the substantial rights of the parties."¹³³ However, amendment has been held not to be proper in the trial court after reversal of judgment by a reviewing court and entry of another judgment in favor of one of the parties.¹³⁴

Since the trial court has broad discretion in allowing amendments, the appellant has the burden of showing an abuse of that discretion.¹³⁵ It was not an abuse of discretion for the trial court in a divorce action to deny the husband's motion to amend his complaint to include adultery when he did not make the motion until the conclusion of his case but knew of the allegedly adulterous conduct prior to filing his complaint and had introduced evidence of it in support of his allegation of extreme

127. FLA. R. CIV. P. 1.170(g).

128. 224 So.2d 791 (Fla. 1st Dist. 1969).

129. *Id.* at 795.

130. *Chappell v. Scarborough*, 224 So.2d 791 (Fla. 1st Dist. 1969).

131. FLA. R. CIV. P. 1.190(a).

132. *Drady v. City of Tampa*, 215 So.2d 493 (Fla. 2d Dist. 1968).

133. FLA. R. CIV. P. 1.190(e).

134. *Atlantic Coast Line R.R. v. Gulf Oil Corp.*, 206 So.2d 688 (Fla. 2d Dist. 1968).

135. *McSwiggan v. Edwards*, 186 So.2d 6 (Fla. 2d Dist. 1965). See *Walker v. Narose Bldgs., Inc.*, 206 So.2d 400 (Fla. 2d Dist. 1968).

cruelty.¹³⁶ However, it was an abuse of discretion to grant a plaintiff's motion to amend, which was filed at a conference on requested jury instructions after all the evidence had been presented, and such amendment was fatally defective when the motion was granted without giving the defendant an opportunity to offer a case in opposition.¹³⁷

Since the general rule is that leave to amend should be freely given, doubts should be resolved in favor of allowing amendment. Thus, in a case where an injured minor's amended complaint failed to state a cause of action under the attractive nuisance doctrine, the minor should have been granted leave to amend since amendment could have been accomplished without any departure from facts already alleged.¹³⁸ Also, permitting a plaintiff to amend by reducing his claim for damages to an amount within the jurisdiction of the court conformed to the general policy indicated by the rules.¹³⁹

The rule governing amended and supplemental pleadings also provides for amendments to conform with the evidence, treating issues not pleaded but tried by the express or implied consent of the parties as if they had been raised in the pleadings.¹⁴⁰ Thus, where evidence of a defense based on the Statute of Frauds appeared in the record, it was reversible error to deny the defendant's motion to amend his pleadings to conform with the evidence.¹⁴¹ However, when there was nothing in the record from which it could be inferred that a quantum meruit issue had been tried by express or implied consent of the parties, there was no abuse of discretion in denying a motion to amend pleadings to conform with such issue after judgment in favor of the defendant.¹⁴²

When an amendment arises "out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment shall relate back to the date of the original pleading."¹⁴³ This rule of "relation back" is important for purposes of the statute of limitations. Thus, in an action against doctors for breach of oral contract and negligence, an amended complaint which added counts based on failure to obtain parental consent to an operation on a minor was not barred by the statute of limitations, notwithstanding the fact that the date of such operation was not referred to in the original complaint.¹⁴⁴

VI. PRETRIAL PROCEDURES

The rule governing pretrial procedure provides that "the court may of its own motion or shall on motion of any party . . . require the at-

136. *Wooten v. Wooten*, 213 So.2d 292 (Fla. 3d Dist. 1968).

137. *Airlift Int'l, Inc. v. Linee Aeree Italiane*, 212 So.2d 109 (Fla. 3d Dist. 1968).

138. *Petterson v. Concrete Constr., Inc.*, 202 So.2d 191 (Fla. 4th Dist. 1967).

139. *Steingold v. L. & L. Motors, Inc.*, 207 So.2d 19 (Fla. 3d Dist. 1968).

140. *FLA. R. Civ. P.* 1.190(b).

141. *Trans World Marine Corp. v. Threlkeld*, 201 So.2d 614 (Fla. 3d Dist. 1967).

142. *Triax, Inc. v. City of Treasure Island*, 208 So.2d 669 (Fla. 2d Dist. 1968).

143. *FLA. R. Civ. P.* 1.190(c).

144. *Brown v. Wood*, 202 So.2d 125 (Fla. 2d Dist. 1967).

torneys for the parties to appear before it for conference¹⁴⁵ In the case of *Coggan v. Coggan*,¹⁴⁶ it was held that a pretrial conference is a "hearing" within the rule that a motion may not be made orally except at a "trial or hearing,"¹⁴⁷ and an order based on oral motion at the pretrial conference was affirmed. When a party's attorney fails to attend a pretrial conference, "the court may dismiss the suit or strike the answer or take such action as justice requires."¹⁴⁸ Thus, when the defendant had already failed to appear at two regularly scheduled pretrial conferences and then failed to respond to an order directing him to appear for a pretrial conference, striking defendant's answer, entering a default order, and holding trial on damages only was not error.¹⁴⁹

Among the purposes of pretrial procedure are simplification of issues and, ultimately, control of the subsequent course of the action. When settlements or stipulations¹⁵⁰ are made before trial, they should control unless modifications are made at trial to prevent injustice. In *Stephenson v. Collins*,¹⁵¹ the issue of compensatory damages was settled prior to trial by mutual agreement between the parties. After the counts relating to compensatory damages were dismissed with prejudice pursuant to stipulation, the plaintiff's claim for punitive damages was properly dismissed, since "the right to recover for punitive damages is directly dependent upon the right to recover for compensatory damages, a right which no longer existed after the compromise and settlement."¹⁵² In *Giblin v. City of Coral Gables*,¹⁵³ a stipulation was made and approved by the circuit court before the plaintiff's death pending litigation. Since this stipulation provided that the basic issues in the lawsuit would be determined in a companion action by plaintiff's wife against the city, an appellate determination adverse to her in the companion case precluded her recovery as administratrix in the plaintiff's action.¹⁵⁴

VII. PARTIES

This area has been of great significance during the survey period, especially in relation to joinder of parties under Rule 1.210. Perhaps, the most talked about case of the past year was *Shingleton v. Bussey*,¹⁵⁵ the leading case on joinder of a liability insurer as a party defendant.

Suit was brought against the insured and her liability insurer for damages the plaintiff sustained from the alleged negligent operation of the insured automobile. The circuit court dismissed the insurer as a party,

145. FLA. R. CIV. P. 1.200.

146. 213 So.2d 902 (Fla. 2d Dist. 1968).

147. FLA. R. CIV. P. 1.100(b).

148. FLA. R. CIV. P. 1.200.

149. *Ross v. City of Miami Beach*, 206 So.2d 243 (Fla. 3d Dist. 1968).

150. See FLA. R. CIV. P. 1.030(d).

151. 210 So.2d 733 (Fla. 1st Dist. 1968).

152. *Id.* at 736.

153. 206 So.2d 434 (Fla. 3d Dist. 1968).

154. *Id.*

155. 223 So.2d 713 (Fla. 1969).

but the First District Court of Appeal reversed and remanded, construing rule 1.210(a) to permit such joinder.¹⁵⁶ The Supreme Court of Florida affirmed the judgment of the first district on the merits, specifically holding that the plaintiff, as a third-party beneficiary of the motor vehicle policy, had a direct cause of action, similar to the insured, against the insurer as a party defendant.¹⁵⁷ Since it emphasized this aspect to a greater extent than the district court, the supreme court undertook a thorough explanation of the rationale of the third-party beneficiary theory.¹⁵⁸

Some of the difficulties involved in this case stem from the fact that although the holding is relatively narrow, the underlying policy behind it is broad, and the decision is therefore fraught with potentially far-reaching implications. To complicate matters, there is an abundance of dicta. For instance, the court makes a statement relating to the value of "a candid admission at trial of the existence of insurance coverage . . . [and] the policy limits . . ." ¹⁵⁹ Furthermore, the court was of the opinion that unless the legislature gives them the right to insert "no joinder" clauses, "there is no basis in law for insurers to assume they have such contractual right . . ." ¹⁶⁰ Neither of these statements is related to the holding of the court.

The basis for the decision in *Shingleton v. Bussey* is one of policy—that of liberal construction of joinder rules in order to prevent multiplicity in litigation. The court stresses that among the fundamental goals of modern procedural jurisprudence is the goal of securing "a method of providing an efficient and expeditious adjudication of the rights of persons possessing adverse interests in a controversy."¹⁶¹ The importance of this policy basis becomes evident in *Highland Insurance Co. v. Walker Memorial Sanitarium & Benevolent Association*,¹⁶² where the second district cites not only the *Shingleton* case, but also the policy just articulated.¹⁶³ Extending the liberality of the permissive joinder rule¹⁶⁴ even further, the second district held that joinder of a hospital and two doctors, residing in different counties in a medical malpractice action brought in the county of one doctor's residence avoided the necessity of several suits, served the interest of expediency, and was proper even though the alleged negligent acts were not concurrent and arose in different counties.¹⁶⁵

156. *Bussey v. Shingleton*, 211 So.2d 593 (Fla. 1st Dist. 1968). For an excellent discussion of the opinion of the first district, see Note, 23 U. MIAMI L. REV. 652 (1969).

157. *Shingleton v. Bussey*, 223 So.2d 713 (Fla. 1968).

158. *Id.* at 715-16, where the court quotes extensively from *Gothberg v. Nemerovski*, 58 Ill. App. 2d 372, 208 N.E.2d 12 (1965).

159. *Id.* at 718.

160. *Id.* at 719.

161. *Id.* at 718.

162. 225 So.2d 572 (Fla. 2d Dist. 1969).

163. *Id.* at 574-75.

164. FLA. R. Crv. P. 1.210(a).

165. *Highland Ins. Co. v. Walker Mem. San. & Ben. Ass'n*, 225 So.2d 572 (Fla. 2d Dist. 1969).

In *Jefferson Realty v. United States Rubber Co.*,¹⁶⁶ the Supreme Court of Florida was faced with the question of whether a parent corporation was properly joined as a party plaintiff in an action brought by its subsidiaries against the defendant for breach of agreements to lease. The joinder was held to be proper in view of the fact that the parent corporation was the "real party in interest,"¹⁶⁷ recognized as such by all parties, and even though the joinder did not take place until the last day of testimony.¹⁶⁸

VIII. INTERVENTION

"Anyone claiming an interest in pending litigation may at any time be permitted to assert his right by intervention . . ."¹⁶⁹ Pending litigation means "litigation pending before the trial court."¹⁷⁰ In view of this interpretation and a general rule that intervention may not be allowed after final judgment, the Supreme Court of Florida held that the state comptroller, a stranger to the record and not aggrieved by the decision, would not be permitted to intervene for purposes of appeal after a final decree since the final judgment did not clearly bind him.¹⁷¹

Although intervention after final decree is generally not allowed, Florida law recognizes an exception created in the "interest of justice."¹⁷² In *Kearney v. Saline*, the court held that the ends of justice required that petitioning taxpayers be allowed to intervene in an action which originally sought a reassessment of property, but which in effect became an action to increase taxes by court order.¹⁷³ The order, entered on the petition of the intervening Board of Public Instruction, enjoined the assessor from certifying a ratio for the reduction of millage, thereby in effect doubling the millage. Furthermore, "there was no true adversary proceeding because the original plaintiffs aligned themselves with all other parties on one side of the issue . . ."¹⁷⁴

The interests of an intervenor are generally in subordination to the main proceeding.¹⁷⁵ Thus, an intervenor is bound by the record at the time of his intervention.¹⁷⁶ For the same reason, it is not an abuse of the

166. 222 So.2d 738 (Fla. 1969).

167. FLA. R. CIV. P. 1.210(a). This "real party in interest" concept was the basis for the district court's decision in *Bussey v. Shingleton*, 211 So.2d 593 (Fla. 1st Dist. 1968): see Note, 23 U. MIAMI L. REV. 652, 654-56 (1969).

168. *Jefferson Realty v. United States Rubber Co.*, 222 So.2d 738 (Fla. 1969). See FLA. R. CIV. P. 1.190(b), 1.250.

169. FLA. R. CIV. P. 1.230.

170. *Dickenson v. Segal*, 219 So.2d 435, 436 (Fla. 1969).

171. *Id.*

172. *Wags Transp. Sys. v. City of Miami Beach*, 88 So.2d 751 (Fla. 1956).

173. 208 So.2d 650 (Fla. 1st Dist. 1968).

174. *Id.* at 651.

175. FLA. R. CIV. P. 1.230.

176. *Krouse v. Palmer*, 131 Fla. 444, 179 So. 762 (1938); *Florida Gas Co. v. American Employer's Ins. Co.*, 218 So.2d 197 (Fla. 3d Dist. 1969).

trial court's discretion to deny leave to intervene where new issues are sought to be injected.¹⁷⁷

IX. INTERPLEADER

If there is a danger of exposing the plaintiff to multiple liability, persons with claims against him may be joined as defendants and required to interplead; if a defendant is exposed to similar liability, he may obtain interpleader by cross-claim or counterclaim.¹⁷⁸ In an action of interpleader where the defendants filed a counterclaim and then moved to dismiss the complaint, the court had no authority to consider the counterclaim after such dismissal was granted.¹⁷⁹

X. DISCOVERY

A. *In General*

Rules 1.280 through 1.410 contain the tools of discovery and the directions for implementing them in building a case. Since these directions do not always lend themselves to the do-it-yourself approach, the courts provided numerous interpretations of the directions during the survey period.

B. *Interrogatories and Depositions*

Although the Florida Rules of Civil Procedure provide for discovery methods such as interrogatories and depositions, it has been held that the rules disclose no intent to abrogate or abolish the traditional right of a court to entertain pure bills of discovery.¹⁸⁰ The courts have broad discretion in discovery matters and they may exercise it to eliminate concealment and surprise so that they can reach the merits of a cause¹⁸¹—"to secure the just, speedy and inexpensive determination of every action. . . ."¹⁸²

Often, this broad judicial discretion must be exercised to insure that discovery methods are used properly, as tools rather than as weapons. For example, in *Dade County v. Jordan Marsh Co.*,¹⁸³ the trial court was held not to have abused its discretion in sustaining a general objection to mass-produced standard interrogatories without prejudice to the right of the defendants to file and serve proper interrogatories. Such interrogatories to parties may be limited as justice

177. *Oster v. Cay Constr. Co.*, 204 So.2d 539 (Fla. 4th Dist. 1967).

178. FLA. R. CIV. P. 1.240.

179. *Acquillina v. Mangus*, 223 So.2d 786 (Fla. 3d Dist. 1969).

180. *Carner v. Ratner*, 207 So.2d 310 (Fla. 3d Dist. 1968); *Poling v. Petroleum Carrier Corp.*, 194 So.2d 925 (Fla. 1st Dist. 1967). See *First Nat'l Bank v. Dade-Broward Co.*, 125 Fla. 594, 171 So. 510 (1936).

181. See 23 AM. JUR. 2d *Depositions and Discovery* § 155 (1965).

182. FLA. R. CIV. P. 1.010.

183. 219 So.2d 756 (Fla. 3d Dist. 1969).

requires to protect a party from harassment and oppression.¹⁸⁴ Even though interrogatories must be answered "separately and fully,"¹⁸⁵ if an interrogatory is framed to call only for a negative or a positive answer, no additional answer has to be filed when it is answered in the negative.¹⁸⁶

Rule 1.280 generally provides for depositions pending an action and, more particularly, for the use of depositions.¹⁸⁷ Rule 1.280(d) provides for the use of depositions at trial or upon the hearing of a motion or an interlocutory proceeding, in addition to their use for pretrial discovery. When a plaintiff intends to avail himself of the rule relating to depositions of expert witnesses for use as evidence,¹⁸⁸ he must put the defendant on sufficient notice of such intent and apprise defendant of the fact that he must object prior to the taking of the deposition in order to enable the court to require the expert witness to attend the trial.¹⁸⁹ In *Bondy v. West*,¹⁹⁰ the court held that notice by a personal injury claimant that he would take the deposition of a particular physician was insufficient, so that introduction of the deposition was error. A party intending to introduce a deposition at trial in lieu of a personal appearance by the deposing expert witness must, in order to comply with the "due notice" and reasonable notice provisions of rule 1.390, specifically state that the deposition is being taken pursuant to rule 1.390.¹⁹¹

When "the witness is at a greater distance than one hundred miles from the place of trial or hearing"¹⁹² use of depositions is permissible. One plaintiff's attorney established this type of factual situation by long distance calls at the time of the trial.¹⁹³

It has been held that a deposition taken "in aid of execution" is admissible in a proceeding on a rule nisi, since rule 1.280(d) provides that depositions may be used at a hearing of a motion or at an interlocutory proceeding.¹⁹⁴

C. Scope of Discovery

There are few limitations on the matters upon which a deponent may be examined. The information must be relevant and not privileged; however, an objection on the ground that the testimony will be inadmissible at trial is not valid, provided that the testimony appears reasonably calculated to lead to the discovery of admissible evidence.¹⁹⁵

184. FLA. R. CIV. P. 1.340(b).

185. FLA. R. CIV. P. 1.340(a).

186. *State Rd. Dept. v. Florida E.C. Ry.*, 212 So.2d 315 (Fla. 3d Dist. 1968).

187. See FLA. R. CIV. P. 1.280(d).

188. FLA. R. CIV. P. 1.390.

189. See FLA. R. CIV. P. 1.390(b).

190. 219 So.2d 117 (Fla. 2d Dist. 1969).

191. *Id.* at 119.

192. FLA. R. CIV. P. 1.280(d)(3)(a).

193. See *Rosenberg v. Maritime Ins. Co.*, 212 So.2d 45 (Fla. 3d Dist. 1968).

194. See *Hanisch v. Wilder*, 210 So.2d 491 (Fla. 3d Dist. 1968).

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

A privilege may be waived,¹⁹⁶ as in the case where a husband voluntarily and without objection testified on deposition as to privileged communications with his wife.¹⁹⁷ However, the court can not require such a waiver. Thus, when a veterans' hospital had a rule that a doctor could not discuss a patient's case with a defendant's attorney while litigation was pending, without the consent of the other side or presence of the attorneys for both sides, the court could not require plaintiff's attorney to consent to the defendant's counsel interviewing a doctor who had invoked this rule.¹⁹⁸

In the divorce proceeding in *Simkins v. Simkins*,¹⁹⁹ the husband invoked his constitutional privilege against self-incrimination. The appellate court ruled that it was error to require the husband to answer on deposition questions designed to wring from him, under penalty of dismissal of his suit for divorce, an admission of adultery or of facts relevant to prove adultery, which was punishable as a crime.

In an action by a seller for money owned, the buyer counterclaimed and filed a motion to produce²⁰⁰ certain telephone recordings that the president of the seller had made of conversations between himself and the president of the buyer. The buyer's motion was denied. On certiorari, it was held that since key issues might turn on agreements made during the conversations, the recordings would be relevant to the subject matter of the actions or might lead to the discovery of admissible evidence, and, therefore, it was an abuse of discretion by the trial court to deny the buyer's motion to produce.²⁰¹

An action was brought for specific performance, injunctive relief, and an accounting. The issue of the right to an accounting had not yet been decided when the plaintiff sought production of certain documents, records, and papers. The court held that the order to produce was improper to the extent that it required production of documents solely relevant to the accounting before the issue of a right to an accounting was decided.²⁰²

In *Ford Motor Co. v. Cochran*,²⁰³ an action was brought against the manufacturer of a bearing by an automobile mechanic injured when the bearing shattered. The fourth district held, *inter alia*, that the manufacturer was not entitled to take the deposition of experts who had made tests on behalf of the mechanic, since this same court had previously

196. *Savino v. Luciano*, 92 So.2d 817 (Fla. 1957).

197. *Tibado v. Brees*, 212 So.2d 61 (Fla. 2d Dist. 1968); see FLA. R. CIV. P. 1.330(c)(a). *But cf.* *Jones v. Life Ins. Co.*, 215 So.2d 889 (Fla. 3d Dist. 1969).

198. *Devlin v. Rosman*, 205 So.2d 346 (Fla. 3d Dist. 1967).

199. 219 So.2d 724 (Fla. 3d Dist. 1969). *But cf.* *Markey v. Joe Sam Lee*, 224 So.2d 789 (Fla. 2d Dist. 1969).

200. FLA. R. CIV. P. 1.350.

201. *Southern Mill Creek Prods. v. Delta Chem. Co.*, 203 So.2d 53 (Fla. 3d Dist. 1967).

202. *Armstrong v. Piatt*, 201 So.2d 830 (Fla. 4th Dist. 1967).

203. 205 So.2d 55 (Fla. 2d Dist. 1967).

recognized that an expert witness is not subject to discovery with regard to expert testimony.²⁰⁴

D. *Refusal to Make Discovery*

Rule 1.380 provides sanctions in the discretion of the court when a party or other deponent refuses to answer²⁰⁵ or fails to comply with a discovery order.²⁰⁶ When a plaintiff elects not to comply with an order to produce which is not erroneous, the trial judge may correctly dismiss the case as to the defendant.²⁰⁷

The judicial thinking in this area is elucidated in the case of *Hurley v. Werly*.²⁰⁸ The court held that a Roman Catholic bishop had the protective attributes of a "corporate sole." In deference to his privileged legal status, before visiting upon him the drastic penalty of outright default for failure to appear to have his deposition taken,²⁰⁹ the court should have adopted other expedients such as requiring the defendant to procure whatever information he sought to obtain from the bishop by deposition from other available sources.²¹⁰

XI. DISMISSAL

A. *Voluntary*

Generally, a party may have his action voluntarily dismissed without a court order by a notice of dismissal served on the opposing party or stated on the trial record, or by a stipulation of dismissal signed by all parties.²¹¹ Voluntary dismissal by order of the court is also available, upon motion and with notice to all other parties.²¹²

Dismissal by notice of dismissal may be accomplished "at any time before a hearing on motion for summary judgment, or . . . before retirement of the jury in a case tried before a jury or before submission of a nonjury case to the court"²¹³ Thus, when the court, at the close

204. *Hartstone Concrete Prods. Co. v. Ivancevich*, 200 So.2d 234 (Fla. 4th Dist. 1967).

205. FLA. R. CIV. P. 1.380(a).

206. FLA. R. CIV. P. 1.380(b).

207. *Kennedy & Cohen, Inc. v. Allen Appliance Serv., Inc.*, 214 So.2d 488 (Fla. 3d Dist. 1968). FLA. R. CIV. P. 1.380(b)(2)(iii).

208. 203 So.2d 530 (Fla. 2d Dist. 1967).

This is known as the "sanction" portion of the discovery Rules. It is not penal. It is not punitive. It is not aimed at punishment of the litigant. The objective is compliance—compliance with the discovery Rules. The sanctions are set up as a means to an end, not the end itself. The end is compliance. The sanctions should be invoked only in flagrant cases, certainly in no less than aggravated cases, and then only after the Court has given the defaulting party a reasonable opportunity to conform after originally failing or even refusing to appear. This is unmistakably the trend of judicial thinking in Florida on the "sanction" Rule.

Id. at 537.

209. See FLA. R. CIV. P. 1.380(d).

210. *Hurley v. Werly*, 203 So.2d 530 (Fla. 2d Dist. 1967).

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

212. FLA. R. CIV. P. 1.420(a)(2).

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

of final arguments, granted counsel leave to submit briefs substantiating their respective positions by a designated date and the case had not been submitted to the court for decision, the plaintiff who filed notice of dismissal before the date for submission of briefs had an absolute right to dismiss his case.²¹⁴ Notice of dismissal was still timely after the trial court had indicated its intention to grant defendant's motion for a directed verdict²¹⁵ at the close of the plaintiff's evidence but prior to any announcement to that effect by the court to the jury.²¹⁶

In an action to determine ownership of land, the trial judge dismissed the case with leave to amend. The plaintiffs, instead of filing an amended complaint within the time allotted, filed a voluntary dismissal, and the judge dismissed the case with prejudice.²¹⁷ The supreme court, reversing the appellate court and the trial judge, held that the dismissal of the complaint with leave to amend was interlocutory in nature and did not cut off plaintiff's right to file a voluntary dismissal.²¹⁸

B. *Involuntary*

While a voluntary dismissal is without prejudice unless otherwise specified, an involuntary dismissal under rule 1.420(b) generally operates as an adjudication on the merits, *i.e.*, with prejudice.²¹⁹ Rule 1.420(b) now requires notice of hearing on a motion for involuntary dismissal in order to conform with rule 1.090(d).²²⁰ The motion to dismiss most frequently encountered is the one based upon the ground that the party seeking relief has not shown that he is entitled to it,²²¹ and this motion may be made after the party seeking relief has completed the presentation of his evidence.²²²

C. *Failure to Prosecute*

Before rule 1.420(e) was amended,²²³ petitions for reinstatement of a cause dismissed for failure to prosecute could be filed within one month after such dismissal,²²⁴ the one-month period running from the date of the recording of the orders of dismissal.²²⁵ The only question to be decided upon motion to dismiss for failure to prosecute is a factual one—whether there was any affirmative action taken during the one-year period specified by the rule. Examples of action held sufficient to

214. *Dreher v. American Fire & Cas. Co.*, 220 So.2d 435 (Fla. 4th Dist. 1969).

215. FLA. R. CIV. P. 1.480; *see* p. 560 *infra*.

216. *Meyer v. Contemporary Broadcasting Co.*, 207 So.2d 325 (Fla. 4th Dist. 1968).

217. *Hibbard v. State Rd. Dept.*, 216 So.2d 245 (Fla. 2d Dist. 1968).

218. *State Rd. Dept. v. Hibbard*, 225 So.2d 901 (Fla. 1969).

219. Exceptions to the general rule are dismissals "for lack of jurisdiction or for improper venue or for lack of an indispensable party . . ." FLA. R. CIV. P. 1.420(b).

220. *In re Florida Rules of Civil Procedure*, 211 So.2d 206, 208 (Fla. 1968).

221. *See* FLA. R. CIV. P. 1.140(b)(6).

222. FLA. R. CIV. P. 1.420(b).

223. *In re Florida Rules of Civil Procedure*, 211 So.2d 206, 208 (Fla. 1968).

224. FLA. STAT. § 45.19(1) (1965).

225. *Larybar, Inc. v. City of Miami Beach*, 208 So.2d 129 (Fla. 3d Dist. 1968).

preclude dismissal under 1.420(e) include the following: filing of an amended complaint; requesting admissions and setting down for hearing the defendant's motion to dismiss;²²⁶ issuing a witness subpoena and a subpoena duces tecum; giving notice of deposition in order to ascertain the defendant's address for service of process;²²⁷ filing of additional interrogatories;²²⁸ giving notice of hearing on pending motions;²²⁹ and filing a trial notice.²³⁰ Whether there was "good cause" why the action should remain pending was taken into consideration only on petition for reinstatement after a dismissal for lack of prosecution.²³¹

The amended rule, 1.420(e), provided for dismissal "after reasonable notice to the parties, *unless a party shows good cause in writing why the action should remain pending at least five days before the hearing on the motion.*"²³² Though decided subsequent to the recent amendment of rule 1.420(e), *Sroczyk v. Fritz*²³³ made no mention of the amendment. The Supreme Court of Florida, however, held that "on the hearing of a motion to dismiss for lack of prosecution under Rule 1.420(e) the plaintiff may show good cause . . . why the motion should not be granted, and if such showing is made the case should not be dismissed."²³⁴

The effect of the rule change was specifically considered in *State ex rel. Avery v. Williams*.²³⁵ The defendant filed a motion to dismiss for failure to prosecute under the amended rule 1.420(e), serving a notice of hearing on said motion. Twenty-eight days elapsed between the original filing of the motion and the date of hearing. Since the plaintiff failed to file any response showing good cause "why the action should remain pending at least five days before the hearing,"²³⁶ the court held that the defendant was entitled to have the action dismissed and to a writ prohibiting the trial court from granting plaintiff's motion to reinstate the action on alleged grounds of good cause, made after the motion to dismiss was granted.²³⁷ This case clearly established the effect of the rule change in eliminating the necessity of two hearings by allowing the trial court to consider at one hearing the questions: 1) whether the action taken during the one-year period was sufficient to preclude

226. *Popkin v. Crispen*, 213 So.2d 445 (Fla. 4th Dist. 1969).

227. *Reddish v. Forlines*, 207 So.2d 703 (Fla. 1st Dist. 1968).

228. *City of Jacksonville v. Hinson*, 202 So.2d 806 (Fla. 1st Dist. 1967), *cert. denied*, 207 So.2d 688 (Fla. 1968).

229. *Knowles v. Gilbert*, 208 So.2d 660 (Fla. 3d Dist. 1968).

230. *Biegel v. Simon*, 210 So.2d 473 (Fla. 3d Dist. 1968).

231. *See Laug v. Murphy*, 205 So.2d 695 (Fla. 4th Dist. 1969).

232. FLA. R. CIV. P. 1.420(e) (emphasis added).

233. 220 So.2d 908 (Fla. 1969), *rev'g Fritz v. Sroczyk*, 202 So.2d 796 (Fla. 1st Dist. 1967).

234. *Sroczyk v. Fritz*, 220 So.2d 908, 912 (Fla. 1969).

235. 222 So.2d 477 (Fla. 3d Dist. 1969).

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

237. *State ex rel. Avery v. Williams*, 222 So.2d 477 (Fla. 3d Dist. 1969).

dismissal for failure to prosecute; and 2) whether there is "good cause" for the action to remain pending.

XII. TRIALS

A. *Right to Trial by Jury*

"The right of trial by jury declared by the Constitution or by statute shall be preserved to the parties inviolate."²³⁸ Although the 1967 revision of the Rules of Civil Procedure resulted in the procedural merger of law and equity,²³⁹ it did not abolish law or equity, and "substantive law should be applied to the actual allegations and relief sought in a complaint or petition . . ."²⁴⁰ The question of whether a jury should try the facts of a case is still to be decided by the tests existing under the Florida Constitution or by legislative enactment. Thus, in a suit to abate a continuing trespass to real property and for compensatory damages, the portion of the court order submitting the issue of compensatory damages, if any, to the jury as incident to appropriate equitable relief was proper,²⁴¹ but submitting the issue of punitive damages, if any, to the jury was improper since punitive damages must be authorized by statute,²⁴² and no such authorization was shown.²⁴³

Demand for jury trial of an issue may be made by service on the other party not more than ten days after the service of the last pleading directed to that issue, or it may be endorsed on a pleading.²⁴⁴ Failure to make a timely demand results in waiver.²⁴⁵

B. *Consolidation and Separate Trials*

When there are common questions of law or fact involved, the court may order joint hearings or trials, consolidation of actions, or whatever is reasonable in avoiding unnecessary costs or delay.²⁴⁶ The court may also order separate trials of claims on the same issues "in furtherance of convenience or to avoid prejudice . . ."²⁴⁷ Discretion is broad in this area since these actions by the court are clearly in the interest of securing "the just, speedy, and inexpensive determination of every action."²⁴⁸ Thus, it was held that the trial court's decision to sever the issue of liability from the issue of damages by submitting the question of foreseeability of damages to the jury and deciding the amount of

238. FLA. R. CIV. P. 1.430(a).

239. See FLA. R. CIV. P. 1.040.

240. R.C. #17 Corp. v. Korenblit, 207 So.2d 296, 297 (Fla. 1st Dist. 1968).

241. The general rule in Florida has been that equity can award damages incident to restraining a trespass. Wiggins v. Williams, 36 Fla. 637, 18 So. 859 (1896).

242. See Orkin Exterm. Co. v. Truley Nolen, Inc., 117 So.2d 419 (Fla. 3d Dist. 1960).

243. R.C. #17 Corp. v. Korenblit, 207 So.2d 296 (Fla. 1st Dist. 1968).

244. FLA. R. CIV. P. 1.430(b).

245. FLA. R. CIV. P. 1.430(d).

246. FLA. R. CIV. P. 1.270(a).

247. FLA. R. CIV. P. 1.270(b).

248. FLA. R. CIV. P. 1.010.

damages itself after the jury decided the question in the plaintiff's favor was not improper.²⁴⁹

C. Continuances

The Supreme Court of Florida has held that the statute²⁵⁰ providing for continuances of causes in which a legislator is involved for the term of the legislature is unconstitutional in its application to litigation involving emergency relief and irreparable damage, and the court should exercise judicial discretion in determining whether a continuance should be granted.²⁵¹ The rule governing motions for continuances provided that they "may be made only before or at the time the case is set for trial, unless good cause for failure to do so is shown or unless the ground for the motion arose after the action was set for trial."²⁵² Such a motion must state the facts entitling the movant to a continuance and, if he seeks a continuance "on the ground of non-availability of a witness, the motion must show when it is believed the witness will be available."²⁵³

An order setting an unlawful detainer action for trial did not state that the trial would be by jury. The defendant's counsel came from another community and stated that he had not anticipated a jury trial and had therefore not hired local counsel, which he would have done had he known the trial would be to a jury. Under these facts, the appellate court ruled that the ordering of a jury trial and refusal to grant defendant's motion for continuance was an abuse of discretion.²⁵⁴ However, it was held not an abuse of discretion to deny a continuance when the defendants already had one postponement, the case had been pending for more than two years, and the absent codefendant's testimony could have been taken by deposition.²⁵⁵

XIII. DIRECTED VERDICT

A. In General

Since verdicts must have a rational predicate in the evidence and cannot rest on a mere probability or guess, a trial court is under an affirmative duty to direct a verdict in cases where the evidence, considered as a whole, fails to prove the plaintiff's case under the issues set forth.²⁵⁶

Plaintiff petitioned, by writ of certiorari, for review of an order by the district court of appeal directing the trial court to sustain "defen-

249. *F. & B. Ceco, Inc. v. Galaxy Studios, Inc.*, 216 So.2d 75 (Fla. 3d Dist. 1968).

250. *FLA. STAT. § 11.111* (1967).

251. *A.B.C. Business Forms, Inc. v. Spaet*, 201 So.2d 890 (Fla. 1967).

252. *FLA. R. CIV. P. 1.460(a)*. The rule governing setting of cases for trial has been revised. *See FLA. R. CIV. P. 1.440*.

253. *FLA. R. CIV. P. 1.460(b)*.

254. *Pittman v. Haselwood*, 214 So.2d 43 (Fla. 1st Dist. 1968).

255. *Lydick v. Chance*, 214 So.2d 885 (Fla. 2d Dist. 1968).

256. *Conda v. Plain*, 215 So.2d 13, 15 (Fla. 2d Dist. 1968).

dant's motion for directed verdict *non obstante veredicto*, in lieu of the order entered by the lower court granting [defendant's alternative] motion for new trial."²⁵⁷ The district court of appeal had directed a ruling on that motion on its own initiative and it was neither presented nor briefed in that court.²⁵⁸ The supreme court held that the direction was error but approved that portion of the judgment of the district court which affirmed the granting of defendant's motion for new trial.²⁵⁹

When the trial court granted a directed verdict in favor of the plaintiff without allowing the defendant an opportunity to present evidence in his behalf and the court on appeal was "unable to say as a matter of law that there could be no evidence whatsoever adduced which could support a verdict for defendant,"²⁶⁰ the defendant had to be given his day in court.²⁶¹

Questions concerning the credibility of witnesses and the weight of the testimony in a jury trial were not within the province of the trial court, being exclusively a jury function.²⁶² When such questions were present, the court erred in passing upon a motion for directed verdict or judgment in accordance therewith.²⁶³

In a third district case, the defendant-appellee had moved for a directed verdict at the conclusion of all the evidence, and made a motion which he labelled "Motion Notwithstanding the Verdict" within ten days of the rendition of a verdict for the plaintiff. The motion should have been labelled a "motion for judgment in accordance with motion for directed verdict," since there is no mention in the applicable provision of the Florida Rules of Civil Procedure for a motion for judgment *non obstante veredicto*.²⁶⁴ The appellate court held that "granting relief in accordance with the substance of appellee's motion rather than denying the appellee relief because the motion was improperly titled . . ." ²⁶⁵ was not reversible error when the substance of the motion complied with the requirements of the rule and the appellant was neither prejudiced nor misled by the erroneous title of the motion as presented by the defendant.²⁶⁶

Under *directed verdict* procedure, the trial court must consider the testimony presented in the light most favorable to the plaintiff. Thus, when there was credible evidence which would warrant a finding that defendant's employees did not use reasonable care under the circum-

257. *Gifford v. Galaxie Homes of Tampa, Inc.*, 204 So.2d 1, 2 (Fla. 1967).

258. *Id.*

259. *Id.* at 3.

260. *Bittson v. Steinman*, 210 So.2d 30, 32 (Fla. 3d Dist. 1968).

261. *Id.*

262. *McQueen v. Atlantic Truck Serv., Inc.*, 215 So.2d 325, 326 (Fla. 1st Dist. 1968).

263. *Id.*

264. See FLA. R. CIV. P. 1.480.

265. *De Mendoza v. Bd. of County Comm'rs*, 221 So.2d 797, 799 (Fla. 3d Dist. 1969).

266. *Id.*

stances, the issue of defendant's negligence should have been submitted to the jury.²⁶⁷

B. *Reservation of Decision on Motion*

"[T]he validity of a judgment non obstante veredicto should be tested by the rules applicable to motions for directed verdicts."²⁶⁸ As stated in terms of present Florida procedural practice,²⁶⁹ when a ruling has been reserved and the court has for consideration a defendant's motion after the verdict for a judgment based on defendant's motion for directed verdict, the court should not rule in favor of the defendant "unless it is clear that there is no evidence whatever adduced that could in law support a verdict for plaintiff. . . . This is so because under the present practice, provided for by rule 1.480 RCP, the ruling made is a deferred ruling on the motion for directed verdict."²⁷⁰

XIV. DEFAULT JUDGMENT

When the defendant mailed a motion to dismiss on the date that the response to the complaint was due, it was error for the court to enter a default against him²⁷¹ because "[a] party may plead or otherwise defend at any time before default is entered."²⁷²

The trial court was held to have abused its discretion in refusing to set aside a default judgment entered in an action for garnishment against the garnishee when the latter's default, consisting of his failure to file an answer to the writ of garnishment, was due to inadvertent and excusable neglect.²⁷³

The established rule in Florida is that in case of reasonable doubt, where there has been no trial upon the merits, the discretion of the trial court is usually exercised in favor of granting the procedure so as to permit a determination upon the merits. [citation omitted] A motion to set aside a default judgment against a garnishee for failure to file an answer to the writ of garnishment may be made in response to the writ of scire facias and should be granted, where the default was due to excusable neglect. [citations omitted]²⁷⁴

A motion to make the complaint more definite and certain was

267. *Seaboard Coast Line R.R. Co. v. Big Chief Constr. Co.*, 211 So.2d 21 (Fla. 4th Dist. 1968).

268. *Conda v. Plain*, 215 So.2d 13, 14 (Fla. 2d Dist. 1968) (citations omitted). The court was obviously not using the modern label for the motion for judgment based on defendant's motion for directed verdict.

269. *See* FLA. R. CIV. P. 1.480.

270. *Whitman v. Red Top Sedan Serv., Inc.*, 218 So.2d 213, 215 (Fla. 3d Dist. 1969).

271. *Lake Towers, Inc. v. Axelrod*, 216 So.2d 86 (Fla. 4th Dist. 1968).

272. FLA. R. CIV. P. 1.500(c).

273. *F.W. Dodge Co. Div. of McGraw-Hill, Inc. v. Southern Indus. Sav. Bank*, 207 So.2d 516 (Fla. 3d Dist. 1968).

274. *Id.* at 518.

granted and the defendant was ordered to file her answer within ten days after service of the amended complaint, but she filed a motion to dismiss within that period instead. Subsequent to the end of the 10-day period, the plaintiff filed an amended motion for entry of a default judgment based on the defendant's noncompliance with the order regarding filing of an answer. Two days prior to the granting of the motion for default, the defendant filed the requested responsive pleading. On appeal by the defendant from the order granting the default, the court held that a pleading had been filed (defendant's motion to dismiss) and that

refusal to set aside the default constituted an abuse of discretion and amounted to "punishment" for possible misconduct on the part of the defendant's counsel. If that be the case, it would seem to be unfair to penalize the litigant for the conduct of her counsel.²⁷⁵

XV. SUMMARY JUDGMENT

The party moving for a summary final decree must affirmatively show an absence of a genuine issue of any material fact and that he is entitled to such a decree in his favor under the applicable substantive law.²⁷⁶

Plaintiff must, of course, prove the elements of . . . [the] cause of action, but . . . need not do so until trial. To require . . . [the plaintiff] to prove . . . [his] case in order to successfully oppose a motion for summary judgment imposes a burden upon plaintiff that is neither contemplated nor justified under the cases and rules of procedure.²⁷⁷

The movant's concession in a motion for summary judgment as to the nonexistence of any genuine issue as to a material fact is only for the purpose of his motion and is not to be extended as a benefit or advantage to be used by the nonmoving party against the movant.²⁷⁸

"In an intersection accident even though the party moving for summary judgment had the right-of-way, he is not automatically entitled to a summary judgment."²⁷⁹ The responsibility to use reasonable care exists even when a driver had the right-of-way and whether the movant fulfilled that responsibility was a question for the jury to determine.²⁸⁰

A party moving for summary judgment may not substitute an affidavit upon the motion for a complaint.²⁸¹

275. *Sharpe v. Herman A. Thomas, Inc.*, 206 So.2d 655, 656-57 (Fla. 3d Dist. 1968).

276. *McClendon v. Key*, 209 So.2d 273 (Fla. 4th Dist. 1968).

277. *Lampman v. City of N. Miami*, 209 So.2d 273 (Fla. 3d Dist. 1968).

278. *McClendon v. Key*, 209 So.2d 273, 276 (Fla. 4th Dist. 1968).

279. *Cohen v. Dennis*, 209 So.2d 465, 466 (Fla. 3d Dist. 1968).

280. *Id.*

281. *Turf Express, Inc. v. Palmer*, 209 So.2d 461, 462 (Fla. 3d Dist. 1968). See FLA. R. Civ. P. 1.510(c), dealing with requisites for granting of a motion for summary judgment.

Indeed, the very language of Rule 1.510(c) . . . seems to provide for a summary judgment only when the claim is supported by 'the pleadings.' A trial court may not grant a summary judgment upon an issue raised by an affidavit in support of the motion rather than by a complaint. . . . [A] contrary holding would deprive the party defending against the motion . . . of an opportunity to raise defenses to the claim.²⁸²

Relaxation of the rule would result in trial by affidavit. Rule 1.190(b), which allowed issues *tried* by express or implied consent of the parties but not raised by the pleadings to be treated as if they had been raised in the pleadings, was limited to the resolution of the issues at full trial and was not extended to summary proceedings.²⁸³

Affidavits served by mail in opposition to a motion for summary judgment must be mailed three days before the hearing in order to be considered.²⁸⁴

At a hearing on the defendant's motion for summary judgment, the plaintiff unsuccessfully made an oral motion either to amend the defective affidavit of an expert which she had submitted in opposition to the motion or to supplement it by a deposition of the affiant. The supreme court held that when the deficiencies contained in the affidavit were largely technical²⁸⁵ and may have been amenable to correction, the plaintiff

should have been afforded, pursuant to her oral motion, at least one opportunity to amend or supplement the affidavit. Liberal treatment is the rule—and should not be the exception—under these circumstances, particularly where the petitioner is not given the benefit of the reasons for the rejection of the affidavit in the trial court's order and an appeal thereon could not be predicated with certainty nor any opportunity to correct deficiencies in the affidavit.

Great caution should be exercised in any summary judgment proceedings not to deny a litigant ample opportunity to demonstrate that he is entitled to the benefit of a trial.²⁸⁶

The court believed that if the plaintiff's oral motion had been granted the affiant might have been able to correct the deficiencies contained in the affidavit and the suit would not have been dismissed without a trial. Accordingly, the supreme court quashed the judgment of the district

282. *Id.* at 462.

283. *Id.*

284. *Henry Stiles, Inc. v. Evans*, 206 So.2d 65 (Fla. 4th Dist. 1968). See FLA. R. CIV. P. 1.090(e) (1967).

285. The deficiencies as pointed out by the district court of appeal consisted of "failure to show affirmatively that affiant was competent to express the opinion contained therein and the vagueness of the affidavit . . ." *Stephens v. Dichtenmueller*, 216 So.2d 448, 450 (Fla. 1968).

286. *Id.*

court of appeal which had affirmed the trial court's summary judgment for the defendant.²⁸⁷

The language of rule 1.510(e), formerly rule 1.36(e), clearly indicates that supporting and opposing affidavits on a motion for summary judgment must be made "on personal knowledge" of the affiant as to "such facts as would be admissible in evidence" in order to be of any efficacy. Thus, where an affidavit in support of plaintiff's motion for summary judgment stated no evidential facts, but only conclusions of ultimate facts or hearsay evidence not meeting any of the exceptions "such affidavit fails to meet the requirement of the rule that the affidavit 'shall show affirmatively that affiant is competent to testify' to such matters."²⁸⁸

The rule of *Williams v. Duggan*²⁸⁹ that a party may not, after giving deposition or affidavit, subsequently change his testimony to create an issue upon his opponent's motion for summary judgment was held not to extend to a situation in which a witness had signed one affidavit and then later signed another affidavit which stated facts to the contrary.²⁹⁰ The court held that "a witness is not irrevocably bound by his first written statement upon the issues of a case."²⁹¹

Where a plaintiff's affidavits do not contradict affirmative defenses raised by the opponent of the motion for summary judgment, the plaintiff is not entitled to a summary judgment even though his supporting affidavits may have made out a sufficient case based on the pleadings alone.²⁹²

Thus, in an action for foreclosure of a chattel mortgage on an automobile where an affidavit of the defendant's attorney raised an issue of fact as to the affirmative defense of payment and the plaintiff's affidavits did not eliminate the defenses set forth by the defendant, it was error to grant a summary judgment for the plaintiff.²⁹³

Summary judgments must be constructed on a granite foundation of uncontradicted material facts. It is well settled that summary judgments and decrees should be entered with caution. Even where the evidence is uncontradicted, the trial court lacks the authority to enter a summary judgment or decree if such evidence is reasonably susceptible of conflicting inferences.²⁹⁴

287. *Id.*

288. *Greer v. Workman*, 203 So.2d 665, 667 (Fla. 4th Dist. 1967).

289. 172 So.2d 844 (Fla. 1st Dist. 1965).

290. *Andrews v. Midland Nat'l Ins. Co.*, 208 So.2d 136, 137 (Fla. 3d Dist. 1968).

291. *Id.*

292. *Pompano Paint Co. v. Pompano Beach Bank & Trust Co.*, 208 So.2d 152, 153 (Fla. 4th Dist. 1968) (citations omitted).

293. *Id.* (citations omitted).

294. *Meigs v. Lear*, 210 So.2d 479, 480 (Fla. 1st Dist. 1968).

Additionally, "the foreseeable difficulty of proving certain allegations may not be used as a yardstick for granting or denying a motion for a summary judgment" ²⁹⁵ Consequently, in an action for inverse condemnation where the evidence before the court was "reasonably susceptible" of an inference that the defendants had taken the plaintiffs' property, the issue should have been determined by a jury and should not have been disposed of by summary judgment. ²⁹⁶

The standards upon which a motion for new trial and a motion for summary judgment rest are clearly distinguishable, ²⁹⁷ so that proper affirmance of an order granting a motion for a new trial "is no basis for also granting that party's motion for summary judgment." ²⁹⁸ Rule 1.510 requires a showing by the movant that there was no genuine issue as to any material fact and that he was entitled to judgment as a matter of law, while, on the other hand, a motion for new trial may rise or fall on the manifest weight of the evidence. However, the scope of the trial judge's authority to grant a motion for summary judgment is not limited to circumstances where there is no evidence to support the plaintiff's case. ²⁹⁹

XVI. MOTIONS FOR NEW TRIAL AND REHEARING

A. *New Trial*

In making a study of the record in the trial court to determine whether an order of the trial judge granting a new trial should be upset, the first district stated in *Hendricks v. Daily*:

[I]t is not sufficient for the reviewing court merely to detect the presence of 'competent, substantial evidence at the trial to support the jury's verdict.' One attacking such an order has a heavy burden to make error to appear in the exercise of the broad discretion allowed the judge who has presided at the trial, and who has had direct, personal contact with the presentation of the case as it unfolded at the trial level. ³⁰⁰

However, the same court in a different decision in that case stated:

[a]n observation by a trial judge that the verdict is contrary to the manifest weight of the evidence does not make such a finding an absolute fact; it must be found from a basis in the record. An appellate court does not review a trial judge's conscience. If the record does not support the finding, it neces-

295. *Wilson v. State Rd. Dept.*, 201 So.2d 619, 622 (Fla. 1st Dist. 1967).

296. *Id.* at 624.

297. *Glisson v. North Florida Tel. Co.*, 210 So.2d 25 (Fla. 1st Dist. 1968).

298. *Id.* at 27.

299. *Id.*

300. 208 So.2d 101, 103 (Fla. 1968). See note 301 *infra* for a history of this case. See also *Spearman Distrib. Co. v. Boyette*, 205 So.2d 690, 691 (Fla. 1st Dist. 1968).

sarily follows that an abuse of discretion is indicated on the part of the trial judge.³⁰¹

The trial court did not abuse its discretion in denying the defendant's motion for a new trial when it appeared from the record that the procedural irregularity on which the defendant based his motion occurred during the final argument of the defendant's counsel before the jury retired and counsel realized the error before the jury returned to deliver its verdict, but he did not complain until after announcement of the adverse verdict.³⁰²

In an action including a counterclaim, it was error for the trial judge to grant a motion for a new trial on the ground that claims should have been severed for trial purposes, when neither counsel requested that any issue be severed and the jury returned a verdict in favor of the counterclaimant.³⁰³

While Rule 1.270(b), Florida Rules of Civil Procedure, 30 F.S.A., gives the court the discretion to order the separate trial of any claim, nevertheless . . . the piecemeal trial of actions is not considered a matter of right, and is allowed only when it would further justice and avoid undue expense or inconvenience to the parties.³⁰⁴

On appeal of a denial by the trial judge of a motion for new trial, where one of the grounds for the motion was that the jurors had arrived at a "quotient verdict," the decision was affirmed.

In order to overturn a verdict on this ground, it is necessary to establish by clear and convincing proof that a verdict was in fact arrived at in such fashion as to be a quotient verdict. [citations omitted] The courts of this State have been reluctant to reverse a trial judge when he had granted [or denied] a new trial on this ground³⁰⁵

301. *Dailey v. Hendricks*, 213 So.2d 600 (Fla. 1st Dist. 1968). This case has been the subject of at least four appellate decisions. The First District Court of Appeal, at 200 So.2d 566 (1967), reversed a judgment for the defendants notwithstanding a verdict for plaintiffs, and the defendants then brought certiorari. The Supreme Court of Florida, at 208 So.2d 101, held that the district court of appeal had properly reversed the order granting the defendant's motion for judgment notwithstanding the verdict for the plaintiffs, but that it had improperly applied the same standards to the defendant's motion for new trial. The order of the district court awarding a new trial was quashed and the cause remanded to the district court for reconsideration. On remand, at 211 So.2d 222, the order granting a new trial to the defendants was affirmed. On petition for rehearing by the district court, 213 So.2d 600 (1968), the judgment appealed from was reversed and the cause remanded with directions to enter a judgment for the plaintiffs in accordance with the jury's verdict. Rehearing was denied by the First District Court of Appeal on Sept. 12, 1968.

302. *Omer Corp. v. Duke*, 211 So.2d 48 (Fla. 3d Dist. 1968).

303. *Manes v. Rowley*, 218 So.2d 487 (Fla. 4th Dist. 1969).

304. *Id.* at 489.

305. *Pix Shoes, Inc. v. Howarth*, 201 So.2d 80, 82 (Fla. 3d Dist. 1967). *See Note*, 22 *UNIV. OF MIAMI L. REV.* 729 (1967).

The court believed that when only one juror testified at the hearing on the motion that the jurors had used a quotient verdict method, notwithstanding a signed statement by three jurors and the jury foreman to the same effect, overruling the new trial motion did not constitute an abuse of the trial court's discretion.³⁰⁶

When the record established that an order denying a motion for a new trial was not based upon the merits but was brought about by the mistake or excusable neglect of counsel, the court had jurisdiction under rule 1.540(b) "to entertain and rule on such motion or petition for rehearing."³⁰⁷ Therefore, when the trial judge who heard the motion for a new trial originally announced his intention to grant it but subsequently denied the motion because the parties failed to provide him with a transcript of the trial proceedings as he had requested, he could thereafter entertain and rule on the motion when a transcript was subsequently furnished.³⁰⁸

Rule 1.530(b) provides that "[a] motion for new trial or for rehearing shall be served not later than 10 days after the rendition of verdict . . . or the entry of judgment. . . ." Therefore, a new trial motion which was served on the defendant 13 days after rendition of the verdict was untimely and properly stricken.³⁰⁹ "The court cannot hear and pass on a reason for a new trial which is not filed within the time specified. It should be treated as nothing more than what it actually is—an untimely motion subject to be stricken or denied."³¹⁰

An amended or successive motion for a new trial filed later than 10 days after the judgment was not untimely when it had been preceded by a timely motion for a new trial which had not yet been ruled upon by the trial court.³¹¹ Over one month after the filing of the amended motion, it was granted by the trial court; however, since the order failed to specify the grounds upon which it was based, it was fatally defective.³¹² Appellants raised this defect in a motion for rehearing of the defendant's motion for a new trial. The trial court responded by entering an amended order in an attempt to cure the defect by stating the ground upon which their earlier order was based. The trial court's order granting a new trial was reversed in spite of its corrective action and the jury's verdict was reinstated by the First District Court of

306. *Id.*

307. *De Padro v. Moore*, 215 So.2d 27, 28 (Fla. 4th Dist. 1968).

308. *Id.*

309. *Potetti v. Ben Lil, Inc.*, 213 So.2d 270 (Fla. 3d Dist. 1968). *See also Bescar Enterprises, Inc. v. Rotenberger*, 221 So.2d 801 (Fla. 4th Dist. 1969), holding that a motion for a new trial filed 14 days after rendition of the verdict was untimely and subject to be stricken or denied.

310. *Bescar Enterprises, Inc. v. Rotenberger*, 221 So.2d 801, 802 (Fla. 4th Dist. 1969). *See* FLA. R. CIV. P. 1.090(b).

311. *Adkins v. Burdeshaw*, 220 So.2d 39, 40 (Fla. 1st Dist. 1969).

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

Appeal. The court held, pursuant to the 1965 decision of the Florida Supreme Court in *Lehman v. Spencer Ladd's, Inc.*,³¹³ "that an order granting a new trial . . . which was defective because of the failure to state the grounds on which the motion was granted could not be corrected after ten days."³¹⁴ The attempted corrective action was rendered fruitless as it occurred some 6 weeks after the defective order was entered and then the lower court was without jurisdiction to correct the order granting a new trial.³¹⁵

B. Adequacy of Verdict

"A verdict for grossly inadequate damages stands on the same ground as a verdict for excessive damages, a new trial may be as readily granted in one case as the other."³¹⁶ A verdict awarding the plaintiff's father the full amount of medical expenses incurred for uncontrovertedly painful surgical procedures performed on the plaintiff, who was awarded zero dollars for his pain and suffering, was held so inconsistent as to require a new trial on the issue of the minor's damages alone.³¹⁷

In a suit for damages for negligent treatment resulting in the death of a dog and for the wrongful disposal of the dog's body, where the only evidence of the dog's value was that it was worth \$100 when alive, it was held that a verdict of \$1,000 was excessive and against the manifest weight of the evidence, the jury having decided against allowance of any punitive damages.³¹⁸ The trial court did not err, therefore, in ordering remittitur to reduce the verdict with the alternative of a new trial on damages.³¹⁹

The trial judge's authority to grant a new trial is not "controlled solely by the presence in the record of substantial, competent evidence to support the verdict. The trial judge's authority in the premises, although reviewable, is nonetheless within his broad discretion."³²⁰ The First District Court of Appeal held that it was not an abuse of this discretion to grant a new trial for the stated reason that the verdict was so inadequate that it shocked the judicial conscience of the court when the court specifically found that the jury failed to heed the instructions of the court on the issues of liability and damages, and there was unrefuted evidence of permanent injuries to the plaintiff.³²¹

313. 182 So.2d 402 (Fla. 1965).

314. *Adkins v. Burdeshaw*, 220 So.2d 39, 42 (Fla. 1st Dist. 1969).

315. *Id.*

316. *Pickel v. Rosen*, 214 So.2d 730, 731 (Fla. 3d Dist. 1968) (citations omitted).

317. *Id.*

318. *Levine v. Knowles*, 218 So.2d 217 (Fla. 3d Dist. 1969).

319. *Id.*

320. *Spearman Distrib. Co. v. Boyette*, 205 So.2d 690, 691 (Fla. 1st Dist. 1968) (citation omitted).

321. *Id.*

C. Rehearing

Rule 1.530(b) provides that motions for rehearing shall be served within 10 days after the judgment is rendered. When such motions are raised *sua sponte*, the rule³²² requires that the court enter its order for rehearing “[n]ot later than ten days after entry of judgment or within the time of ruling on a timely motion for a rehearing or a new trial made by a party”³²³ Thus, it was error for the trial court to amend and clarify its order as requested in the motion for clarification, which was filed 32 days after entry of the original order since the motion was the equivalent of a motion for rehearing, subject to the time limitations set out in rule 1.530.³²⁴

Transmission by mail of the appellate court’s opinion to appellant’s counsel was not considered a ground for extending the time allowed to apply for rehearing by 3 days.³²⁵ The appellant’s petition having been applied for more than 15 days after filing of the decision was correctly struck as untimely.³²⁶

Within 10 days of the entry of an order dismissing his second amended complaint with prejudice, the appellant filed a motion for rehearing. The motion was denied, and entry of the order thereon was made several months later. Appellant filed a notice of appeal within 30 days after the denial of his motion for rehearing, and the court, in denying the defendant’s motion to dismiss, held that the earlier motion for rehearing was proper and had tolled the time for appeal.³²⁷ It was proper under rule 1.530 to move to rehear an order dismissing a complaint with prejudice

because it is directed to an otherwise appealable final judgment heard without a jury within the terms of the rule. This being a judgment, a motion filed within ten (10) days of its entry is proper and tolls the time for appeal. This was the procedure under the former equity rules, and is therefore encompassed by Rule 1.530 of our modern rules of procedure in which law and equity have been merged.³²⁸

XVII. RELIEF FROM JUDGMENTS, DECREES, OR ORDERS

A. *In General*

Rule 1.540(b)(1) which would allow the court to relieve a party from a final decree for mistake, envisioned “the type of honest and inadvertent mistake made in the ordinary course of litigation, usually by

322. FLA. R. CIV. P. 1.530(d).

323. *Id.*

324. Kirby v. Speight, 217 So.2d 871 (Fla. 1st Dist. 1969).

325. *In re Rogers*, 205 So.2d 535 (Fla. 4th Dist. 1967).

326. *Id.*

327. Snyder v. Gulf Am. Corp., 224 So.2d 405 (Fla. 2d Dist. 1969).

328. *Id.* at 406 (citation omitted).

the Court itself, and is generally for the purpose of 'setting the record straight.'"³²⁹ A "miscalculated reliance" by the wife upon her husband's representations inducing her to consent to a voluntary dismissal of divorce proceedings was not considered to be the type of mistake contemplated by the rule.³³⁰ The court nonetheless affirmed the Chancellor's order setting aside the dismissal, holding that since the order appealed had not become final, it was "still under the 'inherent control' of the Court to prevent injustice."³³¹

Rule 1.540 also permits relief from a final judgment, decree, or order on the basis of "newly discovered evidence."³³² "Forgotten evidence newly remembered" would not support an order granting relief pursuant to this provision because the rule contemplates such evidence as "could not have been timely discovered by due diligence."³³³

A third basis for relief under rule 1.540 is "excusable neglect." "Errors and omissions of counsel in the conduct of pending litigation may be 'excusable' when considered in the light of generally accepted practices and amenities with which he is familiar, and upon which he may have had a right to rely."³³⁴ When the record is silent as to the prevailing practice and procedure relied upon by attorneys in the applicable judicial circuit, the question of whether counsel's neglect was "excusable" as envisioned under rule 1.540 "is more properly addressed to the sound discretion of the trial judge."³³⁵

A party seeking "relief from a judgment pursuant to Rule 1.540(b), F.R.C.P., by reason of mistake, inadvertence, surprise or excusable neglect on the part of counsel, [must] . . . show that the facts and circumstances justifying said relief to be applicable to *all* counsel for said party who have appeared in the case."³³⁶ The appellant who failed to establish, by either pleading, affidavit, or other proof, the reason for his cocounsel's failure to file a required amendment of his complaint within the time allowed was denied relief from the judgment of dismissal because the evidence presented on his motion was insufficient under rule 1.540(b).³³⁷

In order to preserve the right to appellate review of the weight and sufficiency of the evidence, the defendant "must make either a timely motion for directed verdict, or a motion for a new trial on the ground that the verdict of the jury is contrary to the manifest weight of the

329. *Danner v. Danner*, 206 So.2d 650, 654 (Fla. 2d Dist. 1968).

330. *Id.*

331. *Id.*

332. FLA. R. Civ. P. 1.540.

333. *Kash 'N Karry Wholesale Supermarkets, Inc. v. Garcia*, 221 So.2d 786, 788 (Fla. 2d Dist. 1969).

334. *Id.* at 789 (footnote omitted).

335. *Id.*

336. *Rogers v. First Nat'l Bank*, 223 So.2d 365, 367 (Fla. 4th Dist. 1969) (emphasis supplied).

337. *Id.*

evidence, and properly assign as error the denial of such motion"³³⁸

In order to question the existence of a valid satisfaction of a prior judgment, satisfaction having been entered on the final judgment, relief should be sought under rule 1.540, and not by collateral attack in a separate action. "If the entry of satisfaction was for any reason improper plaintiffs should have sought amendment or vacation."³³⁹

The Third District Court of Appeal reversed an order taxing costs, holding that payment and satisfaction of a judgment precluded the subsequent entry of an order taxing costs.³⁴⁰

In *City of Hallandale v. Chatlos*,³⁴¹ the appellant, a municipal corporation, had taken an interlocutory and plenary appeal to the fourth district from a cost judgment entered after a voluntary dismissal in a condemnation proceeding. The appellee moved to dismiss the appeals contending a cost judgment was reviewable only by petition under Florida Appellate Rule 3.16(c), which provides that

[i]f any party shall feel aggrieved by any judgment for costs, said judgment shall be reviewable in the appellate court upon petition, provided the petition is filed within 20 days after the entry of said judgment.

Although the third district had rendered several decisions in accordance with appellee's contention, the fourth district chose the view espoused by the second district in *Craft v. Clarembaux*³⁴² "that the proper method of securing review of a cost judgment entered following a voluntary dismissal of a cause of action is by writ of certiorari."³⁴³ Thus, the fourth district dismissed the interlocutory appeal pursuant to Florida Statutes section 59.45, and treated the plenary appeal as a petition for a writ of certiorari. The statute provides that in appeals improvidently taken, "where the remedy might have been more properly sought by certiorari, this alone shall not be a ground for dismissal; but the notice of appeal and the record thereon shall be regarded and acted on as a petition for certiorari duly presented to the Supreme Court."³⁴⁴ On conflict certiorari to the Supreme Court of Florida, the decision of the fourth district denying the motion to dismiss the plenary appeal was approved, and the *Craft* case was held to be correct.³⁴⁵ All contrary decisions were declared overruled.³⁴⁶ The court specifically refrained from

338. *Winnemore v. Morton*, 214 So.2d 509 (Fla. 4th Dist. 1968) (citations omitted).

339. *Weaver v. Stone*, 212 So.2d 80, 82 (Fla. 4th Dist. 1968).

340. *Dock & Marine Constr. Corp. v. Parrino*, 211 So.2d 57 (Fla. 3d Dist. 1968).

341. 220 So.2d 353 (Fla. 1968).

342. 162 So.2d 325 (Fla. 2d Dist. 1964).

343. *City of Hallandale v. Chatlos*, 211 So.2d 53, 54 (Fla. 4th Dist. 1968), *rev'd*, *Chatlos v. City of Hallandale*, 220 So.2d 353 (Fla. 1968).

344. *Id.*

345. *Chatlos v. City of Hallandale*, 220 So.2d 353, 354 (Fla. 1968).

346. *Id.* at 354 n.4.

passing on the question of whether the interlocutory appeal had been properly dismissed.³⁴⁷

Liberality should be applied in setting aside, upon motion, a decree pro confesso before it becomes absolute, but such an order should not be disturbed on appeal after the final decree unless there is a showing of gross abuse of discretion.³⁴⁸ No abuse existed when the trial court set aside a decree pro confesso prior to the entry of a final decree for the failure of the defendant to plead within the time required and allowed him to file an answer.³⁴⁹

B. *Interlocutory Appeals*

Notwithstanding the fact that the distinction between actions at law and in equity has been abolished, Florida Appellate Rule 4.2(a) provides that interlocutory orders in actions at law may be appealed only when such interlocutory orders relate to venue or jurisdiction over the person. Thus, an order dismissing a count based on usury, which sounds in law, "falls outside the class of interlocutory orders which may be reviewable . . . in conformance with Florida Appellate Rule 4.2, subd. a."³⁵⁰

Interlocutory appeals from orders granting partial summary judgment on liability in civil cases may only be allowed when the orders completely disposed of all issues of liability.³⁵¹

Judgments determining the right to an accounting are interlocutory orders, and a trial court has jurisdiction to amend or modify such orders at any time prior to the entry of final judgment.³⁵² Accordingly, a plaintiff is entitled to proceed with two admittedly proper accountings while contesting a ruling on the third, when the three accountings relate to separate transactions in different named and numbered accounts.³⁵³

Upon appeal of the trial court's refusal to grant a motion to set aside an order of sale, sale of property, and other relief entered after a final decree of partition, the Second District Court of Appeal held that it had the discretion to treat the appeal as being interlocutory under rule 4.2 of the Florida Appellate Rules.³⁵⁴

An order reinstating a cause of action which had been dismissed with prejudice was not reviewable as being a final judgment or order granting a new trial, but was treated as an attempted interlocutory appeal.³⁵⁵

347. *Id.*

348. *Ross v. City of Miami*, 205 So.2d 545 (Fla. 3d Dist. 1968).

349. *Id.*

350. *Ford v. West Florida Enterprises, Inc.*, 210 So.2d 723 (Fla. 1st Dist. 1968).

351. *WKAT, Inc. v. Rubin*, 221 So.2d 21 (Fla. 3d Dist. 1969).

352. *A-1 Truck Rentals, Inc. v. Vilberg*, 222 So.2d 442 (Fla. 3d Dist. 1969).

353. *Carberry v. Foley*, 206 So.2d 425 (Fla. 2d Dist. 1968).

354. *Rivers v. Ellman*, 206 So.2d 456 (Fla. 2d Dist. 1968).

355. *Harrison v. Anclote Manor Foundation*, 205 So.2d 541 (Fla. 2d Dist. 1967).

[A] trial court after issuing an interlocutory order retains jurisdiction over a cause and has power to do all things necessary to enable it to reach the final judgment. It follows that a trial court has jurisdiction to amend or modify an interlocutory order any time before it enters final judgment.³⁵⁶

Rule provisions relating to the time for a motion for new trial or rehearing or a motion to alter or amend a judgment are inapplicable to interlocutory orders. An appeal from an interlocutory order is not subject to dismissal for failure to appeal from a prior interlocutory order.³⁵⁷

XVIII. DECLARATORY JUDGMENTS

The test of sufficiency of a complaint in . . . a [declaratory judgment] proceeding is not whether the complaint shows that the plaintiff will succeed in getting a declaration of rights in accordance with his theory and contention, but whether he is entitled to a declaration of rights at all. Thus, sustaining of the adequacy of the complaint only lays the foundation for the case to be heard upon its merits and does not connote a determination as to who should prevail.³⁵⁸

The party seeking declaratory relief must show doubt or uncertainty as to whether some right, status, immunity, power, or privilege exists, and that he "has an actual, practical, and present need for a declaration."³⁵⁹

The controversy must be bona fide, "justiciable in the sense that it flows out of some definite and concrete assertion of right, and there should be involved the legal or equitable relations of parties having adverse interests with respect to which the declaration is sought."³⁶⁰ When a racing association sought a determination of the plaintiff's rights as to racing dates allocated to horse tracks in the state and sought to have declared unconstitutional a statute providing preferential treatment for the horse track having produced the largest amount of tax revenue during the proceeding year of its operation, the plaintiff was held to have had a "justiciable, cognizable, bona fide and direct interest in the result sought by the action"³⁶¹ The rights and privileges of the association under the statute were considered to be in jeopardy and the interest of the parties antagonistic.³⁶²

356. *A-1 Truck Rentals, Inc. v. Vilberg*, 222 So.2d 442, 444 (Fla. 3d Dist. 1969) (footnote omitted). See FLA. R. CIV. P. 1.530(b) and (g), in regard to provisions dealing with final judgments.

357. *A-1 Truck Rentals, Inc. v. Vilberg*, 222 So.2d 442 (Fla. 3d Dist. 1969).

358. *Hialeah Race Course, Inc. v. Gulfstream Park Racing Ass'n, Inc.*, 210 So.2d 750, 752 (Fla. 4th Dist. 1968) (citation omitted).

359. *Id.*

360. *Id.* at 752-53 (citations omitted).

361. *Id.* at 753.

362. *Id.*

In an action for declaratory relief seeking to declare a rule of the Florida State Board of Dispensing Opticians imposing a limitation on the place of optical dispensing to be illegal and unconstitutional, plaintiffs were held to be without sufficient legal status to obtain the relief sought.³⁶³ Plaintiffs were nonresidents of the state, and neither was licensed in Florida as an optometrist, optician, or otherwise. Their only basis for having a right to the relief sought was a conditional and ambiguous offer made by the plaintiffs to set up and operate an optical department in a Miami department store. The court believed that plaintiffs were really seeking "a premature advisory opinion" and that the declaratory judgment statute was not designed to provide relief in these circumstances.³⁶⁴

XIX. EXTRAORDINARY WRITS

A. Injunctions

A temporary injunction should not be granted without requiring bond, and the trial court was correct in vacating the injunction when it had been granted without setting bond.³⁶⁵

The general function of a temporary injunction is to preserve the status quo until full relief can be granted following a final hearing. . . .

. . . . In order to support the granting of a temporary injunction it is also necessary for plaintiff to demonstrate irreparable injury; injury which cannot be redressed in a court of law. Mere loss of business because of a competitor will not suffice.³⁶⁶

Accordingly, in an action by a bus service to prevent operation of a competitor over a certain portion of the state's turnpike, where the defendant had operated the business for three years, "the effect of the injunction was to disturb rather than preserve the status quo"³⁶⁷ and, absent a showing of irreparable damage, it was reversed.

Issuance of a temporary injunction was held to be clearly erroneous when the enjoined person was never made a party to the suit and an attempt on her own motion to become a party was denied. The requisite bond was never posted, nor did the enjoined party have notice or an opportunity to be heard.³⁶⁸ The issuance of the injunction was also at variance with the principle

363. Florida State Bd. of Dispensing Opticians v. Bayne, 204 So.2d 34 (Fla. 2d Dist. 1967).

364. *Id.* at 38.

365. Rich v. Rich, 214 So.2d 777 (Fla. 4th Dist. 1968); FLA. R. CIV. P. 1.610.

366. Tamiami Trail Tours, Inc. v. Greyhound Lines, Inc., 212 So.2d 365, 366 (Fla. 4th Dist. 1968) (footnotes omitted).

367. *Id.* at 366.

368. Levy v. Gourmet Masters, Inc., 214 So.2d 82 (Fla. 3d Dist. 1968). See also FLA. R. CIV. P. 1.610.

that courts of equity are without jurisdiction to enjoin execution upon a judgment obtained at law simply upon the ground that such judgment was irregular and erroneous. A judgment which appears on its face to be regular can not be collaterally attacked absent a showing of fraud or lack of jurisdiction, either of the subject matter or over the person of the defendant.³⁶⁹

B. *Certiorari*

It has long been the law of the State of Florida that common law certiorari is a discretionary writ and will not ordinarily be issued by an appellate court to review interlocutory orders in a suit at law. Such a writ will only be issued in exceptional cases limited to instances where the lower court acts without or in excess of its jurisdiction; where the interlocutory order does not conform to the essential requirements of law and may reasonably cause material injury throughout the subsequent proceedings for which the remedy by appeal will be inadequate.³⁷⁰

A petition for common-law certiorari to review an interlocutory order granting the respondent's motion to produce income tax returns when the petitioner claimed loss of wages as an element of damages was denied. The court held that if the order was in error, it was not so flagrant as to be a departure from the essential requirements of law, nor was it a substantial, fundamental error.³⁷¹

When the error alleged in a petition for writ of certiorari is procedural, the petition must demonstrate that it was a fundamental error.³⁷² "Non-fundamental errors of procedure cannot be the subject of a proceeding for writ of certiorari even though the error might be reversible on appeal."³⁷³

Common-law certiorari was held to be unavailable to review interlocutory orders granting the plaintiff's motion to amend his complaint because the petitioners failed to show that the orders "constitute[d] a departure from 'essential requirements of law' or that petitioners [were] . . . without an adequate remedy by appeal should they suffer an adverse final judgment."³⁷⁴

The writ of certiorari "is essential, even indispensable, to the complete and effective exercise of the prescribed jurisdiction of [the Supreme] Court to decide all appeals from final judgments passing on the validity of a statute."³⁷⁵

369. *Levy v. Gourmet Masters, Inc.*, 214 So.2d 82, 85 (Fla. 3d Dist. 1968).

370. *Gollnsneider v. Stein*, 214 So.2d 628, 629 (Fla. 2d Dist. 1968) (citations omitted).

371. *Id.*

372. *Gulf Cities Gas Corp. v. Cihak*, 201 So.2d 250, 251 (Fla. 2d Dist. 1967).

373. *Id.* (citations omitted).

374. *Marlowe v. Ferreira*, 211 So.2d 228, 230 (Fla. 2d Dist. 1968).

375. *Couse v. Canal Authority*, 209 So.2d 865, 867 (Fla. 1968).

C. Prohibition

“[P]rohibition will not issue from a superior court to an inferior court or tribunal unless the judgments and orders of the latter are reviewable by the former.”³⁷⁶ Thus, when there was a matter before the Florida Industrial Commission in respect to which a writ of prohibition sought “was not one reviewable by the Circuit Court, the latter was without jurisdiction to issue the peremptory writ.”³⁷⁷

D. Mandamus and Quo Warranto

Petitioners sought an alternative writ of mandamus against the Secretary of State and various county canvassing boards to compel the boards to recount ballots cast in a primary election. The supreme court held that it did not have jurisdiction under section 4 of article V of the Florida Constitution since the section

“proscribes the jurisdiction of this Court in original mandamus proceedings to those cases” when a *state* officer, board, commission, or other agency authorized to represent the public generally or a member of such board, commission or other agency is named as respondent.³⁷⁸

The court quoted from its decision in *State ex rel. Winton v. Town of Davie*,³⁷⁹ holding that the constitutional provision limits the power of the court to issue writs of quo warranto to those situations “‘when a *state* officer, or a *state* commission, or other *state* agency is the respondent.’”³⁸⁰ Having found no case since *Winton* which abrogated that case’s construction of the provision with regard to an original proceeding in mandamus, the court declared that it had no alternative but to dismiss the petition.³⁸¹

376. *Johnston v. State*, 213 So.2d 435, 438 (Fla. 1st Dist. 1968).

377. *Id.* at 439.

378. *Petit v. Adams*, 211 So.2d 565, 568 (Fla. 1968) (emphasis added).

379. 127 So.2d 671, 673 (Fla. 1961).

380. *Petit v. Adams*, 211 So.2d 565, 568 (Fla. 1968).

381. *Id.* The original petition had only named one County Canvassing Board as respondent, and it was amended to include as respondents, the Canvassing Boards of several other counties.