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Civil Procedure

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CIVIL PROCEDURE*

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* The decisions surveyed in this article appear in volumes 282 through 305 of the Southern Reporter, Second Series. In addition, the survey covers laws enacted by the 1974 and 1975 sessions of the Florida legislature.

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I. COURTS, JUDGES AND ATTORNEYS

A. *Jurisdiction of the Courts*

During the survey period a jurisdictional question arose in Florida which is similar to an unresolved controversy in the federal circuit courts. These federal courts are divided on whether a district court has jurisdiction to entertain a rule 60(b) motion to vacate a judgment[1] without leave from the appellate court after the appellate court has finished with the case. Neither rule 60(b) nor its Florida counterpart, rule 1.540(b), specifically requires that the trial court obtain appellate court leave.

In Florida, this matter was ruled upon by the District Court of Appeal, First District, in a decision which conflicts with holdings in other districts.[2] The First District held that a trial court may entertain a timely motion for relief from judgment pursuant to Florida Rule of Civil Procedure 1.540(b) even after the judgment has been affirmed on appeal.

In *Avant v. Waites*,[3] the court opined that by implication rule

1. *See* section XIV *infra* for a discussion of the grounds for a court's vacating a judgment.

2. In State v. Anderson, 157 So. 2d 140 (Fla. 3d Dist. 1963), the court held that a trial court must first obtain leave from the appellate court. *See* Lesperance v. Lesperance, 257 So. 2d 66 (Fla. 3d Dist. 1972), holding the same way but which stated that "*even if the trial court had the power* . . . no error has been demonstrated in his denial of the relief sought." (emphasis added) *Id.* at 68. *See also* Fairfax Broadcasting Co. v. Florida Airmotive, Inc., 252 So. 2d 854 (Fla. 4th Dist. 1971); Rinker Materials Corp. v. Holloway Materials Corp., 175 So. 2d 564 (Fla. 2d Dist. 1965).

3. 295 So. 2d 362 (Fla. 1st Dist. 1974).

1.540(b) dispensed with the need to obtain leave from the appellate court. Two reasons were cited in support of its holding. Prior to the adoption of rule 1.540(b), a trial court had to petition the appellate court for a writ of coram nobis before it could proceed; now, the rule has abolished this procedure.[4] Also, section (a) of rule 1.540 specifically requires leave of the appellate court in certain instances before a judgment can be set aside—section (b) does not contain any such condition.[5]

The court further noted that a trial court is in a more favorable position to conduct a hearing, receive evidence and pass upon the issues relating to a determination of whether to grant the motion.[6]

> The useless and delaying formalism of prior permission of the appellate court accomplishes nothing, delays speedy administration of justice and tends to clog the dockets of the appellate courts and the trial courts as well.[7]

In contrast to the decision in *Avant*, the District Court of Appeal, Third District, has held that a judgment of a trial court as affirmed by a district court becomes the judgment of the district court; thus, this judgment cannot later be considered for modification by the trial court without the permission of the district court. In *Jefferson National Bank v. Metropolitan Dade County*,[8] the trial court had ordered the defendants to remove all fill placed beyond the bulkhead line from a public waterway. The Third District affirmed this decision. The defendants procrastinated, and after two extensions for compliance with the order had been granted, they moved in the trial court to modify the judgment. The plaintiff then moved to cite the defendant for contempt and the motion was granted. However, the Third District reversed the contempt finding for lack of a finding of willful disobedience of the original order. The Third District further held that the trial court should have regarded the defendant's motion for modification of the judgment as null and void as that court was without jurisdiction.[9] The case was remanded for a rehearing on the contempt proceeding.

The exercise of formally obtaining leave from the appellate

4. *Id.* at 363.
5. *Id.* at 365.
6. *Id.* at 364-65.
7. *Id.* at 365.
8. 271 So. 2d 207 (Fla. 3d Dist. 1972).
9. 285 So. 2d 445 (Fla. 3d Dist. 1973); *see* Walker v. Young, 93 Fla. 29, 111 So. 516 (1927); Fairfax Broadcasting Co. v. Florida Airmotive, Inc., 252 So. 2d 854 (Fla. 4th Dist. 1971).

court, as illustrated by *Jefferson National*, merely creates unnecessary complexity in the judicial process. Both *Avant* and *Jefferson National* involved simple affirmances of issues decided by the trial courts. Thus, by opening the judgments, the trial courts were not acting in contravention of a mandate of the appellate courts, but were simply rehearing matters which they had originally resolved. Even had there been substantial appellate input, leading authorities suggest that the trial court is in a better position to determine whether some new matter warrants the vacating of a judgment.[10] The better view, therefore, appears to be that appellate leave should not be required.

A jurisdictional problem arose in *Valverde v. Klosters Rederi A/S*[11] involving the applicability of the Jones Act[12] to an action brought by a Spanish national seaman against a Norwegian corporation. Plaintiff's employment contract was signed in Spain and provided that his rights were to be governed by Norwegian law. In addition, the accident occurred on the high seas off the coast of the Bahamas and the plaintiff's only contact with the United States was that the ship docked here. The Third District, applying the rationale of *Corella v. McCormick Shipping Corp.*,[13] affirmed the trial

10. 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2873, at 266-70 (1973).

> The requirement of appellate leave thus read into Rule 60 introduces into an attempted simplification of the practice for reopening judgments a useless and delaying formalism. An appellate court may not know whether the requirements for reopening a case under the rule are met until there has been a full record developed. Such a record can only be made in the trial court. Of course the district judge is not free to flout the decision of the appellate court so far as it goes, but he should be free to consider whether circumstances not previously known to either court compel a new trial. If the trial judge goes too far, and grants, in effect, a rehearing of the appellate court's decision, the normal processes of review still are open. To require in every case the formality of application to the appellate court, which has no facilities for examining the merits of the claim for a new trial, to guard against the possibility that a rare district judge may reopen a judgment that should remain closed, seems of dubious utility.

Id. at 269-70.

11. 294 So. 2d 101 (Fla. 3d Dist. 1974).

12. 46 U.S.C. § 688 (1970).

13. 101 So. 2d 903 (Fla. 3d Dist. 1958).

The *Corella* court noted that the confusion created as to the application of the Jones Act was occasioned by the opening words of the Act referring to "any seaman." Quoting Lauriteen v. Larsen, 345 U.S. 571, 592 (1953), the Third District found, "No justification for interpreting the Jones Act to intervene between foreigners and their own law because of acts on a foreign ship not in our waters." 101 So. 2d at 905.

Thus, recognizing the need in maritime jurisprudence to maintain workable relations with foreign nations in deference to their laws, the court in *Corella* found the Jones Act inapplica-

court's dismissal for lack of jurisdiction over the subject matter under the Jones Act.

The legislature amended the jurisdiction of circuit courts in landlord-tenant possession cases. Suits involving the right of possession of real property have been removed from circuit court jurisdiction and have been vested in the exclusive jurisdiction of the county courts except for actions involving title and boundaries of real property.[14]

Under the Florida Mental Health Act, judicial review of an order of a hearing examiner regarding continued hospitalization may be conducted by "the circuit court of the county in which the hearing is held *or by the court of original jurisdiction.*"[15]

The Florida Administrative Procedure Act[16] provides for judicial review of final administrative agency action in the district court of appeal except where the supreme court may review actions as provided by law,[17] or where the circuit courts retain their jurisdiction when provided by statute in lieu of an administrative hearing, or when rendering declaratory judgments[18] pursuant to the Florida Declaratory Judgment Act.[19]

An administrative agency may seek enforcement of its action by filing a petition in the circuit court where the subject matter of the enforcement is located.[20] Yet if a review petition is pending in the district court of appeal at the same time an enforcement petition is pending in the circuit court, the district court may consolidate the actions.[21]

Having repealed the certiorari jurisdiction of the district courts of appeal over administrative agencies by the new Florida APA, the legislature also provided that judicial review of an order of suspension or revocation of a driver's license shall be vested in the certiorari jurisdiction of the circuit court where the person resides.[22]

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ble where the only factor upon which the Act could apply was the signing of the contract in the United States.

14. FLA. STAT. §§ 26.012(2)(g), 34.011(2) (Supp. 1974).

15. FLA. STAT. § 394.457(6)(d) (Supp. 1974) (emphasis added).

16. For a detailed analysis of the interaction between the courts and administrative agencies, see Levinson, *The Florida Administrative Procedure Act: 1974 Revision and 1975 Amendments*, 29 U. MIAMI L.REV. 617, sections II, M & N (1975).

17. FLA. STAT. § 120.68 (Supp. 1974), *as amended*, Fla. Laws 1975 ch. 75-191.

18. FLA. STAT. § 120.73, added by Fla. Laws 1975, ch. 75-191, § 11.

19. FLA. STAT. § 86.011 (1973).

20. FLA. STAT. § 120.69(a) (Supp. 1974).

21. FLA. STAT. § 120.69(4)(b) (Supp. 1974).

22. FLA. STAT. § 322.27(6) (Supp. 1974).

B. *Court Costs*

The District Court of Appeal, Second District, has adopted a rule for the assessment of costs in comparative negligence cases. In *Spicuglia v. Green*,[23] the Second District, recognizing the general rule that costs follow the judgment,[24] indicated that this principle would be followed in comparative negligence cases where defendant has asserted no counterclaim. However, where a counterclaim for damages is filed

> the better rule is that regardless of who ultimately ends up with the one judgment in the case (again we discount the case wherein one or the other is one hundred percent at fault) each party should recover his full costs from the other.[25]

Section (d) of rule 1.420 specifically provides for costs in actions dismissed under the rule. In *Stein v. Bayfront Medical Center, Inc.*,[26] the plaintiff had sued the defendant in a prior action for malpractice. The plaintiff took a voluntary dismissal and costs were taxed against her for $534 in accordance with rule 1.420(d). Without paying the costs previously taxed, the plaintiff then sued again on the same claim. Under these circumstances the rule provides that the court "shall make such order for the payment of costs of the claim previously dismissed as it may deem proper" and the court shall stay the present proceeding until the order is complied with. Although an order must be entered for costs, the court has discretion regarding its terms. Thus, the Second District held that the trial court correctly applied the rule by ordering that the plaintiff's second action be stayed until the costs of the first action were paid, even though the plaintiff claimed she was indigent. Plaintiff had failed to show that the order exceeded "the trial court's jurisdiction or constituted a departure from the essential requirements of law."[27]

In assessing costs under rule 1.420(d), attorney's fees should not be included within court costs.[28]

Legal aid programs may now receive funding from service charges in excess of those fixed by statute which "may be imposed by the governing authority of the county" for filing an action.[29]

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23. 302 So. 2d 772 (Fla. 2d Dist. 1974).
24. *See* Foley v. Peckham, 256 So. 2d 65 (Fla. 3d Dist. 1971).
25. 302 So. 2d at 773.
26. 287 So. 2d 401 (Fla. 2d Dist. 1974).
27. *Id.* at 402.
28. Coffman v. Jordan, 305 So. 2d 227 (Fla. 4th Dist. 1975).
29. FLA. STAT. §§ 28.241, 34.041 (Supp. 1974).

C. *Judges*

Rule 1.035(b) allows the judges of the circuit court, by a majority vote, to issue a general order setting forth the fees charged by court reporters. The order shall be uniform throughout the jurisdiction of the court and shall be recorded. In *Reedus v. Friedman*,[30] the petitioner sought an order of mandamus to compel a court reporter to transcribe testimony at fifty cents a page as designated by Florida Statutes section 29.03 (1973). The reporter demanded one dollar and fifty cents per page as voted by a majority of the circuit court judges at a meeting. The District Court of Appeal, Third District, held that since no order had been filed or recorded as required by rule 1.035, the statute would govern in this case; the judges' taking a vote was insufficient to satisfy the rule.

The Supreme Court of Florida has adopted rule 1.025, which provides for a conference of county court judges to better the judicial system and its practices through conferences and institutes.[31]

In *David & Dash, Inc. v. Capitol Fixture & Construction Corp.*,[32] the defendant filed a motion under Florida Statutes section 38.10 (1973) to disqualify the trial judge for bias. The challenged judge held the motion insufficient as a matter of law. The District Court of Appeal, Third District, agreed because no grounds for disqualification were stated in the motion and the supporting affidavits did not meet the tests of *Hahn v. Frederick*.[33]

"In each county where there is no resident circuit judge and the county court judge has been a member of the bar for at least 5 years and is qualified to be a circuit judge," the chief justice of the Supreme Court upon the recommendation of the chief judge of the circuit may designate the county court judge to preside over circuit court cases temporarily.[34]

D. *Attorneys*

Rule 1.030(d) provides that a settlement agreement must be signed by the party or his attorney before it can be enforced against the party.[35] Another provision of this rule was strictly interpreted in

30. 287 So. 2d 355 (Fla. 3d Dist. 1974), *cert. denied*, 297 So. 2d 28 (1974).
31. *In re* Conference of County Court Judges, 290 So. 2d 52 (Fla. 1973).
32. 292 So. 2d 381 (Fla. 3d Dist. 1974).
33. 66 So. 2d 823 (Fla. 1953). The requirements are:
(1) the affidavit shall state facts and reasons for the belief of bias,
(2) the facts stated shall be supported in substance.
34. FLA. STAT. § 26.57 (Supp. 1974).
35. Alaimo v. Tirone, 297 So. 2d 584 (Fla. 3d Dist. 1974).

Arnold v. Arnold[36] as to parol agreements between counsel. The trial court had entered a final order of dissolution of marriage following conferences with counsel for both parties as to their agreement on the financial terms of the order. The wife's motion to vacate, which alleged that there had been no agreement by counsel or the parties, was denied by the trial judge. The Third District reversed the final order since it was not supported by the record. Rule 1.030(d) required that parol agreements between counsel either be made part of the record or transcribed as part of the proceedings. The record did not show evidence of a writing nor incorporation *of the actual agreement* into the proceedings transcribed. Mere reference to it in the court's order was insufficient.

II. JURISDICTION OVER THE PERSON

A. *In General*

A court must have jurisdiction over the person of the defendant, as well as subject matter jurisdiction, in order to proceed. When the court does not acquire this personal jurisdiction, any judgment rendered as to the defendant is void, and he should be dismissed as a party to the litigation.[37]

In *Bussey v. Legislative Auditing Committee*,[38] the appellant moved to dismiss a complaint, alleging that the circuit court lacked jurisdiction over his person due to insufficiency of process. The appellant had failed to appear before a legislative committee, which had served him personally with a subpoena. The committee then filed a complaint, pursuant to Florida Statutes section 11.143(4)(b) (1973), which provided that "the court shall take jurisdiction of the witness and the subject matter of said complaint," and requested the court to direct the appellant to comply with the subpoena. The court issued an order to show cause[39] which, along with the complaint, was served on appellant's attorney. The First District held that even though the statute conferred subject matter jurisdiction

36. 292 So. 2d 384 (Fla. 3d Dist. 1974).

37. Kingswood Builders, Inc. v. Wall Plumbing & Heating Co., 287 So. 2d 352 (Fla. 4th Dist. 1974); *see* Crouse-Hinds Co. v. Capellia, 302 So. 2d 800 (Fla. 4th Dist. 1974), discussed in section VII, c *infra*.

38. 298 So. 2d 219 (Fla. 1st Dist. 1974).

39. The court's order directed appellant

> to show cause why the Court should not direct the witnesses to appear before the Committee and why, upon failure to appear pursuant to the Court's Order, he should not be adjudged in direct and criminal contempt of court.

Id. at 220.

to the court, "the court has no jurisdiction to proceed to judgment against a defendant until proper notice is given to that defendant of the action or proceedings against him."[40]

Service on the attorney alone at the institution of a suit was not enough to confer jurisdiction, although it would have been were the cause pending.[41] Here, personal service on the appellant himself was required and under the facts of this case neither the service of the subpoena nor the statute could confer such prior jurisdiction.

B. *Personal Service*

"[I]t is the public policy of Florida that its long arm statute reach as far as the United States Constitution permits."[42] *Babson Brothers Co. v. Allison*[43] and *Heritage Corp. v. Apartment Investors, Inc.*[44] dealt with the constitutional problem of whether there were sufficient minimum contacts with the forum state both to invoke service under the long arm statutes and to satisfy due process.

Babson Brothers involved Florida Statutes section 48.181 (1973).[45] An Illinois corporation denied that it ever had a dealer in Florida; however, the conflicting evidence showed that a representative of the company delivered to the plaintiff, in Florida, a notice of cancellation of the dealership from which this action arose. Also, a representative had worked in Florida for over three months with the dealer and made frequent visits in the state thereafter. In addition, books and records were kept in the Florida office for the Illinois corporation. The First District held that these combined activities constituted "doing business" within the meaning of section 48.181 and upheld jurisdiction.

In *Heritage*, Florida brokers sued a Kansas corporation, a Florida resident, and his Kansas partner for a commission. The defendant partners had actively sought a loan in Florida and the plaintiffs obtained a loan commitment for them. The defendants refused the loan and the plaintiffs instituted suit and served process. The trial court granted the defendants' motion to dismiss as to the Kansas corporation and the Kansas partner but not as to the Florida

40. *Id.* at 221.

41. *Id.* at 221, *citing* Reizen v. Fla. Nat'l Bank, 237 So. 2d 30 (Fla. 1st Dist. 1970).

42. Babson Bros. Co. v. Allison, 298 So. 2d 450, 453 (Fla. 1st Dist. 1974).

43. *Id.*

44. 285 So. 2d 629 (Fla. 3d Dist. 1973).

45. In pertinent part Florida Statutes section 48.181(3) (1973) provides that one who "sells . . . by any means . . . through brokers . . . to any person, firm or corporation in this state shall be conclusively presumed" to be doing business.

partner. On appeal the District Court of Appeal, Third District, held service valid as to all defendants. Under Florida Statutes section 48.081(5) (1973) service on the Florida resident as an officer of the corporation was sufficient service on the Kansas corporation. Under Florida Statutes section 48.061(1) (1973) service on the Florida partner was valid as to the Kansas partner. The court further noted that even if the above statutes did not apply, the defendants were "doing business" within the purview of Florida Statutes section 48.181 (1973).

However, in *Erie Insurance Exchange v. Hoffman*,[46] a foreign insurer not licensed to do business in Florida could not be served pursuant to Florida Statutes section 48.181 (1973) since its only contact with Florida was that its policy holder traveled into the state.

Another long arm statute, Florida Statutes section 48.193 (1973),[47] effective July 1, 1973, has been held to be prospective in application only. In *Marshall v. Johnson*,[48] the First District held that the statute cannot be applied to obtain service of process in an action in which the cause arose prior to the effective date of the statute and where there was no prior effective method of service obtainable.[49]

The burden of proof to sustain service of process under the long arm statutes is on the party seeking to invoke the court's jurisdiction.[50] Where neither party offered testimony or documentary evidence relating to service of process, mere reliance on the bare allegations of sufficient contacts in the complaint did not meet this requisite standard of proof.[51] Likewise, where the plaintiff did not offer further evidence to support the allegations of its complaint in order to rebut the defendant's affidavit to a motion to dismiss, the burden was not met.[52]

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46. 302 So. 2d 445 (Fla. 3d Dist. 1974).

47. The statute replaces Florida Statutes section 48.182 (1971) and increases the number of situations where longarm jurisdiction applies.

48. 301 So. 2d 134 (Fla. 1st Dist. 1974).

49. *Accord*, Barton v. Keyes Co., 305 So. 2d 269 (Fla. 3d Dist. 1974); *see* Gordon v. John Deere Co., 264 So. 2d 419 (Fla. 1972).

50. *See* Zirin v. Charles Pfizer & Co., 128 So. 2d 594 (Fla. 1961).

51. Nichols v. Seabreeze Prop., Inc., 302 So. 2d 139 (Fla. 3d Dist. 1974) (proof of service under FLA. STAT. §§ 48.161, .181 (1973)).

52. Atlas Aircraft Corp. v. Buckingham, 302 So. 2d 163 (Fla. 4th Dist. 1974) (proof of service under FLA. STAT. § 48.181 (1973)); *see* Pan Americana Tel., Inc. v. Latin Media Consult., Corp., 300 So. 2d 730 (Fla. 3d Dist. 1974).

C. *Substituted Service*

In order to obtain substituted service of process, two requirements must be met. There must be service on an in-state agent and a copy of the summons and complaint must be mailed to the out-of-state defendant. The defendant's return receipt must then be filed. In *Crews v. Rholfing*,[53] the plaintiff attempted substituted service of process on the defendant. He served the Secretary of State of Florida as allowed by Florida Statutes section 48.161 (1973) for traffic accidents arising in Florida. A copy of the summons and complaint was then mailed to an address in Albany, Georgia where the defendant had been working. The letter was returned marked "Moved, Left no Address."[54] Prior to this, personal service had been attempted in Dade County, but it was returned undelivered. The District Court of Appeal, Third District, held that the requirements for substituted service were not met. From the facts it appeared that the defendant was not concealing his whereabouts, nor did he reject or refuse to claim the certified letter sent to him.[55]

In 1975 the Florida service of process statute was amended. Substituted service may be made by leaving the original service and any accompanying papers with a "person of the family *who is 15 years of age* or older."[56] Accomplishing service of process in an action for possession of residential premises by leaving a copy of the summons at a conspicuous place on the property is justified when neither the tenant nor a person of the tenant's family *15* years of age or older can be found at the tenant's usual place of residence.[57]

D. *Constructive Service*

One of the most common applications of constructive service is in dissolution of marriage proceedings.[58] However, a prerequisite to service by publication in such cases is the filing of a sworn statement that a diligent search and inquiry was made to ascertain the defendant's residence.[59] In order for a party to meet this standard, it is required that he employ his available knowledge to ascertain the location of the party sought and in so doing make a diligent and

53. 285 So. 2d 433 (Fla. 3d Dist. 1973).
54. *See* Green v. Nashner, 216 So. 2d 492 (Fla. 3d Dist. 1968).
55. 285 So. 2d at 434.
56. Fla. Laws 1975, 75-34, *amending* FLA. STAT. § 48.031 (1973) (emphasis added).
57. Fla. Laws 1975, 75-34, *amending* FLA. STAT. § 48.183 (1973) (emphasis added).
58. *See* FLA. STAT. § 49.011 (1973).
59. FLA. STAT. §§ 49.031, .041, .051, .061, .071 (1973).

conscious effort to obtain information which would result in personal service.[60] In *Canzoniero v. Canzoniero*,[61] the court found material and substantial departures from the requirements. A husband who had been separated from his wife ten years earlier sought a dissolution of marriage. He filed the required sworn statement and specified the address he and his wife had occupied ten years ago as the wife's residence. He made no inquiry as to the current whereabouts of his wife, although he easily could have contacted his children for this information. He clearly did not employ his available knowledge to get the correct address of his wife. Thus, service had not been perfected under the constructive service statute to give the court jurisdiction and the judgment of dissolution was reversed.

Under recent amendments to Florida's constructive service of process statute, in proceedings for dissolution or annulment of marriage, in proceedings for adoption, and where personal service of process is not required by the Florida statutes or constitution or the United States Constitution, "the clerk of the court shall post notices of [the] action . . . when such notices are required of persons authorized to proceed as insolvents and poverty stricken persons" unless the county has established a court docket fund[62] to pay for "the cost of the publication of the fact of the filing of any civil case in the Circuit Court" in a designated newspaper.[63]

When service may be accomplished by publication in a newspaper, the newspaper

> at the time of such publication shall have been in existence for 1 year [rather than having been continuously published at least once each week] and shall have been entered as second-class mail matter at a post office in the county where published . . . [unless] there shall be no newspaper in existence [in that county] which shall have been published for the length of time above prescribed.[64]

III. VENUE

A. *In General*

Although a plaintiff initially elects venue, the defendant may

60. Canzoniero v. Canzoniero, 305 So. 2d 801 (Fla. 4th Dist. 1975).
61. *Id.*
62. Fla. Laws 1975, 75-205, *amending* FLA. STAT. § 49.10(1)(b) (Supp. 1974).
63. Fla. Laws 1975, 75-206, *creating* FLA. STAT. § 50.071 (1975).
64. FLA. STAT. § 50.031 (Supp. 1974).

plead and prove that it is improper. He may do so by motion[65] or he may assert it in his answer.[66] However, if a party fails to raise the issue, it is waived.[67] In *Fixel v. Clevenger*,[68] the plaintiff elected venue in Dade County. The defendant filed his answer but did not object to the venue. Subsequently, the defendant moved for a transfer of venue on the grounds that both the defendant and plaintiff resided in Broward County and the events complained of occurred there. The trial court held that the defendant had waived his right in accord with the above stated principles and refused to allow a change of venue for the convenience of the parties pursuant to Florida Statutes section 47.122 (1973). The District Court of Appeal, Third District, affirmed as to waiver and noted that section 47.122 is discretionary; although the trial court could have granted the defendant's motion, failure to do so was no abuse of discretion.

Florida Statutes section 47.011 (1973) provides that, as against a single defendant residing in one county, an action shall be brought where he resides, or "where the cause of action accrued." *Stanfield v. DeStefano*[69] involved a claim for breach of warranty and necessitated a determination of "where the cause of action accrued." The plaintiff entered into a contract with the defendant in Polk County for the sale of a horse. He then brought an action in that county alleging breach of an express oral warranty that the horse was sound of "wind and limb." The defendant, alleging improper venue, moved to abate or transfer to Pasco County where he resided and where the horse was delivered to the plaintiff. This motion was denied in the trial court on the ground that the cause of action accrued in Polk County where the contract was consummated. By analogy to the Uniform Commercial Code,[70] the District Court of Appeal, Second District, reversed. The cause of action accrued where the default occurred; in the action for breach of warranty the default occurred where the goods were delivered—Pasco County.[71]

In an action against the Florida Public Service Commission, the Third District has held that proper venue lies in the place of official residence—Leon County—which has been established by

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

66. *Id.*

67. FLA. R. CIV. P. 1.140(h)(1).

68. 285 So. 2d 687 (Fla. 3d Dist. 1973).

69. 300 So. 2d 712 (Fla. 2d Dist. 1974).

70. UNIFORM COMMERCIAL CODE § 2-725(2) provides in pertinent part: "A cause of action accrues when the breach occurs . . . . A breach of warranty occurs when tender of delivery is made . . . ." This also appears in FLA. STAT. § 672.725(2) (1973).

71. *But see* Blanton v. Cudahy Packing Co., 154 Fla. 872, 19 So. 2d 313 (1944).

the enacting statutes as where the defendant agency resides.[72] Since the action was originally filed in the wrong district, the court transferred the action pursuant to rule 1.060(b).

B. *Transfer or Dismissal of Actions*

Florida Statutes section 47.122 (1973) allows a change of venue for the convenience of the parties "to any other court of record in which [the action] might have been brought." As noted in the prior section, it is a general rule that actions against state agencies, boards and other governmental bodies lie only in the district of their official residence.[73]

The question in *Ringling Brothers-Barnum & Bailey Combined Shows, Inc. v. State*,[74] was whether a state agency can create a district "where the action might have been brought" by waiving the venue privilege. In *Ringling*, the plaintiff brought suit in Leon County where the defendant government bodies resided. The defendant then moved for and was granted a change of venue pursuant to section 47.122 to Sarasota County. The First District was confronted with the issue of whether Sarasota County was one where the action might have been brought. The plaintiff contended it was not on the ground that Florida law limited venue to the defendant's official residence. The First District disagreed, noting that the requirement of instituting an action where the state agency resides is one "of historic policy for the convenience of the people and the public agency, [more] than it is a fixed rule of law."[75] Since the venue privilege may be waived,[76] Sarasota qualified as a county where the action might have been brought.[77]

A motion to dismiss alleging forum nonconveniens is a proper challenge to venue.[78] Where the defendant demonstrated strongly

72. State Pub. Serv. Comm. v. Terrence Indus., Inc., 294 So. 2d 343 (Fla. 3d Dist. 1974); *see* Florida Real Estate Comm. v. State *ex rel.* Bodner, 75 So. 2d 290 (Fla. 1954).

73. *See* cases cited at note 72 *supra*.

74. 295 So. 2d 314 (Fla. 1st Dist. 1974).

75. *Id.* at 321.

76. *Id.* at 318-19.

77. The venue in Leon County was waived by the State's motion to transfer to another district. It should be noted that Florida Statutes section 47.122 (1973) is almost identical to the federal statute, 28 U.S.C. section 1404(a) (1975). The federal statutory provision "might have been brought," however, has been interpreted by the United States Supreme Court to allow a transfer only to a district in which the action originally could have been brought, regardless of any waiver by the defendant. Hoffman v. Blaski, 363 U.S. 335 (1960). Thus, the decision of the First District in *Ringling* appears to be contrary to the weight of most authorities. *See* C. WRIGHT, LAW OF FEDERAL COURTS 344, at 167-69 (2d ed. 1970).

78. Flota Mercante Gran Centro-Americana v. Stena Shipping AB, 294 So. 2d 98 (Fla. 3d Dist. 1974).

the inconvenience of having Florida as the forum for the trial in an action between two foreign corporations not authorized to do business in Florida, the Third District found error in denying defendant's motion to dismiss on the ground of forum non conveniens.[79] The contract in dispute was made in Guatemala and was to be performed in Sweden. None of the causes of action arose in Florida. In addition, none of the parties and witnesses were Florida residents.

Although Florida Statutes section 47.122 (1973) gives a court the power to transfer an action and rule 1.270(b) gives the power to order a separate trial of any claim or issue, the Third District has held that these provisions do not include the power to transfer one or more claims or issues to a court in another jurisdiction.[80] It was reversible error to transfer a portion of the case. The separate claims provision of rule 1.270(b) contemplates that such claims will be tried in the court where they are pending.

The Supreme Court of Florida has held that transfers pursuant to section 47.122 cannot be made in contravention of Florida Statutes section 47.163 (1973) which provides that "[n]o change of venue shall be made to any county where either of the parties reside, except by their consent."[81] The plaintiff, a Second District Court of Appeal judge, filed suit in Dade County against the defendant corporation for injuries inflicted in an auto accident by the defendant's agent. The defendant moved, pursuant to section 47.122, for a change of venue to Hillsborough County where the accident occurred, the witnesses resided, the investigatory officers were located and the records and vehicles were located. The trial court denied the motion but the Third District reversed, holding that section 47.122 controlled section 47.163 despite the plaintiff's contention that the case should be tried outside Hillsborough County. "[P]laintiff . . . wished to avoid all thoughts of indelicacy or [the] appearance of impropriety"[82] because Hillsborough County is within the Second District where he is an appellate judge. On certiorari review, the supreme court reversed. In somewhat confusing terminology the court stated that section 47.122, a discretionary general statute, "is presumed to have made an exception to the prior specific, mandatory statute [47.163] . . . ."[83] While this language implies that the

79. *Id.*

80. Zuckerman-Vernon Corp. v. Zelikoff, 303 So. 2d 391 (Fla. 3d Dist. 1974).

81. Mann v. Goodyear Tire & Rubber Co., 300 So. 2d 666 (Fla. 1974), *rev'g* 285 So. 2d 681 (Fla. 3d Dist. 1973).

82. 285 So. 2d at 682.

83. 300 So. 2d at 668.

Third District opinion was correct, the court's holding indicates otherwise. Thus, in Florida it appears that a motion for a transfer of venue under the forum nonconveniens statute is subject to the privilege of a party to refuse transfer to a county where he resides.

IV. THE INITIAL PHASES OF AN ACTION

A. *Setting Forth a Cause of Action*

1. COMPLAINT

An essential function of the complaint is to acquaint the defendant with the plaintiff's charge. Although a plaintiff fails to allege all the elements of a cause of action, this function can still be performed. In *Rio v. Minton*,[84] the plaintiff alleged in his complaint that the defendant allowed the decedent to consume alcoholic beverages on his premises and then allowed the decedent to drive his car; that the defendant should have known that the decedent's faculties would be impaired in his inebriated condition; and that the decedent lost control of the car and died in the resulting crash. The trial court dismissed the action against the defendant since no breach of a legal obligation on the part of the defendant had been alleged. The Second District reversed the trial court on this point and held that this short and plain statement of facts was sufficient to show that the pleader was entitled to relief and to enable the defendant to construct an answer intelligently.

Another pleading requirement liberally construed by the courts is that a complaint must state a cause of action.[85] Where a count in a complaint does not state a specific cause of action but does state sufficient facts upon which to base some cause of action, a motion to dismiss should not be granted.[86]

While a complaint must state facts, it is not necessary nor even desirable that it contain evidence in support of its allegations.[87] In one case, an insurance policy covered treatment in a "hospital." The District Court of Appeal, First District, held that it was not necessary for the plaintiffs to have supporting evidence in their complaint that the institution, where their son was being treated, was a "hospital" within the meaning of the policy.[88]

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84. 291 So. 2d 214 (Fla. 2d Dist. 1974).

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

86. Padgett v. First Fed. Sav. & Loan Assoc., 297 So. 2d 101 (Fla. 4th Dist. 1974). Sorrells v. Mullins, 303 So. 2d 385 (Fla. 3d Dist. 1974); *see* Nelson v. Growers Ford Tractor Co., 282 So. 2d 664 (Fla. 4th Dist. 1973). *But cf.* Wells v. Brown, 303 So. 2d 395 (Fla. 2d Dist. 1974).

87. Dawson v. Blue Cross Ass'n, 293 So. 2d 90, 92 (Fla. 1st Dist. 1974).

88. *Id.*

In a recent case,[89] the Supreme Court of Florida used the following principles to test the sufficiency of a complaint: (1) the court must assume the facts alleged in the complaint as true;[90] (2) affirmative defenses should not be anticipated; and (3) assuming the facts alleged can be proved, query whether the plaintiff is entitled to relief.

Rule 1.900[91] sets out the manner of using suggested forms to comply with the Florida Rules of Civil Procedure. Rule 1.900(b) provides that the form of complaints as set out in the rules can be varied to meet the facts of a particular case so long as the substance of the matter is expressed. Although form 1.939 (conversion) provides for insertion of the monetary value of the converted property in the complaint, failure to assert a value need not result in dismissal.[92]

2. COUNTERCLAIMS, CROSSCLAIMS AND THIRD PARTY COMPLAINTS

In order to avoid a multiplicity of law suits, rule 1.170(f) provides that "[w]hen a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect or when justice requires, he may set up the counterclaim by amendment with leave of the court." The District Court of Appeal, Third District, held in *Romish v. Albo*[93] that the trial court abused its discretion when it refused the defendant leave to amend his answer under this rule. Counsel for the defendant learned for the first time during discovery that his client had incurred sufficient medical expenses under the no-fault insurance statute to afford him a right of action in an automobile negligence case. The court, stating that the counterclaim was "compulsory," ordered leave to amend as allowed by the rule. However, it explicitly left open the question whether the counterclaim could be asserted in a later suit if not plead in the present suit.[94]

Another provision of rule 1.170 is that if the counterclaim is for an amount exceeding the jurisdictional amount of the court in

89. Hammonds v. Buckeye Cellulose Corp., 285 So. 2d 7 (Fla. 1973).

90. *See also* Smyler v. Katzer, 289 So. 2d 477 (Fla. 3d Dist. 1974).

91. Rule 1.900 was approved by the Supreme Court of Florida in *In re* Florida Rules of Civil Procedure, 211 So. 2d 174 (Fla. 1968).

92. Thrasher v. First Nat'l Bank, 288 So. 2d 288 (Fla. 3d Dist. 1974). Some matters however must be pleaded with specificity and particularity. An action for rescission of a contract on grounds of mistake is such a case. Arvida Corp. v. Nu-way Plumbing, Inc., 295 So. 2d 118 (Fla. 4th Dist. 1974); *see* FLA. R. CIV. P. 1.120(b).

93. 291 So. 2d 24 (Fla. 3d Dist. 1974).

94. *See* FLA. R. CIV. P. 1.170(a).

which the action is pending, the action should be transferred to a court of proper jurisdiction.[95] Once the action is transferred, the transferee court has full jurisdiction over the entire claim and it should not transfer the cause back to the transferor court even though subsequent events indicate that it would not have had jurisdiction but for the transfer.[96]

A third party complaint differs from a counterclaim; in the former, service is made by the defendant on a person not a party to the original action who may be liable to the defendant or the plaintiff as third party plaintiff for all or part of the original plaintiff's claim against the defendant.[97] It is not necessary, however, that the third party plaintiff be able to recover against the third party defendant based solely on the allegations of the original plaintiff's complaint. Thus, in *Seaboard Coast Line R.R. v. Brown*,[98] Brown, injured when a boxcar door fell on him, sued Seaboard, his employer, under the Federal Employer's Liability Act[99] for failure to provide a safe place to work. Seaboard then filed a third party complaint against Cargill, a freight loader, alleging that it was Cargill's negligent loading of the boxcar which caused Brown's injury. The trial court dismissed the third party complaint for failure to state a cause of action. This dismissal was based on the fact that the allegations in Brown's complaint foreclosed Seaboard from recovery against Cargill "as a matter of law." The Second District reversed. Clearly, rule 1.180 "allows the original defendant [as third party plaintiff] to place his own characterization on the events."[100]

Among its provisions, rule 1.180, dealing with third party practice, provides that a third party defendant may assert against the original plaintiff any defenses which the third party plaintiff has to the plaintiff's claim. The third party defendant may also assert any claim arising out of the transaction or occurrence which is the subject matter of the plaintiff's claim against the third party plaintiff. In *Watson v. G & C Ford Co.*,[101] a verdict was directed for the defendant, and the defendant's third party complaint against a

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

96. *See* Watt v. Bill Branch Chevrolet, Inc., 292 So. 2d 56 (Fla. 2d Dist. 1974).

97. *See* FLA. R. CIV. P. 1.180.

98. 297 So. 2d 843 (Fla. 2d Dist. 1974).

99. 48 U.S.C. §§ 51 *et seq.* (1970).

100. 297 So. 2d at 844. It should be noted that the court misquoted the rule in its decision. The court stated the rule as: "The third party defendant may also assert any claim against the third party defendant . . . ." The rule reads: "The third party defendant may also assert any claim against the plaintiff . . . ." However, this error should not affect the holding.

101. 293 So. 2d 101 (Fla. 1st Dist. 1974).

third party defendant was dismissed with prejudice. On appeal the directed verdict was reversed and on remand the original plaintiff prevailed. The defendant did not appeal the dismissal of its third party complaint. As a consequence of the verdict on remand, the trial court vacated its earlier directed verdict. However, it also vacated its dismissal of the third party complaint and reinstated it. The third party defendants objected. On appeal the First District held that it would be inequitable to allow the third party complaint to be reinstated because the third party defendants would be deprived of the above mentioned procedural advantages of rule 1.180.

3. CLASS ACTIONS

Rule 1.220 simply provides that "[w]hen the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole." However, the courts have adopted rules of interpretation which make it increasingly difficult to maintain a class action. *Sams v. Winn-Dixie Stores, Inc.*[102] involved the requirement that a "community of interest" must exist among the class action plaintiffs. The claims, issues and defenses must be common to all members of the class.[103] *Sams* was a class action by former employees, permanently replaced after a strike, to collect sums allegedly due under a profit sharing plan. The District Court of Appeal, Third District, found that there was not a community of interest because the benefits of the plans to the employees differed according to age, length of employment, contribution to the plan, elections under the plan and the mode of payment. Thus each employee had an independent interest and therefore "cooperative enterprise" was lacking.[104] Likewise, this principle was applied in *Costin v. Hargraves*,[105] a declaratory judgment action brought by owners of property fronted by the beach to settle the status of the beach property. Each owner had acquired his property under separate contracts, and at least four different theo-

102. 294 So. 2d 337 (Fla. 3d Dist. 1974).

103. Costin v. Hargraves, 283 So. 2d 375 (Fla. 1st Dist. 1973).

104. *See* Randall v. General Acc. Fire & Life Assur. Corp., 296 So. 2d 61 (Fla. 1974) (a party under an insurance contract has an independent interest and therefore a suit by a number of persons under the same policy is foreclosed as a class action).

105. 283 So. 2d 375 (Fla. 1st Dist. 1973). It is worthy of note that, in this case, each plaintiff depended upon different facts to support his claim as well as different theories of action. However, the court's emphasis on the different defenses of the several defendants should not have been important to its decision because rule 1.220 only refers to a common interest among plaintiffs.

ries of relief were relied upon by different plaintiffs. Each plaintiff's interest extended only to that covered by his respective contract. Accordingly, the plaintiffs failed to demonstrate the necessary community of interest and the court held that the suit could not be maintained as a class action.

The District Court of Appeal, Third District, in *Southern Bell Telephone & Telegraph Co. v. Wilson*,[106] refused to allow a group of telephone customers to bring a class action. In *Southern Bell*, phone service of an undetermined number of customers was cut off for a period greater than 24 hours. Plaintiffs representing the class were customers who experienced this loss of service and demanded an adjustment in their monthly bill.[107] The class was designated as all those customers of Southern Bell who through no fault of their own experienced this loss of service and did not receive a rebate. While the class clearly was "so numerous as to make it impracticable to bring them all before the court"[108] it was also speculative.[109] A factual determination would have to be made whether a customer had caused his own loss of service or whether he even experienced such a loss.

The court also found the action to be lacking in two other respects. There was no showing of a common or general interest among the class members as to obtaining relief[110] and plaintiffs did not show that they represented the interests of the class.[111]

Although a class action may not be maintainable because the asserted class is too indefinite or community of interest is lacking, the Supreme Court of Florida has held that dismissal of the class action does not justify dismissal of the complaint for failure to state an individual cause of action. In *Harrell v. Hess Oil and Chemical Corp.*,[112] riparian land owners on a creek as well as all persons using the creek were the designated class. The action alleged that the

106. 305 So. 2d 302 (Fla. 3d Dist. 1975).

107. The plaintiffs sought to enforce regulations, governing this public utility, which provided for compensation to customers for loss of service for periods in excess of 24 hours. In view of this regulation, the court stated: "If this is so, then the appellees seek to perform a public service, *i.e.*, the enforcement of lawful rules and regulations for the benefit of the public." *Id.* at 303-04.

108. FLA. R. CIV. P. 1.220.

109. 305 So. 2d at 305.

110. The court noted that the interests among commercial, residential, urban and rural customers may have been divergent.

111. The plaintiffs did not allege that they represented a cross-section of the involved parties (*i.e.*, businessmen, companies, rural customers and city customers). Their claim of membership in the class was not enough. 305 So. 2d at 305.

112. 287 So. 2d 291 (Fla. 1973).

defendant's actions caused pollution of the creek to the detriment of the whole class. The court dismissed the class action but upheld the complaint as to the named plaintiffs. Since rule 1.250 provides that "misjoinder of parties is not a ground for dismissal of an action" the sufficiency of the complaint can be tested by treating the allegations relating solely to the class action "as having been stricken from the complaint by ordering dismissal of the complaint insofar as a class action was asserted. . . ."[113] Even though plaintiffs failed to amend the complaint to eliminate class action allegations, the question as to the individual claims must be considered.[114]

Another rather obvious requirement is that as a representative of the class, one must be a member of it. Thus, where a plaintiff employee voluntarily removed himself from the class by leaving his job, a dismissal of the complaint for failure to state a claim upon which relief can be granted is proper.[115]

One case during this survey period did meet all the requirements necessary to maintain a class action. It was a taxpayer suit for a refund. In *State ex rel. Devlin v. Dickinson*,[116] the members of the class were tenant-stockholders in their respective cooperative apartment associations. All of them had achieved this status prior to October 1, 1970, and had paid a statutory documentary stamp tax,[117] effective only after October 1, 1970, on their cooperative shares. They also had applied for a refund to the Department of Revenue as provided by statute.[118] The First District found that the claims, issues and defenses were common to all the members of the class.[119] There was a community of interest because the tax was uniformly applied; the character of relief (a refund) was available to all, and all members occupied the same position with respect to their respective properties. The class was sufficiently definite because it was limited to those who had applied for a rebate. Finally, the representatives were a good cross-section because the claims of the members were uniform and their interests the same.

Furthermore, class action status has been legislatively created for condominium associations on behalf of unit owners with refer-

113. *Id.* at 295.
114. *Id.*; *accord*, Evans v. St. Regis Paper Co., 287 So. 2d 296 (Fla. 1974).
115. Jackson v. Alterman Trans. Lines, Inc., 301 So. 2d 795 (Fla. 3d Dist. 1974).
116. 305 So. 2d 848 (Fla. 1st Dist. 1975).
117. FLA. STAT. § 201.02 (1973).
118. FLA. STAT. § 215.26 (1973).
119. *See* Costin v. Hargraves, 283 So. 2d 375 (Fla. 1st Dist. 1973).

ence to matters of common interest, when its board of administration is not controlled by the developer.[120]

4. AMENDING THE PLEADINGS

Rule 1.190 provides for leave to amend at any time and "leave shall be freely given when justice so requires." It appears from a recent case that leave to amend may be waived by conduct and once waived, leave may not be granted subsequently by the trial court. In *St. Joe Paper Co. v. Connell*,[121] the plaintiffs brought an action to quiet title under a theory of adverse possession without color of title.[122] During the course of the trial, the judge suggested to the plaintiffs that they amend their complaint to include a claim of adverse possession under color of title because it did not appear that they were going to prove their original complaint. Plaintiffs refused this offer. Subsequently, the court found for the defendant, but gave the plaintiffs leave to file an amended complaint within 15 days alleging a claim under color of title. From this order the defendant appealed.

The District Court of Appeal, First District, held that the trial court erred in granting leave to amend after the plaintiffs had rejected this opportunity during the trial. The First District noted that this was not a case where leave was sought after trial to conform the pleading to the evidence.[123] While it appears that this case demonstrates waiver of leave to amend, it is also apparent from the court's language that it thought justice would not be served by granting leave to amend.

> [P]laintiffs, ignoring admonitions and suggestions of the trial judge . . . *made a binding election* to proceed without amendment . . . . [I]t would be most unfair to force the defendants to bear the hazards, harassment and expenses of a second trial. A second bite at the apple may not be granted . . . .[124]

In another recent case, the appellate court held that leave to amend an answer to a writ of garnishment by a motion *ore tenus*

120. FLA. STAT. § 711.12(2) (Supp. 1974).

121. 299 So. 2d 92 (Fla. 1st Dist. 1974).

122. FLA. STAT. § 95.18 (1973). In Florida, this action is different from one for adverse possession under color of title. *See* FLA. STAT. § 95.16 (1973).

123. *See* FLA. R. CIV. P. 1.190(b). *But see* Ranger Ins. Co. v. Airvac, Inc., 302 So. 2d 801 (Fla. 4th Dist. 1974) (Amended pleading allowed where there was some evidence in the record that the issue sought to be pleaded by the parties had been tried by consent).

124. 299 So. 2d at 93 (emphasis added).

should have been granted in the interest of justice, although the court noted that the garnishee's attempt to obtain leave through "amendment by reservation" did not comply with rule 1.190. In *Florida Power & Light Co. v. Crabtree Construction Co.*,[125] the plaintiff brought an action against the defendant to collect a debt. A writ of garnishment was served on Florida Power, which was indebted to the defendant for certain uncompleted construction contracts. This debt was unliquidated. The garnishee (Florida Power) answered the writ, admitting the debt to the defendant and reserving the right to amend its answer when the debt was liquidated as the amount could have been less than that due the plaintiff by the defendant. The plaintiff obtained a default against the defendant and moved for final judgment against the garnishee. In the meantime, the defendant had breached its contract with the garnishee. Consequently, the garnishee owed the defendant nothing. The garnishee attempted to amend its answer, first through its reservation without leave, then by motion *ore tenus*, stipulating that it was no longer indebted to the defendant. The trial court refused to allow the amendment. On appeal, the trial judge was reversed. The Fourth District cited the liberal spirit of the rules stating that the trial judge abused his discretion as the amendment would not prejudice the plaintiff[126] who had not made substantial trial preparation. Furthermore, the failure to allow it grossly prejudiced the amending party who lost a valuable defense. The Fourth District thus held that although the rules do not provide for the reservation of the right to amend, the garnishee's motion *ore tenus* to amend its answer should have been granted.

Since the major purpose of liberally allowing amendments to pleadings is to get to the merits of a case, leave to amend should be allowed even after a summary judgment has been granted.[127] However, it is not an abuse of discretion to deny leave to amend during a trial where such amendment seeks to change completely the basis of the action.[128] Nor is it an abuse to deny a post-trial motion to amend to conform to the proof at trial where the relief sought in the proposed amended complaint was "wholly inconsistent with and

125. 283 So. 2d 570 (Fla. 4th Dist. 1973).

126. *Accord*, Imperial Bonita Estates, Inc. v. Minster, 283 So. 2d 138 (Fla. 2d Dist. 1973).

127. Gold Coast Crane Serv., Inc. v. Waltier, 257 So. 2d 249 (Fla. 1971); Mount Sinai Hosp., Inc. v. Cordis Corp., 285 So. 2d 645 (Fla. 3d Dist. 1973); *see* Town of Micanopy v. Connell, 304 So. 2d 478 (Fla. 1st Dist. 1974).

128. Santi v. Zack Co., 287 So. 2d 127 (Fla. 3d Dist. 1973).

unrelated to the allegations of the Complaint . . . upon which the issues were framed for trial."[129]

Not all amendments to the pleadings require leave of court. A pleading may be amended once as a matter of right before a responsive pleading, if required, is served.[130] However, if the matters to be added to the complaint occurred subsequent to the date of the pleading sought to be amended, such matters are considered a supplemental pleading[131] and can only be added with leave of court. Thus, in *Florida Power & Light Co. v. System Council U-4, International Brotherhood of Electrical Workers*,[132] the plaintiff filed an amended complaint without leave of court. The original complaint had alleged 104 union violations of a temporary restraining order. The amended complaint alleged 43 additional violations occurring subsequent to the filing of the original complaint and sought additional damages for civil contempt. Since these allegations fell within the category of new facts and events, and not matters which existed at the time of the initial filing but were omitted for some reason, they could only be brought before the court by a supplemental complaint submitted with leave of court. Thus, the amended complaint was a nullity.

B. *Defenses*

A complaint acquaints the defendant with the charge against him,[133] and likewise, the defendant, by answer, indicates the course he plans to pursue in the litigation. In the federal courts further pleadings are not required as both parties have demonstrated their general positions. Thus, where a defendant's answer asserts an affirmative defense, no reply by the plaintiff is required under federal rule 7(a) either to deny or avoid it.[134] However, in Florida, rule 1.100 requires a responsive pleading to an affirmative defense if "the opposing party seeks to avoid it."[135] Whether rule 1.100 requires a responsive pleading to effect a *denial* of an asserted affirmative defense or whether denial is automatically implied when a responsive pleading is not forthcoming is an important question in light

129. Kelly v. Kelly, 296 So. 2d 559, 560 (Fla. 3d Dist. 1974).

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

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

132. 307 So. 2d 189 (Fla. 4th Dist. 1975).

133. *See* section IV, A, 1 *supra*.

134. While no reply is required, the court may under FED. R. CIV. P. 7(a) order one. Also, a reply is required where the answer contains a counterclaim.

135. FLA. R. CIV. P. 1.100(a).

of rule 1.100(e) which provides that "[a]verments in a pleading to which a responsive pleading is required, . . . are admitted when not denied . . . ." The question has been resolved by the Supreme Court of Florida in the case of *Moore Meats, Inc. v. Strawn*.[136]

The confusion surrounding rule 1.100 which prompted the court's decision in *Moore Meats* arose from its earlier holding in *Gulf Life Insurance Co. v. Ferguson*.[137] In *Gulf Life*, the court reversed a trial court decision which had held that a reply to an affirmative defense need not be filed. On its face the supreme court's reversal implies that a responsive pleading is required either to *deny or avoid* an affirmative defense. But the case does not stand for that proposition and is therefore misleading without a consideration of the underlying facts. The affirmative defense asserted in *Gulf Life* by the defendant was fraud.[138] The plaintiff failed to file a reply, but at trial, sought to avoid the fraud defense by asserting waiver and estoppel by the defendant. In essence, the plaintiff was not denying the fraud defense, but seeking to avoid it by asserting a new matter as to why it should not be given effect.[139] Since the scope of the trial is governed by the pleadings, the supreme court correctly held, under the predecessor of rule 1.100,[140] that the plaintiff could not put into issue waiver and estoppel of the alleged defense of fraud without just having raised these new matters *by way of avoidance* in a responsive pleading. In *Moore Meats*, after discussing the factual situation in *Gulf Life*, the supreme court held that an affirmative defense is implicitly deemed *denied* by rule 1.100 if no responsive pleading to it is filed. But if new matter is sought to be introduced to *avoid* the defense, then a reply is required.[141]

A recent Third District case has defined explicitly what affirmative defenses are contemplated by rule 1.100.[142] The court determined that a mere denial in an answer is not an affirmative defense. Only matters which assert a new point previously outside the pleadings (such as fraud) are affirmative defenses, as well as those listed in rule 1.110(d).[143]

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136. 313 So. 2d 660 (Fla. 1975).

137. 59 So. 2d 371 (Fla. 1952).

138. The effect of this was a simple denial of the asserted facts. 313 So. 2d at 661.

139. *Id.*

140. 30 F.S.A. Rules of Common Law, rule 9d. In pertinent part the rule provides: "In pleading to a preceding pleading, a party shall set forth affirmatively . . . any other matter constituting an avoidance . . . ."

141. *Accord*, Trawick, *To Reply or Not to Reply*, 47 Fla. B. J. 702 (1973).

142. American Salvage & Jobbing Co. v. Salomon, 295 So. 2d 710 (Fla. 3d Dist. 1974).

143. Based on its rule, the court held that where the defendant's denial did not raise a

As a general rule a statute of limitations[144] is an affirmative defense which must be asserted as such in an answer or it is waived.[145] However, if an affirmative defense appears on the face of a prior pleading although not in the answer, it may, nonetheless, be asserted as grounds for a motion to dismiss.[146] In *Timmins v. Firestone*,[147] the plaintiff on December 15, 1971, filed a complaint alleging conspiracy by the defendant to libel him. The alleged acts of libel appeared in a newspaper during July of 1966—the time when the cause of action arose. The defense of statute of limitations, although not raised explicitly by the defendant, was evident from the face of plaintiff's complaint. Since the statute of limitations for conspiracy is four years, defendant's motion to dismiss for failure to state a cause of action was correctly granted.[148]

Another exception to the rule of waiver for failing to assert an affirmative defense in an answer exists if the parties try the issue by express or implied consent.[149] However, in *Langlois v. Oriole Land & Development Corp.*[150] the Fourth District held that this exception was not met where the defendant failed to plead in the answer the statute of frauds and for the first time mentioned this affirmative defense during argument on a motion for directed verdict at the close of plaintiff's case, and then again asserted the statute during argument on a motion for a directed verdict after the close of all the evidence. Since the issue had not been tried, the Fourth District found that "the defendant had waived the affirmative defense of the Statute of Frauds and the [lower] court erred in permitting a post-trial amendment to include such affirmative defense."[151]

In some situations there is a fine line of distinction between affirmative defenses and counterclaims. To avoid penalizing a party for improper designation, rule 1.110(d) provides that "[w]hen a

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new issue, it was error for the trial court to hold that the plaintiff admitted under rule 1.110(e) the defendant's "affirmative defense." *Id.*

144. The statutes of limitations provisions in the Florida Statutes were amended in FLA. STAT. ch. 95 *et seq.* (Supp. 1974), *as amended*, Fla. Laws 1975, ch. 75-734.

145. *See* FLA. R. CIV. P. 1.110(d).

146. Timmins v. Firestone, 283 So. 2d 63 (Fla. 4th Dist. 1973).

147. *Id.*

148. *Accord*, Cohodas v. Russell, 289 So. 2d 55 (Fla. 2d Dist. 1974).

149. *See* Trans World Machine Corp. v. Threlkeld, 201 So. 2d 614 (Fla. 3d Dist. 1967), *cert. denied*, 210 So. 2d 227 (Fla. 1968).

150. 283 So. 2d 143 (Fla. 4th Dist. 1973); *see* Seaboard Coast Line R.R. v. Magnuson, 288 So. 2d 302 (Fla. 4th Dist. 1974) (where the defendant attempted to get the pretrial order amended to assert the affirmative defense of assumption of the risk).

151. 283 So. 2d at 145.

party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, on terms if justice so requires, shall treat the pleadings as if there had been a proper designation." In *Moore Meats, Inc. v. Alterman Transport, Inc.*,[152] a unique factual situation was presented for the application of this rule. A trucking company sought to recover the full amount of freight charges due it, but the defendant designated as an affirmative defense an accord and satisfaction because the transported goods were damaged. Applicable federal law governing freight rate structures does not permit agreements lowering rates even where goods are damaged. Thus, in order to recover, the defendant should have alleged a compulsory counterclaim for damages. The Third District could have treated the defense as a counterclaim, but instead affirmed the trial court decision awarding the plaintiff recovery on its rate claim but allowing the defendant the opportunity to raise its claim for damages in an independent suit. While this procedure is clearly permissible under rule 1.170(f) concerning omitted counterclaims, it would have been simpler for the court to have designated the defense as counterclaim under 1.110(d) and thereby have eliminated another trial.

C. *Pretrial Conference*

Pretrial conferences help simplify the issues for trial; a court order designates the issues to be considered for trial as those not disposed of by admissions or agreements of the parties.[153] In a recent "slip and fall" case the pretrial order limited the issues to negligence, contributory negligence and damages. Under these circumstances the Second District held that it was not necessary for the plaintiff to prove the defendant's ownership of the garbage can over which he tripped.[154] However, this decision will not result in binding parties to admissions they did not intend to make. Rule 1.200(c) specifically allows modification of the pretrial order to prevent injustice.

V. PARTIES

A. *Necessary and Proper Parties*

Usually a plaintiff can decide who the parties to his lawsuit will

152. 301 So. 2d 143 (Fla. 3d Dist. 1975).
153. FLA. R. CIV. P. 1.200.
154. Sellars v. Cosby, 289 So. 2d 443 (Fla. 2d Dist. 1974).

be. However, some persons must be made party defendants when their presence is necessary to a complete determination of the cause. For example, where the defendant's insurer is sued in a negligence action, a failure to obtain personal jurisdiction over the insured person can result in a dismissal for failure to join an indispensable party.[155]

Furthermore, a defendant may assert that a plaintiff lacks sufficient legal interest to bring the suit. However, this assertion has been rejected in certain direct actions against insurers. In *Shingleton v. Bussey*,[156] the insurer claimed that the plaintiff lacked sufficient legal interest to sue the insurer directly, as he was not a party to the insurance contract, which contained a "no direct action" clause. The court ruled that the plaintiff was a third party beneficiary and could bring suit directly against the insurer. The insurer also claimed that the jury would be prejudiced by knowing that an affluent institution would bear the loss and thus the jury would be more prone to find liability. The court rejected this "ostrich head in sand" approach to juries.

The third party beneficiary rationale of *Shingleton* was applied in *Spindler v. Kushner*.[157] Improved property had been transferred to the buyer prior to a property closing subject to an agreement that if the deal were not consummated, the premises would be redelivered to the seller in substantially the same condition. The buyer had procured fire insurance on the premises which subsequently were destroyed by fire. Determining that the buyer had an insurable interest in the property, the Third District allowed the seller, now owner of the property, to enforce the payment provisions of the policy in a direct action against the insurer.

B. *Joinder and Severance*

1. IN GENERAL

The rules as to joinder of parties[158] and severance of claims[159] provide sufficient flexibility to prevent delays and prejudice to the parties. They also foster "the elimination of multiplicity of suits and unreasonable impediments to the remedial process of adjudication

155. Insurance Co. of N. America v. Braddon, 285 So. 2d 634 (Fla. 3d Dist. 1973).

156. 223 So. 2d 713 (Fla. 1969).

157. 284 So. 2d 481 (Fla. 3d Dist. 1973); *accord*, Schlehuber v. Norfolk & Dedham Mut. Fire Ins. Co., 281 So. 2d 373 (Fla. 3d Dist. 1973).

158. FLA. R. CIV. P. 1.250(c).

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

of adversary rights . . . ."[160] The Supreme Court of Florida in a somewhat confused opinion has developed guidelines for joinder and severance in multiple collision automobile cases. In *Lawrence v. Hethcox*,[161] the plaintiff was injured by the defendant Hethcox in an automobile accident and filed suit. The plaintiff was later involved in an accident with Gist and sought to amend his complaint against Hethcox to join Gist as a party defendant because "the injuries sustained in both accidents were overlapping . . . "[162] and in addition there would be difficulty in apportioning the damages between the defendants. The trial court denied plaintiff's joinder motion and the District Court of Appeal, Third District, denied certiorari review.[163] The supreme court granted conflict certiorari and held that joinder should have been granted. The court noted that on remand, if the trial court indeed finds from pretrial discovery that the damages are apportionable and that joinder was therefore improper, severance of plaintiff's claims against the respective defendants could then be granted in the trial judge's discretion pursuant to rule 1.270(b). Neither party would be bound by the terms of the judgment against the other.

The supreme court further explained that if

> [o]n the other hand . . . it become[s] apparent as a result of pretrial discovery measures that although joinder was proper because of difficulty or impossibility of apportionment of damages, prejudice to either defendant would nevertheless result from a single trial, severance for trial purposes only would be permissible with the same limitations as provided in Shingleton v. Bussey . . . and Beta Eta House Corp., Inc. of Tallahassee v. Gregory . . . .[164]

Both *Beta Eta* and *Shingleton* permit severance but require the moving party—usually the defendant's insurance carrier—to be bound by the resulting judgment against the remaining defendant.[165] Yet the application of this limited severance rule in the *Hethcox* situation ignores a relevant distinction. Binding a severed defendant to a judgment against a remaining defendant may be

160. Lawrence v. Hethcox, 283 So. 2d 41, 44 (Fla. 1973).

161. *Id.*

162. *Id.* at 42.

163. Lawrence v. Hethcox, 260 So. 2d 909 (Fla. 3d Dist. 1972), *quashed*, 283 So. 2d 41 (Fla. 1973).

164. 283 So. 2d at 44-45 (citations omitted).

165. *See id.* at 44. "Essentially, the effect of those cases is to permit severance but to require the moving party to be bound by the resulting judgment." *Id.*

logical in an insurance situation since the defendant insurer has contracted to pay for the damages caused by the defendant insured. The logic breaks down, however, in the *Hethcox* situation because *Hethcox* involved separate accidents and contractually unrelated defendants.

Furthermore, the court's reliance on *Shingleton* and *Beta Eta* as to the state of the law concerning severability appears misplaced since the supreme court neglected to cite its later decision of *Stetcher v. Pomeroy*[166] which clarified the severability issue in insurance cases. *Stetcher* held that *even if prejudice might result from joinder*, severance should not be allowed "absent a justiciable issue relating to *insurance*, such as a question of coverage or of the applicability or interpretation of the insurance policy or other such valid dispute on the matter of insurance coverage . . . ."[167]

Since *Stetcher* also involved a question of liability between the defendants, its limitation on severance, as well as that enunciated in *Shingleton* and *Beta Eta* should not apply to a two accident situation where there is no issue of liability between the defendants. Based on this distinction, it appears that the reference to the insurance cases in the supreme court's opinion in *Hethcox* should be interpreted to allow joinder only on the issue of damages where the damages are not apportionable but to allow severance as to the liability of the respective defendants.

Although joinder is liberally permitted, it appears that the Third District will not allow it if it is improperly pleaded. In *Miramar Construction, Inc. v. El Conquistador Condominium*,[168] defendants asserted a counterclaim. They then sought to add additional party counter-defendants by bringing a third party complaint. Although unclear from the court's opinion, it appears that the defendant wanted more co-plaintiffs against whom he could assert his counterclaim. A third party complaint was not the proper pleading because it goes to a person not a party to the action who may be liable to the defendant for the plaintiff's claim against him. Whether joinder of additional co-plaintiffs under rule 1.250(c) would have been appropriate does not appear from the case, but the third party complaint was dismissed with prejudice.

166. 253 So. 2d 421 (Fla. 1971).
167. *Id.* at 424 (original emphasis).
168. 303 So. 2d 81 (Fla. 3d Dist. 1974).

2. JOINDER AND SEVERANCE OF INSURERS

It is well established in Florida that "the inclusion of an insurer as a real party in interest in a personal injury action is, in itself, no longer prejudicial or fundamental error."[169] Thus, the supreme court held in *Allred v. Chittenden Pool Supply, Inc.*,[170] that it was harmless error for plaintiff's counsel in his closing argument to demand in the presence of the jury that the defendant's insurance company "be made to pay."

However, in *Pierce v. Smith*,[171] the District Court of Appeal, Second District, held that it was not permissible for plaintiff's counsel to make the following remarks in his closing argument:

> [Plaintiff] does not have the resources nor the ability to go out and compete with Dr. Pierce and the Pacific Indemnity Insurance Company in bringing expert doctors to you . . . . [A]n adverse verdict [against Dr. Pierce] will only call for his insurance company to pay the verdict that is imposed against him . . . . [After this trial defendant's counsel] can go back to defending doctors and insurance companies . . . .[172]

The court also considered that the issue of liability was very close in the *Pierce* case and that the effect on the jury was greater than in *Allred*, where liability was overwhelming and the alleged impassioned comment not as likely to cause significant prejudice.[173]

C. *Intervention*

Although intervention[174] is not granted as a matter of right, it should be granted where a declaratory judgment defining the right of a party would directly affect the rights of the potential intervenor.[175] In *Coral Bay Property Owners Association v. City of Coral Gables*,[176] a private school was granted a special zoning permit by agreement with the city to operate in a residential area. The property owners sent a letter to the city alleging that the school was in

169. Allred v. Chittenden Pool Supply, Inc., 298 So. 2d 361, 365 (Fla. 1974).

170. *Id.*

171. 301 So. 2d 805 (Fla. 2d Dist. 1974).

172. *Id.* at 807.

173. Two other cases during the survey period dealt with this issue. Metropolitan Dade County v. Dillon, 305 So. 2d 36 (Fla. 3d Dist. 1974); Industrial Waste Serv., Inc. v. Henderson, 305 So. 2d 42 (Fla. 3d Dist. 1974).

174. FLA. R. CIV. P. 1.230.

175. Coral Bay Property Owners Ass'n v. City of Coral Gables, 305 So. 2d 853 (Fla. 3d Dist. 1974).

176. *Id.*

violation of the terms of the agreement which authorized it to operate a grade school for 300 students through the first six grades. In fact, however, the school had approximately 1,000 students in the first through ninth grades. The school filed suit against the city for declaratory relief regarding the agreement and seeking to enjoin an investigation by the city of the property owners' charges. The Third District allowed intervention by the property owners because the interpretation of the terms of the aqreement against the city would foreclose the property owners from asserting any rights they might have had.

VI. DISCOVERY

A. *Scope*

The scope of discovery is very broad and may touch any unprivileged matter which is relevant to the proceedings.[177] It functions to "make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."[178] In keeping with the fair trial perspective of discovery, the Supreme Court of Florida has held that "Mary Carter Agreements" must be produced for examination when they are sought to be discovered.[179] A "Mary Carter Agreement" is one by which a co-defendant secretly agrees with the plaintiff that his liability will be limited—usually diminished in proportion to the amount the plaintiff is able to recover against the non-agreeing defendants. The agreeing defendant remains active in the case but with an incentive to increase his co-defendants' liability because his own will be thereby reduced.[180] Thus, if a jury were apprised of this secret agreement it "would likely weigh differently the testimony and conduct of the signing defendant as related to the non-signing defendant."[181] In *Ward v. Ochoa*,[182] the supreme court reasoned that since such agreements promote deception and do not further search for the truth, they are discoverable and admissible into evidence.[183]

177. *See* FLA. R. CIV. P. 1.280.

178. United States v. Proctor & Gamble Co., 356 U.S. 677 (1958).

179. Ward v. Ochoa, 284 So. 2d 385 (Fla. 1973).

180. *See* 28 U. MIAMI L. REV. 988 (1974) for a discussion of this point and other aspects of *Ward v. Ochoa*.

181. Ward v. Ochoa, 284 So. 2d 385, 386 (Fla. 1973).

182. *Id.*

183. *Accord*, Kuhns v. Fenton, 288 So. 2d 253 (Fla. 1973); Maule Indus., Inc. v. Rountree, 284 So. 2d 389 (Fla. 1973); General Portland Land Dev. Co. v. Stevens, 291 So. 2d 250 (Fla. 4th Dist. 1974). *But see* Parish v. Armstrong, 302 So. 2d 767 (Fla. 4th Dist. 1974).

In determining whether matter sought to be discovered is relevant, a liberal construction should be given the scope of permissible discovery. In one case a former husband requested a modification of the dissolution of marriage agreement. The wife served a subpoena duces tecum requesting the production of *all* his corporate and personal financial records. The husband, seeking to quash the subpoena and to obtain a protective order, contended that the request was too broad and indefinite—that relevancy was not shown. The trial court denied the husband's motion and the Second District affirmed. The matter was one for the discretion of the trial court judge, and under the facts as presented, that discretion was not abused.[184]

While the discovery of books and records may be relevant to proceedings involving financial determinations such as an accounting, a right to the accounting must be established prior to permitting discovery of certain items.[185] Thus, interrogatories relevant only "to the *amount* of any sums that might be due the plaintiff in any accounting and not to the issue of the plaintiff's right to an accounting," must be deferred.[186] Likewise, books of account, income tax records, cancelled checks and correspondence related thereto are not discoverable until the issue of a right to the accounting is determined.[187]

1. WORK PRODUCT

In *Reynolds v. Hofmann*,[188] both parties attended a meeting in anticipation of litigation. Certain witnesses in the cause were present and plaintiff taped this meeting after informing those present of his intention to do so. In pre-trial discovery the plaintiff, himself an attorney, was requested to produce the tape. He refused, contending that the tape was work product and therefore privileged from discovery. The District Court of Appeal, Third District, found that the tape did not fall within the work product classification.

184. Kennedy v. Kennedy, 298 So. 2d 525 (Fla. 2d Dist. 1974). The court stated that the record did not contain the transcripts of the hearings below and therefore a determination of whether the information was relevant could not be made. In such a case, the court had to affirm unless a clear abuse of discretion was shown.

185. Charles Sales Corp. v. Rovenger, 88 So. 2d 551 (Fla. 1956).

186. G. H. Crawford Co. Fin. Serv. v. Goch, 292 So. 2d 54, 55 (Fla. 3d Dist. 1974) (emphasis added).

187. David v. Tansill, 297 So. 2d 84 (Fla. 4th Dist. 1974).

188. 305 So. 2d 294 (Fla. 3d Dist. 1974). For certain additional facts of this case (mentioned in the survey), see Brief for Petitioner at A-1, Reynolds v. Hoffman, 305 So. 2d 294 (Fla. 3d Dist. 1974).

Although the court's decision appears correct, its rationale is less than persuasive. The court noted that the purpose of discovery is to promote the process of getting relevant and pertinent evidence before the court. This should not have been a basis for decision however, since most work product is relevant and pertinent but nonetheless privileged. A second, more compelling reason for its decision was that rule 1.280(b)(2) allows a party to discover a statement previously made by himself, including one recorded on tape. But this does not justify discovery of the entire tape as was permitted here. The court further reasoned that the tape did not fall within the generally recognized work product categories of an attorney's mental impressions, *personal* notes and records as to witnesses, or conclusions or legal theories.[189] However, from the facts presented in its opinion, it appears that the tape could easily be considered a record as to a witness but not a *personal*, or private, one.[190]

The court did not elaborate whether its decision was based on this distinction. Perhaps the most critical factor, which the court did not discuss, was that both parties were present at the meeting. This is significant because there was no need to protect plaintiff's "work product" as it had already been disclosed. The privilege, if it existed, could be considered waived.

2. PRIVILEGED REPORTS

It appears that the Third District will follow those cases[191] which hold as privileged, reports required to be filed by statute. Under Florida Statutes section 648.39(3) (1973) an insurer must file a written notice of termination of the appointment of a limited surety agent. This record is privileged and not discoverable.[192]

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189. The court listed the following specific items:

> [P]ersonal views of an attorney as to how and when to present evidence, his evaluation of its importance, his knowledge of which witness will give certain testimony, personal notes and records as to witnesses, jurors, legal citations, proposed arguments, jury instructions, diagrams and charts he may refer to at trial for his convenience, but not to be used as evidence.

305 So. 2d at 295, *citing* Surf Drugs, Inc. v. Vermette, 236 So. 2d 108 (Fla. 1970).

190. *See* Hickman v. Taylor, 329 U.S. 495 (1947).

191. *See* Fogarty Bros. Transfer Co. v. Perkins, 250 So. 2d 655 (Fla. 2d Dist. 1971) (federal agency requiring the filing of accident reports). *See also* Sligar v. Tucker, 267 So. 2d 54 (Fla. 4th Dist. 1972) (hospital reports for the benefit of insurers).

192. Getter v. Yanks, 290 So. 2d 543 (Fla. 3d Dist. 1974).

B. *Discovery Devices*

1. INTERROGATORIES TO PARTIES

Rule 1.340 delineates the procedure for use of interrogatories. Like other discovery devices, they may be used to inquire into matters relevant to the proceedings. *County of Volusia v. Union Camp Corp.*[193] was a tax assessment action. Union Camp purchased property and sought to retain the land's classification as agricultural for assessment purposes. However, the county alleged that the company had conveyed agricultural lands for the purpose of real estate development to its own subsidiary real estate development corporation. In determining whether the property should retain its agricultural classification, the First District held that the following interrogations filed by the county and the Department of Revenue were relevant: inquiry as to the relationship between the corporations, the prior history of land transactions between the companies in the subject county, and the nature of any dealings between the companies in acquiring the property in question.[194] Union Camp's purpose for using the land was relevant as preferential tax treatment would not be extended to land which was obviously not purchased *primarily* for agricultural purposes.

2. DEPOSITIONS

Although rule 1.310(c) provides that depositions of witnesses may proceed as permitted at the trial, this does not mean that a deposition must proceed in accordance with trial rules. Leading questions may be asked[195] to which objections may be raised but such questions must be answered.[196] Applicable to the situation in which a party becomes overzealous in the pursuit of information, rule 1.310(d) provides for orders limiting the scope and manner of taking depositions.

Rule 1.330 provides for the use of depositions in court proceedings. Subsection (a)(3) of the rule provides that if a witness is dead, his deposition may be used for any purpose. Yet, Florida Statutes section 90.05 (1973) provides that no person shall be examined as a

193. 302 So. 2d 160 (Fla. 1st Dist. 1974).

194. In relation to this last inquiry the court also held that a request for production of correspondence and reports or studies between the companies as to the possible ultimate disposition of the property was relevant.

195. Jones v. Seaboard Coast Line R.R., 297 So. 2d 861 (Fla. 2d Dist. 1974).

196. *See* FLA. R. CIV. P. 1.310(c).

witness in regard to any transaction between himself and a person deceased at the time of the examination. The District Court of Appeal, Third District, has held that a deposition taken of a person prior to his demise is admissible into evidence.[197] The dissent would have limited the use of these depositions because the material covered was only that which the deposing attorney wanted. Also, the "dead man's" statute should have been applicable unless the deceased had conceded a cause of action as revealed in the deposition. Therefore, the court's first task should have been to determine if the deceased waived the statute by his statements.[198]

Rule 1.330(a)(2) allows the deposition of a party to be used by an adverse party for any purpose. In *Rothschild v. De Gaspari*,[199] the court was confronted with the issue of whether an incomplete deposition was a "deposition of a party" within the rule. Plaintiff De Gaspari's deposition was only partially taken by defendant's counsel. Acting on his counsel's advice, he left before the deposition could be completed. Allegedly, defendant's counsel harassed and aggravated De Gaspari during the deposition proceedings. Subsequently, the reporter certified and later filed the partially completed deposition. During the trial the defendant attempted to use the deposition to impeach De Gaspari. The trial court denied such use holding that it did not qualify as a deposition of a party since it had not been verified in accordance with rule 1.310(e).[200] On appeal, the Third District reversed and held that rule 1.330(d)(4) required that the plaintiff file a motion to suppress the deposition with reasonable promptness after the verification defect was discovered or his objections would be waived. Under the facts of the instant case, reasonable promptness, according to the court, would have been when notice was received that the deposition had been filed.

As to the allegations of bad faith and harassment, the court noted that the plaintiff could have availed himself of the protection of rule 1.310(d) by moving in court for an order limiting or ending the deposition proceedings. Since this was not pursued, the reporter

197. Cohen v. Glickman, 300 So. 2d 318 (Fla. 3d Dist. 1974).

198. *Id.* at 320 (Pearson, J., dissenting).

199. 287 So. 2d 341 (Fla. 3d Dist. 1973).

200. Rule 1.310(e) presently provides:

> the deposition shall be submitted to the witness for examination . . . . Any changes that the witness desires to make shall be entered . . . [separately and attached] to the deposition and it shall then be signed by the witness . . . [unless signing is waived by stipulation of the parties] or . . . [the witness] cannot be found or refuses to sign . . . [in which case] the officer shall sign it . . . and the deposition may then be used as fully as though signed . . . .

taking the deposition properly certified and filed it.[201] However, not every improperly taken or improperly filed deposition can be validated by a failure to file a motion to suppress. The court's holding is limited to situations where an incomplete deposition is certified and filed by the officer taking it.[202]

3. PRODUCTION OF DOCUMENTS

Rule 1.350(a) allows any party to request that another party produce designated documents in his possession or control for inspection and copying. However, a party cannot request that a statement of his opponent's "net worth" be produced where there was no showing that the statement existed or was in his possession.[203]

Rule 1.350(b)[204] provides that a request for production upon any party not a plaintiff may be made without leave of court with or after service of process and the initial pleading upon that party. A party so served has 30 days within which to state that he will comply or to state his reasons for objecting. Rule 1.310 provides, with certain exceptions, that a plaintiff must obtain leave of court if he seeks to take a deposition within 30 days of service. In *Bergin v. Bergin*[205] the plaintiff served a request for production with a notice to take a deposition. The deposition was scheduled for a time within 30 days of service and production of documents was to accompany the taking of the deposition. The plaintiff contended that rule 1.350(b) required the defendant to produce at that time. The court, however, held that without a court order or a subpoena, production cannot be compelled at a deposition scheduled within 30 days of service. It is not discernable from the court's opinion whether the deposition itself was scheduled with leave of court as rule 1.310 requires for depositions within 30 days of service. However, since rule 1.310 is mandatory it probably was with leave of court. Therefore, it appears that a party seeking production within the 30-day period must request that the order for taking the deposition also specifically authorize production of documents.

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201. FLA. R. CIV. P. 1.310(f)(1).

202. Rothschild v. De Gaspari, 287 So. 2d 341, 343 (Fla. 3d Dist. 1973).

203. Balzebre v. Anderson, 294 So. 2d 701 (Fla. 3d Dist. 1974).

204. Without leave of court the request [for production of documents] may be served upon the plaintiff after commencement of the action and upon any other party with or after service of the process and initial pleading upon that party.

FLA. R. CIV. P. 1.350(b).

205. 292 So. 2d 400 (Fla. 3d Dist. 1974); *accord*, Lytton v. Lytton, 289 So. 2d 17 (Fla. 2d Dist. 1974).

4. REQUESTS FOR ADMISSIONS

Like other forms of discovery, admissions help to narrow the issues. In *Polonsky v. Polonsky*,[206] a husband moved to set aside a final judgment of dissolution of marriage on the grounds that the judgment was void.[207] He alleged that his wife had not met the 6-month residency requirement for plaintiffs seeking dissolution under Florida Statutes section 61.021 (1973). Pursuant to this motion, the husband sought admissions from the wife as to her residency during the particular dates in question. The wife objected on the grounds that his claim had already been adjudicated. The Fourth District held that the wife could not refuse the admissions on those grounds. As long as discovery can narrow the issues and reach matters reasonably calculated to lead to admissible evidence, it should be allowed.

C. *Refusal to Acquiesce in Discovery*

In order to insure that the discovery rules will function effectively, rule 1.380 provides for sanctions against persons who would obstruct the discovery process. If a party refuses to submit to a mental or physical examination pursuant to rule 1.380(b), the court may, among other things, order that the opposing party's facts be taken as established, that the refusing party cannot assert his claims or defenses, or that the pleadings of the refusing party be stricken.[208]

In a case involving dissolution of marriage, the wife, who was not presently self-supporting, refused to submit to a physical examination to determine her ability to support herself.[209] The court struck the wife's claim for support and alimony even though a physical examination would have related only to her claim for support. The wife then filed a motion with the trial court to vacate that order based on her subsequent willingness to submit to the examination. This motion was denied. The District Court of Appeal, Third District, reversed. The objective of the sanction portion of the discovery rules is compliance and should be invoked "only after . . . the defaulting party . . . [has had] a reasonable opportunity to

206. 303 So. 2d 64 (Fla. 4th Dist. 1974).

207. *See* FLA. R. CIV. P. 1.540(b).

208. FLA. R. CIV. P. 1.380(b)(2).

209. Goldstein v. Goldstein, 284 So. 2d 225 (Fla. 3d Dist. 1973). The wife alleged that she was unable to work due to poor health and loss of weight.

conform after originally failing or even refusing to appear . . . ."[210] The court further stated that rather than dismiss, a more proper sanction would have been to bar the wife from presenting evidence on the status of her health or to order the condition of her health as established by the respondent's contentions.

If a motion compelling discovery is granted, rule 1.380(a)(4) provides that the party whose conduct necessitated the order shall be made to pay to the moving party the reasonable expenses incurred, including attorneys' fees, unless circumstances mitigate against such award. Where the record on appeal is vague as to why the trial court refused to impose expenses although a motion to compel discovery had been granted, the trial court decision will be affirmed because its order is presumed correct.[211]

VII. DISMISSAL

A. *Voluntary*

A distinction between the Florida and federal rules on voluntary dismissals helps to focus on a problem currently encountered in Florida courts. Federal rule 41 limits a party's right to request a voluntary dismissal to the period before the service of an answer or a motion for summary judgment by the adverse party, whichever comes earlier. Florida rule 1.420(a) is more liberal. An action may be voluntarily dismissed at any time before a hearing on a motion for a summary judgment or before retirement of the jury or before the submission of a non-jury case to the court for decision. A recent case points out how this more liberal rule can be used to defeat, rather than promote, justice.

DeMaupassant v. Evans[212] involved an action to recover for personal injuries which the plaintiff had sustained as a passenger in a taxicab which collided with another vehicle. He sued the cab driver, the cab company, the other driver and the other driver's insurance company. During closing arguments, counsel for the defendant cab company and the plaintiff placed the fault on the other driver. Plaintiff's counsel then took a voluntary dismissal as to the defendant cab driver and cab company as allowed by the combination of rules 1.420(a) and 1.250(b).[213] Since the rules permit

210. *Id.* at 227, *quoting* Hurley v. Werly, 203 So. 2d 530, 537 (Fla. 2d Dist. 1967).

211. Rankin v. Rankin, 284 So. 2d 487 (Fla. 3d Dist. 1973).

212. 300 So. 2d 313 (Fla. 1st Dist. 1974).

213. Rule 1.250(b) allows a plaintiff to voluntarily dismiss parties in accordance with rule 1.420(a).

this tactic to be employed, the First District, on appeal, found no error. However, the following admonition of the court is worth noting:

> [W]e do think that this case raises an issue which should be considered by the Supreme Court of Florida when it next undertakes a revision of the Rules of Civil Procedure . . . .
> [W]e feel that the rule [rule 1.420] should be changed to prevent voluntary dismissals, without order of court, of co-defendants at the end of a trial after they have had an opportunity to "heap it on" the remaining defendant or defendants.[214]

Another aspect of rule 1.420(a) is that a second voluntary dismissal in an action based on or including the same claim operates as an adjudication on the merits. But this "two dismissal" rule does not include voluntary dismissals granted by leave of court.[215] In *Dave Hess, Inc. v. Black Angus, Inc.*,[216] the plaintiff announced his intention to take a voluntary dismissal, and subsequently the court, although not compelled to so act, issued a judgment dismissing the action. This counted as one of the dismissals under the "two dismissal" rule because the order dismissing the action "only confirmed what the appellant had already accomplished under the rule."[217] Subsequently, the plaintiff filed a second voluntary dismissal on all claims as to some defendants and some claims as to other defendants. Although the trial court held that this second dismissal was an adjudication on the merits, the Fourth District, noting that the rule is addressed to dismissals of *actions* prior to the filing of a responsive pleading by the opposing party, held that "such filing was insufficient to permit the circuit court to apply the two dismissal rule to appellant, because that notice [of the second dismissal] did not involve all the defendants in the action."[218] Thus, in Florida, a reading of *DeMaupassant* and *Dave Hess* together could allow a plaintiff, at his convenience, to take voluntary dismissals as to fewer than all parties as many times as he wishes.

The procedure for effecting a voluntary dismissal requires only that the plaintiff indicate to the court that such action is being taken. The court's approval is not required. Accordingly, a plaintiff cannot complain that he was denied his right to a voluntary dis-

214. 300 So. 2d at 314.
215. Crump v. Gold House Restaurants, Inc., 96 So. 2d 215 (Fla. 1957).
216. 288 So. 2d 286 (Fla. 4th Dist. 1974).
217. *Id.* at 287.
218. *Id.*

missal when his *request* for either a mistrial or a nonsuit was denied. He could have taken the nonsuit as of right.[219]

For purposes of Florida Statutes section 713.29 (1973), which provides for an award of attorneys' fees to the "prevailing party" in actions to enforce liens, when one party takes a voluntary dismissal the opposing party is deemed to have prevailed even though neither party wins or loses when a voluntary dismissal is taken.[220]

B. *Involuntary*

In a non-jury case a defending party can move under rule 1.420(b) to dismiss on the grounds that the party seeking affirmative relief, given the facts and law, has not made a case.[221] In *Akdouruk v. Advanced Jet Systems, Inc.*,[222] the defendant moved to dismiss at the conclusion of plaintiff's opening statement alleging that the contract upon which plaintiff was suing did not support his cause of action. The motion was granted by the trial court with prejudice. However, the District Court of Appeal, Third District, reversed on the basis that rule 1.420(b) requires that a party be given an opportunity to present all the evidence in support of his side. The court commented that the defendant could have moved to dismiss during the pleading stage and then the plaintiff would have been able to amend his complaint to conform to the contract. The effect of the court's dismissing the cause after the plaintiff's opening statement was to "preclude either the amendment of the complaint or the introduction of evidence to explain the discrepancy."[223]

When in doubt, parties should request that a court designate whether its dismissal is with or without prejudice. In one case[224] the trial court dismissed the defendant's third party complaint. There was no provision for leave to amend, however, the dismissal was not with prejudice. When the defendant filed an amended third party complaint, it was dismissed as "out of order." The Third District affirmed, holding that the first dismissal was a final adjudication on the merits. When the court does not designate whether the dismissal is with or without prejudice, the dismissal operates as an

219. Tate v. Gray, 292 So. 2d 618 (Fla. 2d Dist. 1974).
220. Jackson v. Hatch, 288 So. 2d 564 (Fla. 2d Dist. 1974).
221. *See* FLA. R. CIV. P. 1.420(b).
222. 296 So. 2d 656 (Fla. 3d Dist. 1974).
223. *Id.* at 657; *see* FLA. R. CIV. P. 1.480 (jury trials).
224. Maude Indus., Inc. v. MacDonald Eng'r Co., 296 So. 2d 512 (Fla. 3d Dist. 1974).

adjudication on the merits.[225] Since it is on the merits or with prejudice, res judicata would apply in subsequent actions and the court's jurisdiction would end.

C. *Failure to Prosecute*

Compared to an involuntary dismissal which is with prejudice, a dismissal for failure to prosecute under rule 1.420(e) is without prejudice[226] unless special circumstances are shown.[227] The rule is further distinguished from other forms of dismissal in that if lack of prosecution within the year is demonstrated by the facts, and a motion to dismiss on this ground is made, the action "*shall* be dismissed . . . unless a party shows *good cause* in *writing* why the action should remain *pending* at least five days before the hearing on the motion."[228]

In *Koppers Co. v. Victoire Development Corp.*,[229] the Supreme Court of Florida held that this language in the rule is mandatory and not permissive if the judge finds lack of prosecution. In *Koppers*, the plaintiff had filed a complaint in October of 1968 but never had served process on the defendant. A co-defendant cross-claimed against the defendant on July 12, 1971, but no action by either party was taken in the main suit. In September 1971 the defendant moved to dismiss the original complaint pursuant to rule 1.420(e) because more than a year had elapsed since the plaintiff's filing. The filing of the cross-claim did not satisfy the "activity" requirement of the rule. The trial judge ordered dismissal unless the plaintiff obtained service within 20 days. This conditional order was contested by the defendant to the Fourth District, which affirmed.[230] The supreme court reversed. The trial court had no discretion to grant an extension because the rule is mandatory if no good cause had been shown why the action should have remained pending.[231]

A trial court may, upon its own motion, schedule a hearing on

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

226. Gibbs v. Trudeau, 283 So. 2d 889 (Fla. 1st Dist. 1973).

227. Nicholson v. Eli Lilly & Co., 285 So. 2d 648 (Fla. 3d Dist. 1973). The court failed to specify what the circumstances were. *See* Golinvauz v. Bill Bower Friendly Ford, 303 So. 2d 406 (Fla. 3d Dist. 1974). In *Golinvauz* the court, without mentioning rule 1.420(e), held that failure by the plaintiff to respond to repeated notices of hearings on the motions to dismiss without adequate excuse warranted dismissal with prejudice.

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

229. 284 So. 2d 193 (Fla. 1973).

230. Koppers Co. v. Victoire Devel. Corp., 261 So. 2d 211 (Fla. 4th Dist. 1972), *rev'd*, 284 So. 2d 193 (Fla. 1973).

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

whether a cause should be dismissed for failure to prosecute. In *Barr v. Ehrlich*,[232] the parties were notified of such a hearing but it was never conducted and no adjudication was made on whether the case should have been dismissed. Instead, there was a trial on the merits in which the plaintiff prevailed. The defendant appealed on the grounds that the court failed to rule on its own motion. The Fourth District agreed with the defendant that "the machinery under the mentioned rule having been cranked up, the parties were entitled to an adjudication . . . ."[233] Either the cause should have been dismissed or the court should have found good cause why the case should remain pending. The case was then remanded for a ruling on the undisposed motion.

On remand the circuit court made certain findings to justify denying the motion to dismiss. Plaintiff's counsel, upon receiving notice of the hearing scheduled by the court, spoke with the defense counsel and was informed that the latter would not object to a cancellation of the hearing. Further, plaintiff's counsel obtained assurances from the court that an order of dismissal would not be entered. Neither party appeared at the hearing, no hearing was held, and no order was entered. Prior to the commencement of the trial, the judge in his chambers asked the defense counsel if there were any problems with proceeding on the merits, but the attorney indicated his willingness to begin since apparently he believed that plaintiff's action was unenforceable. The Fourth District affirmed the denial of defendant's motion on the ground that the case had been tried on its "merits to partial final judgment without appropriate objection or preservation of error on the part of defendant's counsel."[234] The court, by way of dictum, stated that all pending motions should be disposed of by order, prior to trial, and if a court intends to withdraw its 1.420(e) motion, it is an act of discretion subject to review.

At first glance this decision may seem difficult to reconcile with the supreme court's holding in *Koppers* that rule 1.420(e) is mandatory once its conditions are met. However, a recent district court of appeal decision helps eliminate any confusion. In *Fields v. Fields*,[235] the First District held that in order to dismiss a case pursuant to rule 1.420(e), a court must hold a hearing on dismissal. Where the

232. 301 So. 2d 147 (Fla. 4th Dist. 1974).
233. Barr v. Ehrlich, 295 So. 2d 697 (Fla. 4th Dist. 1974).
234. 301 So. 2d at 148.
235. 291 So. 2d 663 (Fla. 1st Dist. 1974).

court files notice of an intention to dismiss but holds no hearing, the parties may continue to file pleadings, take depositions and rely on the inaction of the court as indicating no dismissal will occur.

Thus, the general rule in Florida under *Koppers, Fields*, and *Barr* appears to be that if a court files a motion to dismiss but nothing more, the parties can continue with pretrial proceedings. Furthermore, it is before trial that the motion must be disposed of. But, if a hearing is held and lack of prosecution is found to exist, the action must be dismissed.

In considering whether there has been any "action" within the 1-year period, the rule contemplates that the activity involves contact with the opposing party or the court.[236] "[N]on record activity which moves the case toward ultimate resolution is sufficient 'prosecution' under the rule;" thus, sending a medical report to opposing counsel by mail upon his request satisfies the rule.[237] There is, however, no contact when a notice of taking a deposition is filed but no deposition is subsequently taken.[238]

An interesting case involving the question of "action" was that of *Crouse-Hinds Co. v. Capellia*.[239] In *Crouse-Hinds*, the action was brought against two defendants, one of whom was a foreign corporation not authorized to do business in Florida. After trying several times to obtain jurisdiction over the foreign corporation through long arm statutes,[240] the plaintiff proceeded against the other defendant. Nearly two years after the last complaint had been filed against the foreign corporation,[241] it moved for a 1.420(e) dismissal for failure to prosecute without being served; it may have wanted to clear the record against it. The motion was granted even though there was action against the other defendant during this period. This case is to be distinguished from a situation where the plaintiff has obtained jurisdiction over both defendants but there is action with respect to only one.[242] In such a case, dismissal will not be granted as to either defendant, since activity against one defendant

236. Wells v. Van Arnam, 271 So. 2d 186 (Fla. 1st Dist. 1973).

237. Eddings v. Davidson, 302 So. 2d 155, 157 (Fla. 1st Dist. 1974); Leverenz v. Schmieder, 294 So. 2d 690 (Fla. 3d Dist. 1974); *see* Musselman Steel Fabricators, Inc. v. Radziwon, 263 So. 2d 221 (Fla. 1972) (mailing of photographic copies of exhibits marked for identification during a deposition).

238. Castle v. Struhl, 293 So. 2d 798 (Fla. 3d Dist. 1974).

239. 302 So. 2d 800 (Fla. 4th Dist. 1974).

240. FLA. STAT. §§ 48.181, .193 (1973).

241. Plaintiff had twice amended his original complaint—the last amendment being 20 months prior to the motion to dismiss.

242. Eastern Elevator, Inc. v. Page, 250 So. 2d 326 (Fla. 4th Dist. 1971).

precludes the other from obtaining a motion to dismiss for failure to prosecute.[243]

VIII. DIRECTED VERDICTS

A verdict should not be directed for a party pursuant to rule 1.480 unless no evidence presented could in law support a verdict for the opposing party.[244] Thus, where conflicting conclusions can be drawn from the evidence, a directed verdict will be reversed.[245]

Rule 1.480(b) provides that "[w]ithin ten days after the reception of a verdict a party who has moved for a directed verdict may move . . . to have judgment entered in accordance with his motion . . . ." The Supreme Court of Florida has held that where a party *served* his motion on opposing counsel on the tenth day after the verdict but did not file with the clerk until 2 days later the 10 day period of the rule was satisfied.[246] The court noted that service was the crucial factor because the purpose of the requirement is to notify the parties.[247]

In *Carmichael v. Shelley Tractor & Equipment Co.*,[248] the Fourth District has held that rule 1.480(a) motions for directed verdict can only be made at the close of the evidence offered by the adverse party although the rule is couched in less demonstrative terms. The plaintiff brought an action for breach of a contract to deliver and service equipment. In a counterclaim the defendant alleged that the plaintiff failed to make payments in accord with the contract provisions. The plaintiff voluntarily dismissed his complaint and moved to amend his answer to the defendant's counterclaim to include allegations that the defendant had not performed

243. *Crouse-Hinds* gives the reasons for the distinction between the two cases. The jurisdiction acquired in *Page* allowed action taken by one of the two defendants to be viewed as a positive step toward bringing the suit to judgment. Further adjudication of the suit was not possible as to *Crouse-Hinds* since the court never did get jurisdiction over the second defendant.

244. Strahm v. Aetna Cas. & Sur. Co., 285 So. 2d 679 (Fla. 3d Dist. 1973); *accord*, Lehrer v. Fontainebleu Hotel Corp., 285 So. 2d 636 (Fla. 3d Dist. 1973); Lustig v. Feinberg, 285 So. 2d 631 (Fla. 1st Dist. 1973). In a "slip and fall" case a directed verdict should never be granted unless all the evidence as taken with a view most favorable to the adverse party could not support a verdict by the jury. Marlowe v. Food Fair Stores, Inc., 284 So. 2d 490 (Fla. 3d Dist. 1973); *cf.* Clemente v. Tundidor, 284 So. 2d 31 (Fla. 3d Dist. 1973) (undisputed evidence showed plaintiff contributorily negligent as a matter of law, thus a verdict was directed against the plaintiff).

245. Vertomen v. Williams, 287 So. 2d 116 (Fla. 4th Dist. 1973).

246. Behm v. Division of Administration, Dept. of Transp., 288 So. 2d 476 (Fla. 1974).

247. *Id.* at 478, *citing* Miami Transit Co. v. Ford, 155 So. 2d 360 (Fla. 1963).

248. 300 So. 2d 298 (Fla. 4th Dist. 1974).

his contract obligations. This motion was denied and before the original plaintiff presented his case on the counterclaim, a directed verdict was entered for the defendant. This decision was reversed on two grounds. The Fourth District held it was an abuse of discretion not to allow the plaintiff's amendment to his answer which was "nothing more than the substance of . . . [his] voluntarily dismissed complaint . . . ."[249] No surprise or prejudice to the defendant would result by such an amendment as the issue of breach of contract was included in the pretrial order. Secondly, the defendant's motion for directed verdict was premature. The court emphasized that rule 1.480(a) requires that a directed verdict not be granted prior to the time that the plaintiff has presented his case.[250]

IX. DEFAULT JUDGMENTS

"The purpose of a default judgment is to prevent a defendant from employing dilatory tactics during the pendency of a case; it is not intended to relieve the plaintiff of the burden of contesting his claim against the defendant . . . ."[251] Where delay is evidenced by a failure to file or serve any paper in the action, rule 1.500(a) allows the clerk of the court to enter a default against the party engaging in the dilatory tactics. In *Mo-Con Properties, Inc. v. American Mechanical, Inc.*,[252] the defendant served opposing counsel by mail with a copy of a motion within the time allowed and mailed the original simultaneously to the clerk for filing. However, the original did not arrive at the clerk's office until the following day in the late afternoon. By that time, the plaintiff had been granted his motion for a default by the clerk and final judgment had been entered thereon. The trial court denied the defendant's rule 1.540(b) motion to vacate.[253] On appeal, the Fourth District reversed. The defendant had properly served a paper within the time allowed; therefore, the entry of the default by the clerk was erroneous.[254] In a similar case it was

249. *Id.* at 299.

250. *See* Akdoruk v. Advanced Jet Sys., Inc., 296 So. 2d 656 (Fla. 3d Dist. 1974), discussed in section VII, B *supra*.

251. Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Publisher's Vending Serv., Inc., 296 So. 2d 570, 572 (Fla. 3d Dist. 1974).

252. 289 So. 2d 744 (Fla. 4th Dist. 1974).

253. Rule 1.500(d) allows the court to set aside a mere default and also provides that if final judgment has been entered thereon, it may be set aside in accordance with rule 1.540(b).

254. Although the defendant's motion to vacate did not assert a meritorious defense to the suit, the Fourth District held that this was not fatal.

[T]he default was not entered due to defendant's failure to comply with the

held to be an abuse of discretion not to vacate a judgment where pursuant to rule 1.080(b) service was mailed to opposing counsel prior to the entry of the default but after the time specified for responsive pleading.[255] Thus, a party can reply at any time before default is entered.

In *Metcalf v. Langston*,[256] a default was entered in favor of the plaintiff. The defendant moved pursuant to rule 1.540 to set the default aside apparently on the basis of excusable neglect. He alleged that the plaintiff's complaint and summons were delayed temporarily while being channelled through defendant's offices and that the defendant had a valid defense to plaintiff's claim. Thus, the motion met the tests for setting aside a default—it alleged a meritorious defense to the claim and a willingness to proceed to trial.[257] However, defendant's motion was signed only by his attorney,[258] was not under oath, and was not accompanied by an affidavit or other proof of its contents. The District Court of Appeal, First District, held that the trial judge did not err in denying the motion to vacate the default; although rule 1.030 states that "pleadings" need not be verified or accompanied by an affidavit, "[i]f affirmative relief is desired then it is necessary that proof be adduced."[259] Thus, at least in the First District, rule 1.540 motions generally should be accompanied by affidavit. The court did note that other methods of proof may be acceptable: by sworn statement of counsel with actual knowledge of the facts, by deposition, or by live testimony in court. Proof is not necessary, however, if the parties stipulate to the allegations or the allegations are admitted by opposing counsel.

Once a default has been entered against the defendant and his motion to vacate is denied, he is, of course, deprived of his right to contest the existence of the plaintiff's claims and his own liability. However, when the cause proceeds to trial, the defendant is not deprived of his "right to contest the amount of damages by way of

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rules, but was entered erroneously by the clerk at a time when the defendant had, in fact, served a paper in the cause.

289 So. 2d at 745.

255. Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Publisher's Vending Serv., Inc., 296 So. 2d 570 (Fla. 3d Dist. 1974). Rule 1.500(c) allows a party to plead at any time before default is entered.

256. 296 So. 2d 81 (Fla. 1st Dist. 1974).

257. *Id.*, *citing* North Shore Hosp. Inc. v. Barber, 143 So. 2d 849 (Fla. 1962).

258. Signature by counsel only signifies that to the best of his knowledge, there are good grounds to support the allegations—it does not import the truthfulness of the facts alleged therein. *Id.* at 85.

259. *Id.*

the introduction of evidence in mitigation of them or by cross-examination."[260]

X. SUMMARY JUDGMENTS

A. *In General*

A summary judgment should only be granted where there is no dispute as to genuine issues of material fact and the moving party is entitled to a judgment as a matter of law.[261] When a party moves for summary judgment he concedes that there is no genuine issue of material fact only for the purpose of his motion. Thus, where genuine issues of material fact are shown to exist, the fact that both parties filed motions for summary judgment does not eliminate such factual issues. The motions should be denied and the issues tried.[262]

When considering a motion for summary judgment by one party, a court may order summary judgment for the opposing party or, the opposing party may move for one in his favor.[263] Therefore, a moving party should be prepared to contest summary judgment in favor of the opposing party. In *Jockey Club, Inc. v. Blake*,[264] the plaintiff moved for a "summary judgment on the pleadings." Since the rules do not provide for such a motion, it was treated as one for summary judgment by the trial court. The court then granted the defendant's *ore tenus* motion for summary judgment. On appeal, the plaintiff insisted that his motion was merely for a judgment on the pleadings[265] and therefore he was unprepared to contest the summary judgment granted in the defendant's favor. The Third District considered this rationale and held that in light of the plaintiff's

260. Robbins v. Thompson, 291 So. 2d 225, 226 (Fla. 4th Dist. 1974).

261. Frank v. Pepin, 283 So. 2d 389 (Fla. 2d Dist. 1973). During the survey period there were a number of cases involving the question of whether an issue of fact existed. *E.g.*, Wood v. Camp, 284 So. 2d 691 (Fla. 1973) (whether a party is an invitee, licensee or trespasser may be an issue of fact); Armstrong v. Pet Memorials, Inc., 301 So. 2d 150 (Fla. 4th Dist. 1974) (failure to attach contract to complaint raises issue of fact); City of Hallandale v. State *ex rel.* Sage Corp., 298 So. 2d 437 (Fla. 4th Dist. 1974) (affirmative defenses asserted in defendant's answer raise issue of fact unless conclusively refuted by plaintiff); Claudio v. Miami Aerospace Academy, Inc., 291 So. 2d 72 (Fla. 3d Dist. 1974) (issue of fact where only evidence before the court was plaintiff's deposition which was not conclusive that no issues existed; Florida E.C. Ry. v. City of Hallandale, 288 So. 2d 291 (Fla. 4th Dist. 1974) (issue whether property in question was part of a right-of-way); City of St. Petersburg v. Naden, 284 So. 2d 15 (Fla. 2d Dist. 1973) (negligence); Northside Motors v. Brinkley, 282 So. 2d 617 (Fla. 1973) (liability for conversion).

262. Francis v. General Motors Corp., 287 So. 2d 146 (Fla. 3d Dist. 1973).

263. Carpineta v. Shields, 70 So. 2d 573 (Fla. 1954).

264. 297 So. 2d 44 (Fla. 3d Dist. 1974).

265. *See* FLA. R. CIV. P. 1.140(c). The plaintiff only contemplated a ruling on the sufficiency of defendant's answer in defense of the complaint.

contention that his was not a motion for summary judgment he should be given an opportunity to defend against the defendant's motion.

Although a statute of limitations is an affirmative defense, it is not always grounds for the granting of a summary judgment. In *Mount Sinai Hospital, Inc. v. Cordis Corp.*,[266] the hospital's action against a cardiovascular instruments manufacturer was for an accounting, for a declaratory judgment as to its rights in the subject "pacemaker" and for injunctive relief. A summary judgment was granted by the trial court in the defendant's favor based on the statute of limitations. The District Court of Appeal, Third District, reversed because the plaintiff's *equitable rights* under the principle of laches were defeated by granting the motion. The court also questioned the validity of the statute of limitations defense.[267]

The Fourth District has shown that a court should broaden its scope of inquiry on summary judgment where obvious defenses are present. In *Ivey Plants, Inc. v. FMC Corp.*,[268] the parties had entered into a lease of equipment which contained an exculpatory clause for damages from personal or property injury and an indemnity clause to the benefit of the defendant. Plaintiff-lessee sought to recover for damages caused by a fire to its property which allegedly resulted from defendant-lessor's breach of contract and negligent maintenance of the equipment. The trial court entered a summary judgment for defendant finding no genuine issue of material fact due to the limitation of liability and indemnity provisions of the lease. The Fourth District reversed, holding that a summary judgment for the defendant was improper. This exculpatory clause did not defeat a right to sue for breach of contract. Furthermore, exculpatory clauses can be challenged as unconscionable, which challenge requires a consideration of the relative bargaining positions of the contracting parties—an issue of fact to be determined by a jury. Also, the indemnification clause lacked the required specific language to "authorize indemnification for negligence committed by the indemnitee alone."[269]

Rule 1.510(d) provides that the court shall, upon motion for summary judgment, ascertain material facts not in substantial con-

266. 285 So. 2d 645 (Fla. 3d Dist. 1973).

267. The statute of limitations may not have been available because the hospital could assert a contract action based on a continuing obligation. There may have been partial payment of a debt, tolling the running of the statute. Also, a material issue of fact existed whether the defendant was estopped from asserting the defense. *Id.* at 647.

268. 282 So. 2d 205 (Fla. 4th Dist. 1973).

269. *Id.* at 209.

troversy and other relief not in issue and make an order so that at the trial or final hearing these matters will be clearly established. The order constitutes a partial summary judgment and is proper although questions of material fact remain as to other issues not covered by the order.[270] However, the purpose of the order is only to simplify the final hearing and therefore it is error to grant a partial *final* summary judgment. There should be only one judgment—the order entered being only interlocutory in nature.[271]

B. *Sufficiency of Affidavits*

A motion for summary judgment may be accompanied by supporting affidavits. The affidavits should set forth facts that would be admissible into evidence at trial;[272] therefore, a statement which is merely a conclusion of law does not qualify.[273] However, where the facts stated in an affidavit are admissible and sufficient to prove a defense, a motion for summary judgment will be granted if the plaintiff fails to bring before the court sufficient proof to raise the existence of material issues of fact.[274]

XI. JURY TRIAL

Under modern pleading, equitable and legal claims can be brought in a single action.[275] Where such issues are joined, the right to trial by jury of the legal issues must be given effect. However, if a trial on the equitable issues would be collateral estoppel or res judicata foreclosing a hearing of the legal issues and thereby depriving the party of his right to jury trial on those issues, a court ought to try the jury issues first.[276] In *Westview Community Cemetery v. Lewis*[277] the defendant asserted a counter-claim to quiet title to property and to eject the tenant who claimed he was the owner of the property. Since the factual determinations of the equitable claim to quiet title were so similar to those of the legal ejectment claim, the right to a jury trial on the latter issue would be effectively foreclosed by a trial of the former issue. Although the court could

270. Tiffany Realty, Inc. v. Alvin, 286 So. 2d 258 (Fla. 3d Dist. 1973).

271. Pointer Oil Co. v. Butler Aviation, Inc., 293 So. 2d 389 (Fla. 3d Dist. 1974).

272. FLA. R. CIV. P. 1.510(e).

273. Stringfellow v. State Farm Fire & Cas. Co., 295 So. 2d 686 (Fla. 2d Dist. 1974).

274. Moore v. Maschmann, 296 So. 2d 76 (Fla. 2d Dist. 1974).

275. *See* FLA. R. CIV. P. 1.040, 1.110(g). Legal and equitable issues can also be severed in accordance with rule 1.270(b). Commodore Plaza at Century 21 Condominium Ass'n v. Century 21 Commodore Plaza, Inc., 290 So. 2d 539 (Fla. 3d Dist. 1974).

276. *See* Westview Community Cemetery v. Lewis, 293 So. 2d 373 (Fla. 4th Dist. 1974).

277. *Id.*

have tried the legal claim first, it chose instead to order a trial by jury on all the issues.

Although the historical separation of equity and law may have prevented the awarding of punitive damages in an action seeking both legal and equitable relief,[278] the Fourth District has adopted a more enlightened view by allowing "a judge who sits as the trier of fact in a case involving both legal and equitable claims . . . [t]o award both compensatory and punitive damages, where appropriate, as well as any appropriate equitable relief."[279]

It is generally recognized that the right to trial by jury cannot be lost as to legal issues where those issues are characterized as incidental to equitable issues.[280] In a questionable decision, the District Court of Appeal, Third District, refused to require a trial court to grant a jury trial in circumstances where the legal claim appeared to be incidental. In *Vivian Greene, Inc. v. Levine*,[281] the plaintiff brought an action for a breach of an oral contract to convey stock in return for cash and services. Plaintiff requested relief in the form of damages and equitable relief in the form of a mandatory injunction compelling issuance of the stock to him, an injunction to stop mismanagement and an accounting. The defendant denied plaintiff's allegations and demanded a jury trial on the issues of plaintiff's claim of entitlement to the stock ownership based on the alleged oral contract. In support of his demand, the defendant noted that the court had scheduled to try the contract issue prior to the other issues as to accounting, etc. The Third District, however, agreed with the denial of jury trial by the trial court and held: "In a case of this kind a party is not entitled as of right to have an *issue* tried by a jury. The matter is one resting in the discretion of the court."[282] Since a ruling denying a jury trial should not be disturbed unless an abuse of discretion is shown, the party challenging the ruling has the burden of proof. In this case, no abuse of discretion had been demonstrated. This reasoning does not square with rule 1.430(b) which provides: "Any party may demand a trial by jury of any issue triable of right by a jury."

Florida's summary procedure statute, Florida Statutes section 51.011 (1973) provides that a demand for a jury trial under its provi-

278. Glusman v. Lieberman, 285 So. 2d 29, 30-31 (Fla. 4th Dist. 1973).

279. *Id.* at 31.

280. FLA. R. CIV. P. 1.430 (a)-(b).

281. 287 So. 2d 135 (Fla. 3d Dist. 1973).

282. *Id.* at 136, *citing* Berg v. New York Life Ins. Co., 88 So. 2d 915, 917 (Fla. 1956); St. Sophia Greek Orthodox Community v. Vamvaks, 213 So. 2d 313 (Fla. 3d Dist. 1968); Hightower v. Bigoney, 145 So. 2d 505, 507 (Fla. 2d Dist. 1962).

sions must be made not later than five days after the action comes to issue. Although this conflicts with the time specified in rule 1.430(b),[283] rule 1.010, which establishes the applicability of the Florida Rules of Civil Procedure, provides that the statute would control. However, section 51.011 does not specify when the action "comes to issue" or how to compute the five day period. The District Court of Appeal, Fourth District, has resolved both these issues. In *Moffett v. MacArthur*,[284] a section 51.011 proceeding, the defendant's answer was filed on October 4, 1972. At a hearing on October 10, 1972, the defendant moved for a jury trial. The court held that the action "came to issue" no earlier than October 4 when the defendant filed his answer. Therefore, it appeared that the demand for a jury trial was untimely because it was made six days after the action was at issue. However, in computing the five day period the court applied rule 1.090 which excludes intervening Saturdays and Sundays in cases where the period of time allowed is less than seven days.

A decision within the survey period also considered the manner of stating damages within the jury's verdict. Rule 1.481 provides that "when punitive damages are sought, the verdict shall state the amount of punitive damages separately from the amounts of other damages awarded." Whether such damages must be separately stated as to each joint tortfeasor was resolved by a recent case. In *Town of Medley v. Scott*,[285] two police officers abused their authority by roughing up the plaintiff while taking him into custody. The jury's verdict designated $500 as compensatory damages and $5,000 as punitive damages against the defendants. The defendants appealed and cited as error the rendition of a *single verdict* for punitive damages against them as *joint* tortfeasors. The District Court of Appeal, Third District, found no error, holding that the defendants' "objection to the form of the verdict has been waived because of a failure to object when the trial judge instructed the jury."[286] Even absent waiver, the rule requires segregation only of punitive damages from compensatory damages; under the facts of this case, that requirement had been met.

The procedure for selecting a trial jury is governed by rule

283. This rule provides that a demand for trial by jury on an issue may be made "at any time after commencement of the action and not later than ten days after the service of the last pleading directed to such issue."

284. 291 So. 2d 134 (Fla. 4th Dist. 1974).

285. 285 So. 2d 663 (Fla. 3d Dist. 1973).

286. *Id.* at 664.

1.431. In a clarification of this procedure, rule 1.431(b) has been expanded. Formerly the rule stated: "The parties have the right to examine jurors orally on their voir dire." This language was retained in the new rule,[287] effective October 1, 1973, with the following addition: "The order in which the parties may examine each juror shall be determined by the court. The court may ask such questions of the jurors as it deems necessary, but the right of the parties to conduct a reasonable examination of each juror orally shall be preserved."

Rule 1.431(c) allows a party to challenge a prospective juror "for cause," if, among other things, the juror has formed or expressed an opinion on the action or has any bias or prejudice concerning it. The District Court of Appeal, First District, held that cause had not been demonstrated when a prospective juror, asked for an opinion, expressed his views during voir dire that he would give more credit or weight to the expert testimony of a medical doctor than that of a chiropractor.[288] The court reasoned that the juror had not had an opportunity to hear either witness testify and that after hearing such testimony, the juror would then be instructed by the judge to use his own general knowledge of such factors as education and training to determine the believability of a witness anyway.

A jury's job is not completed until its foreman signs the verdict it has rendered. When a verdict has not been signed by the foreman and neither received nor published by the court clerk, it is proper to allow the jurors to redeliberate their verdict and change a prior award.[289]

The age qualification for a juror has been lowered by the legislature from 21 years to 18 years or older. Furthermore, mothers with children under 15 years of age shall be exempted from jury duty.[290] Exemption from jury duty has also been extended to any practicing physician granted an exemption by the presiding judge at his discretion.[291]

Jurors have been granted protection by the legislature from dismissal from employment due to service on a jury. An individual so dismissed may maintain a civil action for compensatory and punitive damages.[292]

287. *See In re* Clarification of Florida Rules of Prac. & Pro., 281 So. 2d 204 (Fla. 1973).
288. Williams v. Nowling, 297 So. 2d 82 (Fla. 3d Dist. 1974).
289. Glecer v. Fletcher, 299 So. 2d 134 (Fla. 3d Dist. 1974).
290. Fla. Laws 1975, 75-78, *amending* FLA. STAT. § 40.01 (1973).
291. FLA. STAT. § 40.08 (Supp. 1974).
292. FLA. STAT. § 40.271 (Supp. 1974).

XII. JURY INSTRUCTIONS

As a general rule, each party is entitled to have the jury instructed upon his theory of the case "where such theory is supported by competent evidence and the instructions properly requested . . . ."[293] A requested instruction becomes especially important if the issue to be addressed involves an important facet of the case.[294] In *Sea Ledge Properties, Inc. v. Dodge*,[295] the plaintiffs requested a jury instruction that the measure of damages for a breach of a construction contract was the difference between plaintiff's total cost, including his cost of completion, and the contract price. However, defendant's counsel in his closing argument suggested that the plaintiffs should not recover any damages because they sold the complete building at a profit; although they incurred costs greater than the contract price, they could now sell the building for an amount sufficient to recoup those losses. The trial court refused to give the plaintiffs' requested instruction and the jury found for the defendant.

The Third District reversed because the omitted instruction was, in view of defendant's closing argument, crucial to the proper decision. Although the jury found the defendant not liable, such a finding "[w]ithout being advised of the proper measure [of damages] . . . might well have assumed that if plaintiffs made a profit on the entire project, that should suffice and preclude any recovery."[296]

The Supreme Court of Florida recently changed the burden of proof instruction for reformation of insurance contract cases. Prior to *Allstate Insurance Co. v. Vanater*,[297] in reformation of insurance contract cases, the plaintiff's standard of proof was to show his claim by clear and convincing evidence as established beyond a reasonable doubt. The Supreme Court of Florida, in *Allstate*, found this dual standard of proof both improper and confusing; thus, the court overruled prior cases.[298] Such a rule lead to contradictory jury

293. Luster v. Moore, 78 So. 2d 87, 88 (Fla. 1955); Holdsworth v. Crews, 129 So. 2d 153 (Fla. 2d Dist. 1961).

294. Mathis v. Adler, 295 So. 2d 652 (Fla. 3d Dist. 1974); Grant v. Red Lobster Inns of America, 292 So. 2d 372 (Fla. 4th Dist. 1974), where failure to give a requested instruction on comparative negligence was reversible error. Ross v. Elaine Powers Figure Salon, 289 So. 2d 740 (Fla. 4th Dist. 1974). In *Ross*, counsel for both parties requested a jury instruction pursuant to rule 1.470(b) on the issue of agency. This was an important issue and the trial court was reversed for not granting the requested instruction.

295. 283 So. 2d 55 (Fla. 4th Dist. 1973).

296. *Id.* at 57.

297. 297 So. 2d 293 (Fla. 1974).

298. Rosenthal v. First Nat'l Fire Ins. Co., 74 Fla. 371, 77 So. 92 (1917); Fidelity Phenix

instructions by giving a jury two different standards of proof—"clear and convincing evidence" and "beyond a reasonable doubt." Establishing the claim by clear and convincing evidence has been adopted as the new standard for jury instructions in these cases.[299]

In another supreme court decision, *Aetna Life Insurance Co. v. Fruchter*,[300] the defendant insurance company had begun disability payments to the plaintiff. Later, the defendant discontinued the payments; consequently, the plaintiff sued for their resumption. Since it is well established, in Florida, that the burden of proving that the disability had ceased is on the insurance company,[301] the plaintiff requested that the trial court issue a jury instruction to that effect. However, the court was faced with a conflict. Florida Standard Jury Instructions 3.7, Comment 2, which was approved by the supreme court,[302] recommends that no charge be given to a jury using the term "burden of proof" because it is an insufficient standard for use by a jury to determine a verdict.[303] Therefore, the trial court charged the jury in accordance with Florida Standard Jury Instruction 3.7 which provides that "[i]f the *great weight of the evidence* does not support the claim of (claimant), then your verdict should be for (defendant)."[304] The Third District found this instruction to be in error and the supreme court agreed. Technical adherence to the Instructions under the facts of this case resulted in the plaintiff having to prove his continuing disability by the greater weight of the evidence—a burden which conflicts with prior law. The problem could have been solved if plaintiff's attorney had requested an instruction that "the insurance company 'must establish by the greater weight of the evidence' "[305] that plaintiff's disability had ceased.

Fire Ins. Co. v. Hilliard, 65 Fla. 443, 62 So. 585 (1913); Old Colony Ins. Co. v. Trapani, 118 So. 2d 850 (Fla. 2d Dist. 1960); Crosby v. International Invest. Co., 101 So. 2d 15 (Fla. 2d Dist. 1958).

299. 297 So. 2d at 295-96. The court stated that reformation was a "pure" equity matter whether a jury decided facts or not. However, the burden of proof in fraud cases, which are neither in law nor in equity, is unchanged—only a greater weight of the evidence need be shown. *See* Rigot v. Bucci, 245 So. 2d 51 (Fla. 1971).

300. 283 So. 2d 36 (Fla. 1973).

301. *See* Mutual Life Ins. Co. v. Ewing, 151 Fla. 661, 10 So. 2d 316 (1942); New York Life Ins. Co. v. Lecks, 122 Fla. 127, 165 So. 50 (1936).

302. This jury instruction, dealing with preponderance of the evidence and burden of proof, was published by the Florida Bar pursuant to the supreme court's opinion in *In re* Standard Jury Instructions, 198 So. 2d 319 (Fla. 1967).

303. FLA. STD. J. INSTR. 3.7.

304. 283 So. 2d at 39 (emphasis added).

305. *Id.* at 40.

The District Court of Appeal, Third District, has held that an instruction to the jury on issues not in the pleadings is proper if there is sufficient material evidence in the record to support the court's charge.[306] This appears to be a corollary to the proposition that pleadings may be amended to conform to evidence as presented at trial.[307]

Several standard jury instructions were amended on January 21, 1974, to conform with changes in the statutes or common law upon which the instructions were based.[308]

XIII. Motions for New Trial and Rehearing

A new trial may be granted on grounds that damages are legally inadequate[309] or excessive.[310] When damages are excessive a trial judge cannot reduce a verdict by remittitur without giving a plaintiff the option of a new trial.[311] Another basis for granting a new trial is newly discovered evidence which, if introduced at trial, would have a substantial likelihood of changing the result.[312] In addition, although failure to object, prior to the discharge of the jury, to a verdict which was inconsistent and unsupported by the law or the facts precludes raising such issue on appeal, such failure does not preclude the trial court from granting a new trial pursuant to rule 1.530(d).[313]

Rule 1.530(b) requires that a motion for a new trial be served within ten days of the *rendition of the verdict* in a jury action or the

306. Winn-Dixie Stores, Inc. v. Nall, 302 So. 2d 781 (Fla. 3d Dist. 1974) (sufficient evidence from medical witnesses existed in the record to support an instruction on aggravation of a pre-existing condition).

307. Fla. R. Civ. P. 1.190(b).

308. *E.g.* Fla. Std. J. Instrs. 3.2(e) (the preliminary charge on the guest statute was deleted as the statute had been repealed); 5.2 (deletion of charge on doctrine of last clear chance); 6.3-.13 (to conform to the revisions as to damages recoverable under the new Florida Wrongful Death Act).

309. Thompson v. Fields, 292 So. 2d 612 (Fla. 4th Dist. 1974).

310. Osteen v. Seaboard Coast Line R.R., 305 So. 2d 241 (Fla. 1st Dist. 1975).

311. Dura Corp. v. Wallace, 297 So. 2d 619 (Fla. 3d Dist. 1974).

312. *In re* Estate of Ira C. Hill, 294 So. 2d 46 (Fla. 3d Dist. 1974).

313. Shank v. Fassoulas, 304 So. 2d 469 (Fla. 3d Dist. 1974). *But see* Gordon v. St. Mary's Hosp., Inc., 305 So. 2d 234 (Fla. 4th Dist. 1974). At the conference on jury charges in *Gordon*, both counsel agreed to a charge of last clear chance. Rule 1.470(b) provides that failure to object to a charge constitutes waiver of assigning it as error. It was therefore error to grant a new trial on the ground of the jury charge. *Shank* cannot be properly distinguished on the basis that in that case the new trial was granted by the court's own motion pursuant to rule 1.530(d). That rule specifically limits a court's power to those reasons "for which it might have granted a rehearing or a new trial on motion of a party." Thus, there is a conflict between the Third and Fourth Districts.

entry of judgment in a non-jury action. In *Lehmann v. Cloniger*,[314] the defendant served his motion for a new trial 29 days after the jury verdict[315] but only five days after the plaintiff's motion to assess costs and enter a final judgment. The District Court of Appeal, First District, held that the defendant's motion was within ten days of the "rendition of the verdict" as rule 1.530(b) requires. To reach this result the court had to construe Florida Appellate Rule 1.3 *in pari materia* with Florida Rule of Civil Procedure 1.530. Appellate Rule 1.3 states that *rendition* of a judgment, decision, order or decree occurs only after post-trial motions as permitted by the rules are disposed of. Thus, when plaintiff's motion to assess costs was disposed of, the verdict was "rendered" and the defendant's motion within five days thereof was timely.[316]

This decision, with its convoluted reasoning, is objectionable because it may cause different results in the same type of situations under rule 1.530. The rule is clear—a party has ten days after the rendition of the verdict to file his motion. But by disregarding this plain meaning, the court has created uncertainty as to the time element for filing the motion because once a post-trial motion is filed, a party will have ten days after it is disposed of to move for a new trial. Thus, the time when the post-trial motion is disposed of, not the time when the verdict is rendered, becomes the determining factor. One wonders whether a dilatory party can, by filing a post-trial motion, give himself another extended opportunity to move for a new trial. Such rationale is within the context of the court's decision.[317]

Kilburn v. Davenport[318] involved a suit by an employee against

314. 294 So. 2d 344 (Fla. 1st Dist. 1974).

315. The verdict was directed by the court as to compensatory damages and the jury awarded $100,000 in punitive damages. This verdict was filed and recorded on the day it was rendered. *Id.* at 345.

316. Appeals from motions granting new trials are governed by Florida Appellate Rule 4.2. It provides that "[a]ppeals may be prosecuted . . . from interlocutory orders . . . except those relating to motions for new trial . . . ." However, in 1971, Florida Statute section 59.04 (1973) was passed which allows appeals from motions granted for a new trial without waiting for final judgment. This apparent conflict was resolved by the Supreme Court of Florida in Clement v. Aztec Sales, Inc., 297 So. 2d 1 (Fla. 1974). The court held that

> an order granting a new trial is a substantive right given by statute and is not interlocutory in nature so that an appeal therefrom may be made without conflicting with Appellate Rule 4.2.

317. The court also stated that even if its rationale was not correct, it could construe the word "judgment" in rule 1.530(b) as encompassing directed verdicts because as such they are "more akin to a non-jury action" and therefore the "ten days from judgment" requirement was met. 294 So. 2d at 347.

318. 286 So. 2d 241 (Fla. 3d Dist. 1973).

his former employer for malicious prosecution. The jury returned a verdict for the plaintiff. The defendant moved for a directed verdict and in the alternative for a new trial. The court granted the former but failed to rule on the latter. The Third District reversed the directed verdict and noted that in Florida a motion for a directed verdict, when joined with a motion in the alternative for a new trial, should be ruled upon in its entirety. This procedure eliminates separate appeals from the individual motions. The trial court was ordered to rule on the new trial motion on remand.

XIV. Relief From Judgment

Rule 1.540(b) sets forth five specific reasons for granting a motion to vacate a judgment. Federal rule 60(b), from which its Florida counterpart 1.540(b) is derived, provides a sixth reason—"any other reason justifying relief from the operation of the judgment." It appears that Florida courts have by judicial decision adopted this sixth reason as part of rule 1.540(b). In *Smith v. Garst*,[319] a hearing was held on the petitioner's competency. The court stated during these proceedings that it would rule eventually on the petitioner's status; yet, sixteen months later when the petitioner's brother inquired as to the status of the case, the court replied that the ruling would be entered but did not specify when or how it would rule. Subsequently, the petitioner was ruled incompetent and the court notified the attorney who represented him at the original hearing. However, that attorney informed the court that he no longer represented the petitioner. No further notice was given. About three months later, after the time for appeal had expired, petitioner's brother for the first time became aware of the ruling. The Second District held, that under the described circumstances, an order to vacate the adjudication of incompetency was proper so that the petitioner could take an appeal.[320]

Relief may be granted parties from a judgment on grounds of mistake. Rule 1.540(a) allows correction of clerical mistakes and rule 1.540(b) allows correction of mistakes such as mutual mistakes between the parties. In *Hutchison v. Wintrode*[321] the plaintiff won a suit for specific performance of a real property contract. At the conclusion of the trial, both parties stipulated as to the legal

319. 289 So. 2d 774 (Fla. 2d Dist. 1974).

320. *Id.* at 776. In another case not falling within the specific definitions of rule 1.540(b), it was proper to vacate a default judgment entered upon issues settled in a prior case. Silverman v. Lichtman, 285 So. 2d 632 (Fla. 3d Dist. 1973).

321. 286 So. 2d 231 (Fla. 2d Dist. 1973).

description of the property. The final judgment described the property as stipulated. Upon affirmance of the judgment by the Second District, a petition for a writ of certiorari was filed by the defendant to the supreme court, which was pending at the time of the instant case. In the interim, the plaintiff was granted a rule 1.540 motion for relief from the judgment to correct the legal description of the property, but the motion, although alleging mutual mistake or clerical error, did not specify upon which subsection of rule 1.540 it was based. On appeal, the Second District reversed.

The order could not have been based on subsection (a) of the rule; this subsection "relates to clerical mistakes arising from oversight or omission" such as "misnomers or misdescriptions of the parties."[322] Yet in this case, since the description sought by the plaintiff did not conform to the complaint or the contract, any modification of the judgment would have modified the terms of the contract, which was *substantive* mistake. Subsection (b) would not apply, if this were a mutual mistake, as this subsection did not provide for making a correction during pendency of appeal, unlike subsection (a). Thus, the lower court lost jurisdiction to entertain a subsection (b) order once an appeal from the final judgment had been filed.[323]

Kuykendall v. Kuykendall[324] also involved the issue of mistake. The husband's counsel, in a dissolution of marriage proceeding, mistakenly believed that, after jointly held property was partitioned and judgment was entered thereon, his client could assert ownership of the whole. As a result he consented to the inclusion of such a partition in the final judgment. On counsel's assertion of this mistake, the trial court vacated a final judgment ordering the property to be held as a tenancy in common. However, the First District reversed, and held that a mistaken view of the law is not a circumstance of mistake contemplated by rule 1.540(b).[325]

Rule 1.540(b) also allows a judgment to be vacated if excusable neglect was the cause of the adverse judgment. In one case, the plaintiff failed to appear for a deposition for the fourth time, the last of which was scheduled by court order. The plaintiff's complaint was dismissed with prejudice, and he moved to vacate on the

322. *Id.* at 232, *citing* Danner v. Danner, 206 So. 2d 650 (Fla. 2d Dist. 1968).

323. *Id.* at 233.

324. 301 So. 2d 466 (Fla. 1st Dist. 1974).

325. The court noted that the husband had sufficient opportunity before final judgment was entered to ascertain the law of Florida in regard to distribution of property upon dissolution. *Id.* at 467.

grounds that the failures to appear for deposition were the result of his counsel either being out of state on vacation, at trial in another case, or in the hospital for surgery. The trial judge granted the motion to vacate and defendant appealed. The Third District held that, although the grounds may have been marginal in substance, granting the motion was not an abuse of the trial judge's discretion and affirmed the granting of plaintiff's motion to vacate on grounds of excusable neglect.[326] In *Scott v. Seabreeze Pools, Inc.*,[327] the plaintiff claimed excusable neglect for his failure to appear at trial to prosecute. It appears that five days prior to trial, plaintiff's counsel was granted a motion to withdraw from the case because he had not been paid. Plaintiff had notice of the motion but did not attend the hearing. Instead, he flew to Las Vegas and did not return until five days after the trial date and the dismissal of his case with prejudice. His motion for relief from judgment was denied by the trial court and affirmed by the Fourth District. No inadvertence or excusable neglect had been shown to justify relief.

If a judgment or decree is entered by a court without jurisdiction, a motion to vacate will be granted.[328] Also a rule 1.540(b) motion will be granted if newly discovered evidence is presented.[329] However, when this evidence would not change the original result if a new trial were granted, the motion will be denied.[330] Another limitation on the newly found evidence rule is that the motion must be made within one year of the judgment.[331] However, in one case, the last sentence of rule 1.540(b), which provides that a court may entertain an independent action to vacate a judgment for fraud upon the court, was interpreted by the majority opinion as a possible way of circumventing the one year provision.[332] As a result, the First District reversed the trial court's granting defendant's motion to dismiss with prejudice of a tardy complaint to re-open an action. Although not inferring that fraud upon the court could be alleged or proven by the plaintiff, the court ordered, "in the interest of

326. Gillett v. Callaway, 289 So. 2d 36 (Fla. 4th Dist. 1974); *see* Oxford Consumer Discount Co. v. Adler, 296 So. 2d 568 (Fla. 3d Dist. 1974).

327. 300 So. 2d 279 (Fla. 4th Dist. 1974).

328. Murphy v. Shoemaker, 287 So. 2d 143 (Fla. 4th Dist. 1973). This case was docketed in a court of record which was subsequently abolished due to revision of article V of the Florida Constitution, effective January 1, 1973. The claim for $1642 was transferred to a circuit court with a minimal jurisdictional amount of $2500. Since the circuit court was without jurisdiction, the rule 1.540(b) motion was properly granted.

329. FLA. R. CIV. P. 1.540(b).

330. Milgen Devel., Inc. v. Goodman, 302 So. 2d 491 (Fla. 3d Dist. 1974).

331. FLA. R. CIV. P. 1.540(b).

332. Potter v. Potter, 293 So. 2d 718 (Fla. 1st Dist. 1974).

justice, under the facts alleged in this case," that the plaintiff be permitted to file an amended complaint alleging fraud upon the courts.[333]

A motion to vacate final judgment on the basis of newly discovered evidence was also at issue in a quiet title action during the survey period. Defendants charged that a final judgment was procured by fraud through the use of an alleged warranty deed which was two separate instruments taped together. The Third District held these allegations as a serious enough charge to warrant remanding the case for further discovery concerning the alleged wrong and a new evidentiary hearing on a rule 1.540(b) motion to vacate.[334]

In *Ashland Oil, Inc. v. Pickard*,[335] appellees recovered a two million dollar judgment against the appellants in a jury trial. The judgment was affirmed by the District Court of Appeal, Third District. Subsequently, the appellant moved for an order to stay execution on the grounds that newly discovered evidence would affect the case materially. The evidence was a fabricated check which was the focus of alleged perjured testimony by the appellee. There had been two trials in the case. The first, in which the alleged fraudulent evidence was introduced, had resulted in a mistrial. In the second trial, at which the judgment was awarded, the check had not been entered into evidence because the falsity of the evidence had become known to appellees' counsel approximately one week before the trial. Appellant contended that "it became incumbent upon [appellees'] counsel to divulge this information to the court and to the appellants."[336] The Third District held that fraud was not demonstrated, even though the information as to the falsity of the check was not divulged to the court, and therefore denied the rule 1.540(b) motion to vacate.

In *Kern v. Kern*,[337] sufficient fraudulent misrepresentation was demonstrated to vacate a judgment. The proceeding was one for dissolution of marriage. The wife relied on the husband's representations as to the issue of child custody and allowed a default to be entered against herself. The husband however had misled her and the court granted her motion to vacate.

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333. *Id.* at 719.

334. Pelekis v. Florida Keys Boys Club, 302 So. 2d 447 (Fla. 3d Dist. 1974); *accord*, Pender v. Hatcher, 303 So. 2d 427 (Fla. 2d Dist. 1974).

335. 289 So. 2d 781 (Fla. 3d Dist. 1974).

336. *Id.* at 781-82.

337. 291 So. 2d 210 (Fla. 4th Dist. 1974).