THE MECHANICS OF FLORIDA CIVIL PROCEDURE

William J. Cook
Barker & Cook, P.A.
501 East Kennedy Boulevard, Suite 1040
Tampa, Florida 33602
(813) 489-1001
wcook@barkercook.com

RESPONSIVE PLEADINGS – WHAT TO USE AND HOW

A. TIMING AND AVOIDING DEFAULT

A defendant has twenty days from the date of service to respond to a complaint. *See* Fla. R. Civ. P. 1.140(a). More often than not, the defendant retains counsel with little time left to respond, and sometimes after the time to respond has passed. Plaintiff's counsel usually will grant a reasonable time extension upon request, but if not, there are several options. First, Rule 1.090(b) provides that a party can move for an enlargement of time for cause shown, and even after the time for responding has elapsed upon a showing of excusable neglect. *See* Fla. R. Civ. P. 1.090(b). The rule, however, does not provide for an automatic extension, and it may be difficult to obtain hearing time before the deadline.

Nonetheless, it is wise to file a motion for enlargement of time, stating the reasons for filing it, including counsel's futile efforts to obtain an extension from opposing counsel. The defendant then will have better grounds for setting aside a default if one is entered. Another option, if counsel has a good faith basis, is to file a motion under Rule 1.140, as serving a motion tolls the time to answer. *See* Fla. R. Civ. P. 1.140(a)(3).

If a default is entered, the court will vacate it upon a showing of excusable neglect, a meritorious defense, and due diligence. *See Gibson Trust, Inc. v. Office of the Atty. Gen.*, 883 So.2d 379, 382 (Fla. 4th DCA 2004) (citations omitted). Florida courts have a liberal policy of vacating defaults so that cases can be decided on the merits, and clerical errors are usually a sufficient excuse. *See Somero v. Hendry General Hospital*, 467 So.2d 1103, 1106 (Fla. 4th DCA 1985) ("[W]here inaction results from clerical or secretarial error, reasonable misunderstanding, a system gone awry or any other of the foibles to which human nature is heir, then upon timely application accompanied by a reasonable and credible explanation the matter should be permitted to be heard on the merits.").

B. MOTIONS

According to Rule 1.140(b), the following defenses may be made by motion:

(1) lack of jurisdiction over the subject matter,

(2) lack of jurisdiction over the person,

(3) improper venue,

(4) insufficiency of process,

(5) insufficiency of service of process,

(6) failure to state a cause of action, and

(7) failure to join indispensable parties.

In addition, Rule 1.110(d) provides a catch-all for affirmative defenses appearing "on the face" of a pleading may be raised in a motion to dismiss under Rule 1.140(b).

Rule 1.140(b) requires that "the substantial matters of law intended to be argued shall be stated specifically and with particularity." Fla. R. Civ. P. 1.140(b). In other words, a motion simply stating that a complaint fails to state a cause of action likely will not be sufficient. *See, e.g., Liton Lighting v. Platinum Television Group, Inc.*, 2 So. 3d 366, 367 (Fla. 4th DCA 2008) (trial judge may not dismiss a cause of action on grounds not pleaded because the claim is being dismissed without notice and the opportunity to be heard).

A motion to dismiss for failure to state a cause of action pursuant to Rule 1.140(b)(6), tests the legal sufficiency of the complaint's allegations and its compliance with the pleading standards in Rules 1.110 ("short and plain statement of ultimate facts") and 1.120 (special matters). The movant has a heavy burden. In ruling on a motion to dismiss for failure to state a cause of action, the trial court must consider only the "four corners of the complaint" and must assume that all allegations in the complaint are true. *See Carmona v. McKinley, Ittersagen, Gunderson & Berntsson, P.A.*, 952 So. 2d 1273, 1275 (Fla. 2d DCA 2007) (citations omitted). Moreover, under the Florida rule, all reasonable inferences must be construed in favor of the non-moving party, and a complaint should not be dismissed unless the movant can establish beyond any doubt that the claimant could prove no set of facts whatever in support of his claim. *See Meadows Cmty. Ass'n, Inc. v. Russell-Tutty*, 928 So. 2d 1276, 1280 (Fla. 2d DCA 2006).

If a defendant raises an affirmative defense in a motion to dismiss, the defense must appear on the face of the complaint. *See* Fla. R. Civ. P. 1.110(d). The plaintiff does not have the burden of anticipating a defense and then overcoming it in his initial pleading. *See Legrande v. Emmanuel*, 889 So. 2d 991 (Fla. 3d DCA 2004). Statute of limitations is one example of an affirmative defense that sometimes is raised in a motion to dismiss. *See Aquatic Plant Mgmt., Inc. v. Paramount Eng'g, Inc.*, 977 So.2d 600, 604 (Fla. 4th DCA 2007).

If the trial court grants a motion to dismiss, the plaintiff ordinarily must be given leave to amend the complaint. *See Trotter v. Ford Motor Credit Co.*, 868 So. 2d 593 (Fla. 2d DCA 2004). Indeed, a plaintiff has an absolute right to amend once before a responsive pleading is filed. A motion to dismiss is not a responsive pleading, and so a plaintiff can amend an initial

complaint at any point prior to the trial court's ruling on a motion to dismiss. A judge's discretion to deny amendment of a complaint arises only after the defendant files an answer or if the plaintiff already has exercised the right to amend once. *Boca Burger, Inc. v. Forum*, 912 So. 2d 561, 567 (Fla. 2005).

The federal standard for dismissal is less stringent for the defendant as a result of the Supreme Court's decisions in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). To survive a motion to dismiss in federal court, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *See Twombly*, 550 U.S. at 570.

There is no mechanism in the rules for dismissing separate counts of a complaint. As discussed above, service of a motion to dismiss tolls the time to respond to the complaint. *See* Fla. R. Civ. P. 1.140(a)(3). If a defendant wishes to seek dismissal of some but not all of the counts, the defendant need not answer to unchallenged counts when filing a motion to dismiss. If the motion is successful, the entire complaint is dismissed with leave to amend. If the motion is unsuccessful, the defendant has ten days to answer. *See* Fla. R. Civ. P. 1.140(a)(3). The closest thing to a "partial" motion to dismiss is a motion to strike pursuant to Rule 1.140(f), which permits a trial court to strike "redundant, immaterial, impertinent, or scandalous matter from any pleading." Fla. R. Civ. P. 1.140(f). The standard is different from a motion to dismiss, however, as the court must find that the material is wholly irrelevant, can have no bearing on the equities and no influence on the decision." *See Rice-Lamar v. City of Fort Lauderdale*, 853 So.2d 1125, 1133-34 (Fla. 4th DCA 2003)(citing *McWhirter, Reeves, McGothlin, Davidson, Rief & Bakas, P.A. v. Weiss*, 704 So.2d 214, 216 (Fla. 2d DCA 1998)). The rule often is invoked when the defendant feels that the plaintiff has inserted unnecessary allegations in an attempt to create publicity or embarrass the defendant.

C. ANSWER AND AFFIRMATIVE DEFENSES

Rule 1.110 sets forth the pleading rules for both complaints and answers. An answer must admit or deny the plaintiff's allegations, and if the defendant is without knowledge, the defendant shall so state and such statement shall operate as a denial. The denial must "fairly meet the substance" of the allegation. Fla. R. Civ. P. 1.110(c). Allegations that are not denied are deemed admitted. Fla. Rule Civ. P. 1.110(e).

Rule 1.110(d) contains a laundry list of specific affirmative defenses that must be pled,

along with the catch-all "any other matter constituting an avoidance or affirmative defense." Fla. R. Civ. P. 1.110(d). A defendant may raise alternative and inconsistent defenses. Fla. R. Civ. P. 1.110(g).

Sometimes it is difficult to determine what constitutes an affirmative defense, as opposed to a denial. Affirmative defenses do not deny facts. They raise some new matter that defeats the plaintiff's claim. *See Tropical Exterminators, Inc. v. Murray*, 171 So. 2d 432 (Fla. 2d DCA 1965).

Affirmative defenses are subject to the same pleading rules as the complaint. A motion to strike a defense tests the legal sufficiency of the defense. *See Burns v. Equilease Corp.*, 357 So.2d 786, 787 (Fla. 3d DCA 1978). In addition, Rule 1.120, contains specific pleading rules governing defensive pleadings. For example, Rule 1.120(b)'s particularity requirement applies to defenses alleging fraud or mistake. *See Thompson v. Bank of New York*, 862 So.2d 768, 770 (Fla. 4th DCA 2003); *Codomo v. Carroll*, 438 So. 2d 158 (Fla. 2d DCA 1983). In addition, a defendant must include "such supporting particulars as are specifically within the pleader's knowledge" when asserting the plaintiff's lack of capacity. *See* Fla. R. Civ. P. 1.120(a). A plaintiff need only generally allege satisfaction of conditions precedent, but a defendant must deny that they occurred with particularity. *See* Fla. R. Civ. P. 1.120(c).

Rule 1.140(h) generally provides that a party waives all defenses that it does not present in either a motion to dismiss or in the answer. The rule creates somewhat of a dilemma for defense counsel. To avoid waiver, defendants sometimes raise every defense that might possibly apply to the cause of action, regardless of whether any factual basis exists. When asked in interrogatories to state the factual basis for its defenses, the defendant will respond that certain defenses were raised to "avoid waiver" and "discovery is continuing."

This tactic invites a motion to strike or dismiss the defense and potentially runs afoul of section 57.105, Florida Statutes, which authorizes sanctions against parties and their attorneys for filing claims or defenses without a factual or legal basis. *See* § 57.105(1), Fla. Stat.

One way to avoid a waiver without risking sanctions is to seek leave to amend the affirmative defenses pursuant to Rule 1.190 once the defendant has a sufficient factual or legal basis. *See Nash v. Wells Fargo Guard Services, Inc.*, 678 So.2d 1262, 1264 (Fla. 1996) (holding that a defendant may move to amend pleadings to assert the negligence of a nonparty in order to include a nonparty on the verdict form); *Wayne Creasy Agency, Inc. v. Maillard*, 604 So.2d 1235

(Fla. 3d DCA 1992) (abuse of discretion to deny leave to amend affirmative defenses).

D. AMENDMENTS

Rule 1.190(a) allows a party to amend once as a matter of course before a responsive pleading is filed. After that, amendment is permitted by consent of leave of court. "Leave of court shall be given freely when justice so requires." Fla. R. Civ. P. 1.190(a). A trial court has broad discretion in considering a motion for leave to amend, but it abuses its discretion in denying the motion unless it clearly appears that allowing the amendment would prejudice the opposing party; the privilege to amend has been abused; or amendment would be futile. *See Sonny Boy, L.L.C. v. Asnani*, 879 So.2d 25, 28 (Fla. 5th DCA 2004). A proposed amendment is futile if it is insufficiently pled or insufficient as a matter of law. *Quality Roof Services, Inc. v. Intervest Nat. Bank*, 21 So.3d 883, 885 (Fla. 4th DCA 2009). In practice, most trial judges seem to prefer to grant an amendment and then entertain a motion to dismiss rather than deny leave to amend on grounds of futility.

Trial courts should be especially liberal in granting leave to amend where it is sought prior to a summary judgment hearing. *See Thompson v. Bank of New York*, 862 So. 2d 768 (Fla. 4th DCA 2003). Liberality in granting leave to amend diminishes as the case progresses to trial, and amending a complaint during trial to assert a new cause of action generally should not be permitted over objection. *See Palm v. Taylor*, 929 So.2d 566, 568 (Fla. 2d DCA 2006). Notwithstanding this principle, Rule 1.190(b) allows for amendments to conform with the evidence presented during trial. *See* Fla. R. Civ. P. 1.190(b).

Amendments generally relate back to the date of the original pleading, so long as the claim or defense arose from the facts giving rise to the original pleading. *See* Fla. R. Civ. P. 1.190(c). In a pair of recent cases, the Florida Supreme Court clarified that an amendment that asserts a new claim can relate back so long as it arises out of the same conduct. The Court disapproved several cases holding that an amendment that adds a new claim does not relate back. *See Palm Beach County School Board v. Doe*, 42 Fla. L. Weekly S23 (Fla. Jan. 26, 2017); *Kopel v. Kopel*, 42 Fla. L. Weekly S26 (Fla. Jan. 26, 2017).

Rule 1.190 (c), however, does not specifically allow for the addition of a new party. Generally, the addition of a new party to an action will not relate back to the original complaint. *See Kozich v. Shahady*, 702 So. 2d 1289 (Fla. 4th DCA 1997). Allegations against a new party relate back in cases of a misnomer, or if the new party has a sufficient "identity of interest" to an

original party such that the addition would not prejudice the new party. An identity of interest can exist when two companies (1) operate out of a single office; (2) share a single telephone line; (3) have overlapping officers and directors; (4) share consolidated financial statements and registration statements; (5) share the same attorney, and (6) receive service of process through the same individual at the same location. *See Schwartz ex rel. Schwartz v. Wilt Chamberlain's of Boca Raton, Ltd.*, 725 So.2d 451, 453 (Fla. 4th DCA 1999).

NON-COMPLAINT CLAIMS AND THIRD PARTY PRACTICE

A. COUNTERCLAIMS, CROSS-CLAIMS, THIRD PARTY CLAIMS, AND APPORTIONMENT

The rules of civil procedure are intended to provide for liberal joinder of parties and an efficient determination of issues. Specifically, Rule 1.210(a) states that all persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs, and any person having an adverse interest to the plaintiff may be made a defendant. Further, "[a]ny person may at any time be made a party if that person's presence is necessary or proper to a complete determination of the cause." Fla. R. Civ. P. 1.210(a). To accomplish this goal, the rules allow for counterclaims, cross-claims, and third party claims.

Rule 1.170 distinguishes between compulsory and permissive counterclaims. A compulsory counterclaim arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. Fla. R. Civ. P. 1.170(a). A permissive counterclaim does not arise out of the transaction or occurrence that is the subject matter of the opposing party's claim. Fla. R. Civ. P. 1.170(a). The supreme court has adopted the so-called "logical relationship test" to determine whether a counterclaim is compulsory or permissive, as follows:

> A claim has a logical relationship to the original claim if it *arises* out of the same aggregate of operative facts as the original claim in two senses: (1) that the same aggregate of operative facts serves as the basis of both claims; or (2) that the aggregate core of facts upon which the original claim rests activates additional legal rights in a party defendant that would otherwise remain dormant.

Londono v. Turkey Creek, Inc., 609 So.2d 14, 20 (Fla. 1992).

There are significant procedural and substantive ramifications to this fact-based question. Essentially, a permissive counterclaim is treated a separate lawsuit on a different subject that happens to be included in the same proceeding as the original suit. Thus, the following rules apply:

1. Waiver. A party who fails to assert a compulsory counterclaim cannot assert that claim in a separate action. *See id.*

2. Statute of limitations. Statutes of limitations do not apply to compulsory counterclaims. *See Johnson v. Allen, Knudsen, DeBoest, Edwards & Rhodes, P.A.*, 621 So.2d 507, 509 (Fla. 2d DCA 1993) (former client could assert otherwise time-barred legal malpractice

claim as a compulsory counterclaim to a law firm's collection complaint) (citing *Allie v. Ionata*, 503 So.2d 1237, 1240 (Fla.1987)). Permissive counterclaims are subject to a statute of limitations defense.

3. Jurisdiction. A permissive counterclaim requires an independent basis for personal and subject matter jurisdiction. *See Beach Park Dev. Corp. v. Remhof*, 673 So.2d 912, 914 (Fla. 2d DCA 1996).

4. Appeals. Judgment on a compulsory counterclaim is not immediately appealable, whereas judgments on permissive counterclaims can be appealed before the end of the original case. *City of Haines City v. Allen*, 509 So.2d 982 (Fla. 2d DCA 1987); *Cunningham v. MBNA America Bank, N.A.*, 8 So. 3d 438, 440 (Fla. 2d DCA 2009).

Cross claims against a co-party must either arise out of the subject matter of the lawsuit or relate to property at issue. *See* Fla. R. Civ. P. 1.170(h).

Rules 1.170(h), 1.180, and 1.250(c) address third party claims. Before asserting any other claim against a third-party defendant, a third-party plaintiff must allege a claim for indemnification, subrogation or contribution. *See Rupp v. Philpot*, 619 So. 2d 1047, 1048 (Fla. 5th DCA 1993).

Section 768.81, Florida Statutes, allows defendants in negligence to ask the jury to apportion liability to third parties without having to implead them. In addition, indemnity, contribution, and subrogation claims may be asserted in a later proceeding. Consequently, defendants often choose not to assert third party claims against potentially liable parties.

B. INJUNCTIONS AND PREJUDGMENT REMEDIES

"The purpose of a temporary or preliminary injunction is not to resolve disputes, but rather to prevent irreparable harm by maintaining status quo until a final hearing can occur when full relief may be given." *Michele Pommier Models, Inc. v. Diel*, 886 So.2d 993, 996 (Fla. 3d DCA 2004). Rule 1.610 governs the procedure for seeking a temporary injunction. *See* Fla. R. Civ. P. 1.610. The courts have established the following elements:

1. Substantial likelihood of irreparable harm. The threat of violation of a restrictive covenant or disclosure of trade secrets constitutes irreparable harm. *See* Fla. Stat. § 542.335(1)(j) (violation of an enforceable restrictive covenant creates a presumption of irreparable injury). Threatened loss of employment does not constitute irreparable harm. *See City of Boynton Beach v. Finizio*, 611 So.2d 74, 75 (Fla. 4th DCA 1992).

2. No adequate remedy at law. An injunction generally is not appropriate in cases where the plaintiff can be made whole with money damages. *See Hiles v. Auto Bahn Fed'n, Inc.*, 498 So.2d 997 (Fla. 4th DCA 1986).

3. Substantial likelihood of success on the merits.

4. Threatened injury to the petitioner that outweighs any possible harm to the respondent.

5. The injunction will not disserve the public interest.

A complaint for an injunction must be verified, and "every necessary fact" supporting the issuance of an injunction "should be clearly, definitely and unequivocally alleged and there must be something more than the conclusions and opinions of the plaintiffs." *Polk County v. Mitchell*, 931 So.2d 922, 925 (Fla. 2d DCA 2006).

Motions for preliminary injunction are a predominant feature of restrictive covenant litigation, and unique rules apply. The usual remedy in cases involving a valid covenant not to compete or non-solicitation agreement is injunctive relief since it is extremely difficult for a court to determine what damages are caused by a breach of the covenant. *See Pinch-A-Penny of Pinellas County, Inc. v. Chango,* 557 So. 2d 940 (Fla. 2d DCA 1990) (citing *Miller Mech., Inc. v. Ruth*, 300 So. 2d 11 (Fla. 1974)). In the case of a breach of a restrictive covenant, there is a presumption of irreparable harm, and if the employer presents a prima facie case of a breach, the burden shifts to the Defendant to rebut the presumption and show the absence of irreparable harm. *See* Fla. Stat. § 542.335(1)(i), (j); *DePuy Orthopaedics, Inc. v. Waxman*, 95 So. 2d 928, 939 (Fla. 1st DCA 2012); *America II Electronics, Inc. v. Smith,* 830 So.2d 906, 908 (Fla. 2d DCA 2002). In addition, the party seeking enforcement of a restrictive covenant also must plead and prove the existence of one or more legitimate business interests, which include, but are not limited to trade secrets, valuable confidential business or professional information that otherwise does not qualify as trade secrets; substantial relationships with specific prospective or existing customers, patients, or clients; or extraordinary or specialized training. *See* Fla. Stat. § 542.335(1)(b).

WRAPPING UP – SETTLEMENTS, JUDGMENTS, APPEALS AND ENFORCEMENT

A. SUMMARY JUDGMENT

Rule 1.510 governs summary judgment procedure. Rule 1.150(c) requires that a motion for summary judgment must "state with particularity the grounds upon which it is based and the substantial matters of law to be argued" and mandates that the moving party identify the admissible evidence upon which it relies. *See* Fla. R. Civ. P. 1.150(c). It is improper to raise new arguments at the summary judgment hearing. *See H.B. Adams Distributors, Inc. v. Admiral Air of Sarasota County, Inc.*, 805 So. 2d 852 (Fla. 2d DCA 2001).

The moving party's summary judgment material must be "admissible in evidence." Fla. R. Civ. P. 1.510(c); *see also Bifulco v. State Farm Mut. Auto. Ins. Co.*, 693 So. 2d 707 (Fla. 4th DCA1997) (holding that a trial court should not have considered unsworn and uncertified documents attached to a summary judgment motion); *see In re Forfeiture of 1998 Ford Pickup*, 779 So.2d 450, 451 (Fla. 2d DCA 2000) (reversing summary judgment and concluding that the trial court entered summary judgment without the benefit of any facts when it relied on an insufficient affidavit).

It is fundamental that if the record reflects the existence of any genuine issue of material fact or the possibility of any issue, or if the record raises even the slightest doubt that an issue might exist, summary judgment is improper. *See Nard, Inc. v. Devito Contr. & Supply, Inc.*, 769 So. 2d 1138, 1140 (Fla. 2d DCA 2000); *Snyder v. Cheezem Dev. Corp.*, 373 So.2d 719 (Fla. 2d DCA 1979). The courts have held that certain types of cases are particularly unsuited for summary judgment. *See, e.g., Mac-Gray Servs. v. Savannah Assocs.*, 915 So. 2d 657 (Fla. 2d DCA 2005) ("Where there is a latent ambiguity affecting a disputed contract provision, there necessarily will be a disputed issue of material fact."); *Palmer v. Santa Fe Health Care Systems, Inc.*, 582 So. 2d 1234, 1236 (Fla. 1st DCA 1991) (reversing a summary judgment and observing that fraud is a "subtle thing requiring a full explanation of the facts and circumstances of the alleged wrong"); *U. S. Fire Ins. Co. v. Progressive Cas. Ins. Co.*, 362 So.2d 414, 417 (Fla. 2d DCA 1978) (holding that the introduction of the doctrine of comparative negligence has accentuated the degree of caution with which a trial court must view a motion for summary judgment).

Although this standard requires the party to prove a negative and is more difficult to satisfy than its federal counterpart, the Florida rule does require the non-moving party to identity at least two business days prior to the day of the hearing, any summary judgment evidence on which it relies. *See* Fla. R. Civ. P. 1.510(c).

Rule 1.510(c) states that judgment shall be entered "forthwith," but the rule also expressly allows for continuances, and the courts have held that summary judgment should not be granted if discovery has not been completed. *See Rice v. NITV, LLC*, 19 So. 3d 1095, 1099 (Fla. 2d DCA 2009); *Brandauer v. Publix Super Mkts.*, 657 So. 2d 932, 933 (Fla. 2d DCA 1995) (citations omitted). An oral request for a continuance is sufficient. *See id.* at 934.

In addition, under Rule 1.530(a), a judge has broad discretion to grant a rehearing of a summary judgment when the party seeking rehearing submits matters that would have created an issue precluding summary judgment if they had been raised prior to the hearing on the motion. *Fatherly v. California Fed. Bank, FSB*, 703 So. 2d 1101, 1103 (Fla. 2d DCA 1997).

B. POST TRIAL MOTIONS

1. Motions for Costs and Attorney's Fees

Rule 1.525 sets forth a bright line rule. Motions for attorney's fees must be served no later than 30 days after the filing of a judgment. Fla. R. Civ. P. 1.525; *see Saia Motor Freight Line, Inc. v. Reid*, 930 So. 2d 598, 599 (Fla. 2006) (approving *Gulf Landings Ass'n v. Hershberger*, 845 So. 2d 344 (Fla. 2d DCA 2003)). The rule, however, does not apply when the trial court has determined entitlement to attorneys' fees and costs in its final judgment, but reserves jurisdiction only to determine the amount in attorneys' fees and costs that is owed. *Amerus Life Ins. Co. v. Lait*, 2 So.3d 203, 207 (Fla. 2009).

2. Motions for New Trial and Rehearing; Amendments of Judgments; Relief from Judgments.

The Florida Rules of Civil Procedure provide two mechanisms a trial court can use to reconsider and correct its prior decision. The first is the motion for rehearing of non-jury matters (or motion for new trial of matters heard by a jury). Fla. R. Civ. P. 1.530. The purpose of a motion for rehearing is to give the trial court an opportunity to consider matters which it overlooked or failed to consider. The second mechanism is the motion for relief from judgment.

Fla. R. Civ. P. 1.540. Rule 1.540 is designed to provide one additional, although restrictive, mechanism whereby the trial court can reconsider and correct its prior decision if necessary. *Francisco v. Victoria Marine Shipping, Inc.*, 486 So.2d 1386, 1389-90 (Fla. 3d DCA 1986) (citations omitted).

Motions for new trial or rehearing must be served within ten days after the return of the verdict in a jury action or the date of filing the judgment in a non-jury action. Fla. R. Civ. P. 1.530(b). There are many potential grounds for seeking a new trial or rehearing, including evidentiary rulings, improper arguments, jury instructions, and failure of comport with the manifest weight of the evidence. *See, e.g., McCloud v. Sherman Mobile Concrete Co., Inc.,* 579 So.2d 773, 774 (Fla. 2d DCA 1991).

By contrast, motions for relief from judgment are limited to five specific grounds: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing; (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) that the judgment or decree is void; or (5) that the judgment or decree has been satisfied, released, or discharged, or a prior judgment or decree upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or decree should have prospective application. Fla. R. Civ. P. 1.540(b). Such motions must be filed within a "reasonable time," except that motions raising the first three grounds (mistake, newly discovered evidence, or fraud) must be filed within one year of the judgment. *See id.*

Not to be confused with a motion for rehearing, a motion for reconsideration is a common law motion seeking to invoke a trial court's inherent authority to modify or vacate any of its nonfinal rulings prior to entry of a final judgment. *See Bettez v. City of Miami*, 510 So. 2d 1242 (Fla. 3d DCA 1987). Motions for reconsideration are "unauthorized" by the rules and therefore not governed by the limitations for the above-referenced motions. For this reason, however, a motion for reconsideration generally does not toll the time for filing an appeal, whereas a motion for rehearing does. *See* Fla. R. App. P. 9.010(i).

C. PROPOSALS FOR SETTLEMENT

Proposals for settlement have generated a tremendous amount of litigation, contrary to the rule's purpose of encouraging settlements and eliminating trials. *See Lamb v. Matetzschk*, 906 So.2d 1037, 1043 (Fla. 2005) (Pariente, J., concurring). Rule 1.442 addresses the procedural

aspects of proposals for settlement, while section 768.79, Florida Statutes governs substance. *See* Fla. R. Civ. P. 1.442; Fla. Stat. § 768.79.

Rule 1.442 requires that proposals for settlement must "state with particularity" any relevant conditions and all nonmonetary terms. According to the supreme court, a release the defendant wants the plaintiff to sign is a nonmonetary term that must be described with particularity. It is not necessary to include a copy of the proposed release with the proposal so long as the proposal unambiguously describes the proposed release's material terms. *See State Farm Mut. Auto. Ins. Co. v. Nichols*, 932 So.2d 1067 (Fla. 2006). If a release is attached, its terms must be consistent with the terms of the proposal. *See Stasio v. McManaway*, 936 So.2d 676, 679 (Fla. 5th DCA 2006) (holding that attorney's fees could not be awarded where the proposal referred to a settlement amount as $60,000, but the attached release stated the consideration was fifty-nine thousand dollars in words followed by the number $60,000).

A joint offer or proposal of settlement that is conditioned on the mutual acceptance of all joint offerees is invalid and unenforceable because it is conditioned such that neither offeree can independently evaluate or settle his or her respective claim by accepting the proposal. *Attorneys' Title Ins. Fund, Inc. v. Gorka*, 36 So.3d 646, 647 (Fla. 2010).

Although Rule 1.442 expressly prohibits filing proposal for settlement, a motion for attorney fees and costs made pursuant to Florida's offer of judgment statute need not be denied because the underlying proposal for settlement was filed in the trial court before the judgment was entered. Any grievance with the timing of the filing of a proposal for settlement can be addressed by filing a motion to strike, and the proper remedy where a court finds that a proposal is filed unnecessarily is to strike the proposal from the record, with leave to refile the proposal if and when it becomes necessary to enforce an entitlement to attorney fees and costs. *Frosti v. Creel*, 979 So.2d 912, 914 (Fla. 2008).

The plain language of section 768.79 and Rule 1.442(c) requires that an offer of settlement cite the Florida law on which it is based. An offer that does not expressly cite the statute and rule is invalid. *Campbell v. Goldman*, 959 So.2d 223, 227 (Fla. 2007).

A proposal for settlement is not invalid for failing to state whether the proposal includes attorney's fees and whether attorney's fees are part of the legal claim under rule 1.442(c)(2)(F) if attorney's fees are not sought in the pleadings. *See Kuhajda v. Borden Dairy Co.*, Case No. SC15-1682 (Fla. Oct. 20, 2016).

Offers of settlement must be differentiated between the parties, even if a party's liability is purely vicarious. *Lamb v. Matetzschk*, 906 So.2d 1037, 1038 (Fla. 2005).

Offers of judgment made by multiple offerors must apportion the amounts attributable to each offeror. *Willis Shaw Exp., Inc. v. Hilyer Sod, Inc.*, 849 So.2d 276, 278-79 (Fla. 2003); *see also Pratt v. Weiss*, 161 So. 3d 1268 (Fla. 2015) (holding that a joint proposal made by two defendant offerors was invalid because it failed to apportion the settlement amount between the two defendants).

D. APPEALS

A notice of appeal must be filed with the clerk of the lower tribunal within thirty days of rendition of the order to be reviewed. Fla. R. App. P. 9.110(b). The time for initiating an appeal is jurisdictional. If the notice of appeal is not filed in time, the appellate court must dismiss the appeal. *See State ex rel. Cantera v. District Court of Appeal, Third District,* 555 So.2d 360, 362 (Fla.1990). A trial court cannot extend the time for filing a notice of appeal. *Gordon v. Green*, 382 So.2d 1344, 1345 (Fla. 5th DCA 1980).

If a trial court enters an amended judgment that does not change the substance of the original judgment, the time to appeal runs from the original judgment. *See Rice v. Freeman*, 939 So. 2d 1144 (Fla. 3d DCA 2006).

Rule 9.020(h) provides that "[a]n order is rendered when a signed, written order is filed with the clerk of the lower tribunal." Fla. R. App. P. 9.020(h). The date of rendition is tolled by the filing of "authorized" post-judgment motions set forth in the rule. A motion is generally not effective to suspend rendition of the time for an appeal unless it is one of the motions identified in the rule. *See Klemba v. State*, 490 So.2d 1050 (Fla. 4th DCA 1986). If a party files a motion that is authorized in the proceeding, but not listed in rule 9.020(h), the time for filing an appeal will run uninterrupted from the date the final order was signed and filed with the clerk. In addition, if the motion is listed but untimely, the motion likewise does not suspend rendition. *Fire & Cas. Ins. Co. of Connecticut v. Sealey*, 810 So.2d 988, 990-91 (Fla. 1st DCA 2002).

E. COLLECTING THE JUDGMENT

In many cases, entry of a judgment marks the beginning of a case and not the end. A creditor has a variety of statutory tools at its disposal to attempt to collect the judgment, including levy, garnishment, etc. In addition, the rules provide a number of procedural devices,

starting with the judgment itself. Rule 1.560, which governs discovery in aid of execution, includes a provision allowing a party to request that a final judgment order a judgment debtor to complete a Form 1.977 Fact Information Sheet. *See* Fla. R. Civ. P. 1.560(c). The Fact Information Sheet includes most of the basic information a creditor would want in seeking to collect on the judgment, including sources of income, location of bank accounts, and information on personal and real property. *See* Fla. R. Civ. P. Form 1.977.

Notably, failure to complete the Fact Information Sheet in accordance with the final judgment or a separate order is punishable by contempt. *See* Fla. R. Civ. P. 1.560(b). As such, a trial court has broad powers to impose sanctions, including fines and incarceration to enforce its orders. *See Creative Choice Homes, II, Ltd. V. Keystone Guard Services, Inc*., 137 So. 3d 1144 (Fla. 3d DCA 2014).