

# Supreme Court of Florida

No. SC15-2298

**ALLSTATE INSURANCE COMPANIES,**  
Petitioner,

v.

**ORTHOPEDIC SPECIALISTS, et al.,**  
Respondents.

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**RESPONDENTS' SUPPLEMENTAL AUTHORITIES RE  
QUESTIONS AND TOPICS RAISED IN ORAL ARGUMENT**

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Respondent Orthopedic Specialists submits as supplemental authorities the following decisions, opinions and statute, copies of which are attached to this notice. The supplemental authorities in paragraphs 1, 2 and 3 are pertinent to Petitioner's Issues II and III on appeal as to whether its policies clearly and unambiguously adopt the Medicare Fee Schedules as the exclusive method of reimbursement for PIP Medical Benefits. They are also pertinent to questions posed by members of the Court at oral argument on that issue. The supplemental authority in paragraph 4 is pertinent to the issue Petitioner raised at oral argument concerning a possible increase in coinsurance costs to the Insured.

1. The following decisions by County Courts hold that the PIP insuring agreement sufficiently drafted a PIP insuring agreement to pay benefits solely

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under the Medicare Fee Schedules:

A. *Quantum Imaging Holdings LLC v. Allstate Fire & Cas. Ins. Co.*, 21 Fla. L. Weekly Supp. 823a (Broward County Apr. 22, 2014):

“The methodology for determining the amount we will pay for such expenses shall, pursuant to the fee schedule limitations under Section 627.736(5)(a)1 of the Florida Statutes [formerly 627.736(5)(a)2 (2008-2011)], or any other limitations established by section 627.736 of the Florida Statutes, or of the Florida Motor Vehicle No-Fault Law ... be limited to eighty percent of the following schedule of maximum charges ... :

a. for emergency transport and treatment by providers licensed under Chapter 401 of the Florida Statutes, 200 percent of Medicare;

b. for emergency services and care provided by a hospital licensed under Chapter 395 of the Florida Statutes, 75 percent of the hospitals' usual and customary charges;

c. for emergency services and care as defined by Section 395.002 of the Florida Statutes, provided in a facility licensed under Chapter 395 rendered by a physician or dentist, and related hospital inpatient services rendered by a physician or dentist, the usual and customary charges in the community;

d. for hospital inpatient services, other than emergency services and care, 200 percent of the Medicare Part A prospective payment applicable to the specific hospital providing the inpatient services;

e. for hospital outpatient services, other than emergency services and care, 200 percent of the Medicare Part A Ambulatory Payment Classification for the specific hospital providing the outpatient services; and

f. for all other medical services, supplies and care, 200 percent of the allowable amount under:

(i) the participating physicians fee schedule of Medicare Part B, except as provided in subparagraphs (ii) and (iii) below

(ii) Medicare Part B, the case of services, supplies and care provided by ambulatory surgical centers and clinical laboratories.

(iii) the Durable Medical Equipment Prosthetics, Orthotics and Supplies fee schedule of Medicare Part B, the

case of durable medical equipment.”

B. *Dussault v. Windhaven Ins. Co.*, 21 Fla. L. Weekly Supp. 436b (Hillsborough County July 9, 2013):

**“INSURING AGREEMENT ...**

Subject to the limits shown in the Schedule or Declarations, personal injury protection benefits consist of the following:

**MEDICAL EXPENSES**

80 percent of the following schedule of maximum charges ... for all other medical services, supplies, and care, 200 percent of the allowable amount under the participating physicians schedule of Medicare Part B. ...”

C. *Unique Chiropractic LLC v. Southern-Owners Ins. Co.*, [FLWSupp Online Ref. 2301BALD] No. 2013SC-003005 (Polk County March 19, 2015):

“If Personal Injury Protection is shown in the Declarations, the benefits shall consist of ... *Medical Benefits*, meaning ... 80% of the schedule of maximum charges set forth by Florida Motor Vehicle No-Fault Law for medically necessary medical, surgical, X-ray, dental, and rehabilitative services, including prosthetic devices and medically necessary ambulance, hospital, and nursing services....”

D. *Orthopedic Specialists LLP v. Nationwide Affinity Ins. Co. of Amer.*, 23 Fla. L. Week Supp. 154a (Pinellas County June 12, 2015):

**“MEDICAL BENEFITS**

Benefits will be paid to or for the benefit of the injured person at 80% of the rate of the schedule of maximum charges pursuant to the Florida Motor Vehicle No-Fault Law. Medical expenses that are not reimbursable under Medicare or Florida’s worker’s compensation are not covered and will not be paid. If the Florida Motor Vehicle No-Fault Law schedule does not apply to covered medical expenses or does not exist, then benefits will be paid at 80% of the reasonable amount billed.”

2. *In Re Amendments to the Florida Rules of Civil Procedure*, No. SC16-155 (Fla. Sep. 1, 2016), amends Rules of Civil Procedure by eliminating certain usage of the word *shall* and replacing it with the word *must*. The Opinion further cautions that, until published in the permanent law reports, the amendments are “*subject to* revision or withdrawal.”

3. *Hastie v. Eckholm*, --- So.3d ---, 2016 WL 4539922, No. 4D15-289 (Fla. 4th DCA Aug. 31, 2016), holds that the words “**subject to**” in a contract generally create an ambiguous contract.

4. § 627.736(5)(a)5, Fla. Stat. (2008-11), addresses how coinsurance costs are statutorily affected when Medicare Fee Schedules are used to calculate benefits and states that:

“If an insurer limits payment as authorized by subparagraph 1, the [provider] ... may not bill or attempt to collect from the insured any amount in excess of such limits, *except for amounts that are not covered by [PIP] due to the coinsurance amount* or maximum policy limits.”

\* \* \*

#### *Certificate of Filing and Service*

*I hereby certify* that in compliance with Fla. R. Jud. Adm. 2.515 this Notice was electronically filed on September 8, 2016. *I further certify* that in compliance with Fla. R. Jud. Adm. 2.516 this Notice was electronically served on all persons in the attached Service List on September 8, 2016.

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*Quantum Imaging Holdings LLC v. Allstate Fire & Cas. Ins. Co.*, 21 Fla. L.  
Weekly Supp. 823a (Broward County Apr. 22, 2014)

**21 Fla. L. Weekly Supp. 823a**

**Online Reference: FLWSUPP 2108MADI**

**Insurance -- Personal injury protection -- Coverage -- Medical expenses -- Policy provision that makes vague references to amounts payable being "subject to any and all limitations authorized by [PIP statute]...including, but not limited to, all fee schedules" does not unambiguously elect to limit reimbursement to permissive statutory fee schedule -- Florida Supreme Court's opinion in *Virtual Imaging* does not compel finding that policy provision at issue unambiguously elects use of statutory fee schedule where sufficiency of policy language was never considered in *Virtual Imaging* opinion -- Divergent judicial opinions from county and circuit courts as to whether policy provision at issue clearly elects to limit reimbursement to permissive statutory fee schedule demonstrates that policy provision is far from clear and unambiguous**

QUANTUM IMAGING HOLDINGS, LLC A/A/O CHRISTINE MADIA, Plaintiff, v. ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE 13-12360 COCE 53. April 22, 2014. Honorable Robert W. Lee, Judge. Counsel: Emilio R. Stillo, for Plaintiff. Douglas E. Brehm, for Defendant.

FINAL JUDGMENT IN FAVOR OF PLAINTIFF

THIS CAUSE having come to be heard before the Court on non-jury trial on April 21, 2014. After reviewing the pleadings, the evidence, and argument of counsel, the Court makes the following findings:

Facts

At issue in this case is the sufficiency of the Defendant's (hereinafter referred to as "Allstate") policy language. Allstate has stipulated that the Plaintiff's charge of \$1750.00 for both CPT Code 72141 and 70551 are reasonable in amount. Allstate chose to pay the submitted bills at the 200% Medicare cap.

The language of Allstate's policy provides that Allstate will pay as follows, as pertains to personal injury protection (PIP) coverage:

"Medical Expenses: Eighty percent of reasonable expenses for medically necessary medical, surgical, X-ray, dental and rehabilitative services, including prosthetic devices, and medically necessary ambulance, hospital, and nursing services.

The policy further states:

"Any amounts payable under this coverage shall be subject to any and all limitation authorized by section 627.736, or any other provisions of the Florida Motor Vehicle No-Fault Law, as enacted, amended or otherwise continued in the law, including, but not limited to, all fee schedules."

Allstate contends that this latter provision is a clear and unambiguous election rejecting reimbursement of 80% of reasonable charges and that the only limitation authorized by section 627.736, as pertains to the bills in this case, is the 200% Medicare cap, and as a result, it is unambiguously electing to use the Medicare cap methodology as its payment method.

The Plaintiff contends that Allstate failed to clearly and unambiguously include this methodology in its policy, as required by Geico General Insurance Company v. Virtual Imaging Services, Inc. etc., 38 Fla. L. Weekly S517a (Fla. 2013), and as a result, Allstate is obligated to pay 80% of the “reasonable expenses.” Allstate agrees that if the Plaintiff’s interpretation is correct, it would owe Plaintiff an additional sum towards the medical bills submitted.

#### Analysis

The Supreme Court explained in U.S. Fire Insurance Company v. J.S.U.B. Inc., 979 So.2d 871, 877 (Fla. 2007) [32 Fla. L. Weekly S811a] that:

“Insurance contracts are construed according to their plain meaning, with any ambiguities construed against the insurer and in favor of coverage. Further, ‘in construing insurance policies, courts should reach each policy as a whole, endeavoring to give every provision its full meaning and operative effect.’”

[Citations omitted]

And in Travelers Indemnity Co. v. PCR Inc., 889 So.2d 779 (Fla. 2004) [29 Fla. L. Weekly S774a], the Supreme Court explained:

“Policy language is considered to be ambiguous. . . if the language ‘is susceptible to more than one reasonable interpretation, one providing coverage and the other limiting coverage.’ When language in an insurance policy is ambiguous, a court will resolve the ambiguity in favor of the insured by adopting the reasonable interpretation of the policy’s language that provides coverage, as opposed to the reasonable interpretation that would limit coverage.”

[Citations omitted]

Finally, in Virtual, the Supreme Court required that the choice of the methodology be done in a manner so that the insured patient and health care providers would be aware of it. *Id.*

Applying the Supreme Court’s principles of construction, this Court concludes that Allstate’s language is ambiguous in attempting to limit reimbursement to Medicare cap methodology for numerous reasons.

Allstate’s choice of confusing language placed in a separate section a page later than the “eighty percent of reasonable expenses” language results in a finding that Allstate did not make its election in a manner so that the insured patient and health care providers would be aware of it, even if Allstate’s “subject to” language could be interpreted to incorporate the Medicare fee cap. Further, the Florida Supreme Court in Virtual recognized that there are two methodologies for satisfying the statutory mandate to pay reasonable expenses. One is a fact dependent analysis under 5a1 and the other is by clearly and unambiguously electing the fee schedules under 5a2 in the policy. The policy provision at issue in this matter incorporates both. As the Supreme Court noted in Virtual, “even if the Medicare fee schedules are incorporated into the insured’s policy, neither the insured nor the provider knows, without the policy providing notice by electing the Medicare fee schedules that the insurer will limit reimbursements.”

Allstate’s policy contains several ambiguities. First, the term “subject to” is ambiguous as it has many possible interpretations. Its customary use is to indicate a condition to one party’s duty of performance

and not a promise by the other. The amounts payable are already “subject to” all portions of the Florida Motor Vehicle No-Fault Law.

By use of the phrase “subject to,” Allstate has not incorporated the optional provisions of the Medicare fee cap into the policy. *See St. Augustine Pools, Inc. v. James M. Barker, Inc.*, 687 So.2d 957, 958 (Fla. 5th DCA 1997) [22 Fla. L. Weekly D432a] (the words “subject to” in a contract are distinct from “incorporating” provisions of another document). Allstate has said nothing more than what is already true -- all PIP policies are “subject to” these provisions; however, Allstate must clearly and unambiguously *take the next step* to incorporate these optional provisions into the policy if it desires to use the alternative methodology provided. *See also Geico General Insurance Company v. Virtual Imaging Services, Inc. etc.*, 38 Fla. L. Weekly S517a (Fla. 2013); *The Imaging Center of West Palm Beach, LLC (a/a/o Susan Angello) v. Allstate Property & Casualty Insurance Company*, 21 Fla. L. Weekly Supp. 96a (17th Circuit, County Court; Judge Robert W. Lee).

Even if the term “subject to” were deemed to be limiting in nature the provision makes amounts payable subject to any and all limitations authorized by 627.736. There are several limitations authorized by this statute. In addition to the permissive schedule of maximum charges under FS 627.736(5)(a)(2)(a)-(f), a medical provider is limited to charging the insurer and injured party only a reasonable amount for his services and the amount charged is limited to no more than the amount the provider customarily charges for like services under FS 627.736(5)(a)(1). Moreover, the provision is written in the alternative. Therefore the policy can be interpreted as subjecting amounts payable to either any and all limitations “or” any other provisions of the Florida Motor Vehicle No-Fault Law. . . including, but not limited to all fee schedules. Not only does this language fail to clearly and unambiguously elect the fee schedules under 627.736(5)(a)(2) it subjects amounts payable to all provisions of the statute including 627.736(5)(a)(1).

Allstate has done nothing other than give itself the option to reimburse benefits under either the 5a1 or 5a2 methodology and has not clearly and unambiguously elected to limit reimbursement in accordance with FS 627.736(5)(a)2. The Court also notes that the policy retains a provision giving Allstate the right to contest whether charges are reasonable. If it was Allstate's intent to elect to limit reimbursements in accordance with 5a2 there would be no reason to ever have to contest the reasonableness of the charge.

Additionally, earlier in its policy under the Limits of Liability for Automobile Medical Payments Allstate uses the following language in an effort to elect the fee schedules:

“ANY AMOUNTS PAYABLE UNDER THIS COVERAGE SHALL BE SUBJECT TO THE FEE SCHEDULE REIMBURSEMENT LIMITATIONS SET FORTH IN THE FLORIDA MOTOR VEHICLE NO-FAULT LAW, AS ENACTED, AMENDED OR OTHERWISE CONTINUED IN THE LAW”

While the Court believes the use of the term “subject to” is ambiguous, the remaining portion of the provision subjects amounts payable to only the fee schedule reimbursement limitations set forth in the Florida Motor Vehicle No-Fault Law. The specific reference to fee schedule reimbursement limitations as opposed to any and all limitations together with the elimination of the alternative “or any other provisions of the Florida Motor Vehicle No-Fault Law” do not create the myriad of possible interpretations applicable to the PIP provision at issue. Had Allstate used this language in the PIP provision of the policy the question of ambiguity would be much closer.



Similarly, the Plaintiff has moved into evidence a 2013 Allstate policy which contains the following language:

"The methodology for determining the amount we will pay for such expenses shall, pursuant to the fee schedule limitations under Section 627.736 (5)(a)1. of the Florida Statutes, or any other limitations established by Section 627.736 of the Florida Statutes, or of the Florida Motor Vehicle No-Fault Law, as enacted, amended or otherwise continued in the law, be limited to eighty percent of the following schedule of maximum charges (or any other fee schedule limitation which may be enacted, amended or otherwise continued in the law):

a. for emergency transport and treatment by providers licensed under Chapter 401 of the Florida Statutes, 200 percent of Medicare;

b. for emergency services and care provided by a hospital licensed under Chapter 395 of the Florida Statutes, 75 percent of the hospital's usual and customary charges;

c. for emergency services and care as defined by Section 395.002 of the Florida Statutes, provided in a facility licensed under Chapter 395 rendered by a physician or dentist, and related hospital inpatient services rendered by a physician or dentist, the usual and customary charges in the community;

d. for hospital inpatient services, other than emergency services and care, 200 percent of the Medicare Part A prospective payment applicable to the specific hospital providing the inpatient services;

e. for hospital outpatient services, other than emergency services and care, 200 percent of the Medicare Part A Ambulatory Payment Classification for the specific hospital providing the outpatient services; and

f. for all other medical services, supplies and care, 200 percent of the allowable amount under:

(i) the participating physicians fee schedule of Medicare Part B, except as provided in subparagraphs (ii) and (iii) below

(ii) Medicare Part B, the case of services, supplies and care provided by ambulatory surgical centers and clinical laboratories.

(iii) the Durable Medical Equipment Prosthetics/Orthotics and Supplies fee schedule of Medicare Part B, the case of durable medical equipment."

Had Allstate used the 2013 language in the PIP provision of the policy at issue the Plaintiff contends the question of ambiguity would likely have been resolved in Allstate's favor.

The Court rejects Allstate's position that the Florida Supreme Court's ruling in *Virtual* approved the text in GEICO's amendment to its standard policy made while the case was being presented in the Supreme Court. The case on review in the Supreme Court involved only GEICO's 2008 version of its PIP policy. At some point during the proceedings in the Supreme Court, respondent had moved to dismiss the case, arguing that GEICO had since changed the same provision significantly in its standard form PIP policy mooted the issue.

The Supreme Court obviously refused to dismiss the case because it proceeded to decide it on the merits. But what the Supreme Court actually said about Geico's new policy text was this:

*“Because the GEICO policy has since been amended to include an election of the Medicare fee schedules as the method of calculating reimbursements, and the Legislature has now specifically incorporated a notice requirement into the PIP statute, effective July 1, 2012, see § 627.736(5)(a) 5., Fla. Stat. (2012), our holding applies only to policies that were in effect from the effective date of the 2008 amendments to the PIP statute that first provided for the Medicare fee schedule methodology, which was January 1, 2008 through the effective date of the 2012 amendment, which was July 1, 2012.”*

In short, contrary to approving the new text put forth by GEICO, the Court made clear that its holding applied only to the policies in effect from 2008 to 2012. The Court was careful to express no decision as to the new policy text, because the issue before the Court involved only the policies in effect in the cases already adjudicated in the lower courts. The Supreme Court's real, distinct and clear holding in Virtual is that the contested PIP med-pay policies in effect from 2008 to 2012 failed to state a clear election to limit medical benefits to the Medicare fee schedules. The Allstate policy language before the Court involves an Allstate policy in effect between 2008 and 2012 for the Florida Supreme Court has expressly made Virtual directly controlling. Further, the Court notes that on April 10, 2014 the Broward Circuit Court struck Allstate's Appendix from the record as it relates to the amended GEICO policy in a pending appeal from this division in the case of Allstate Fire and Casualty Insurance Company v. Chironex Enterprises, Inc., Case No.CACE13-010002, L.T.CASE NO.:COCE11-005112 [21 Fla. L. Weekly Supp. 641b].

Finally, the Court notes that to date there have been over 70 orders entered on this issue by various courts around the state. The percentage of courts that have found the provision ambiguous as opposed to clearly and unambiguous electing to limit reimbursements in accordance with the fee schedules under 627.736(5)(a)2 is approximately 50-50. Although this does not create any presumptions regarding the outcome of this dispute it is certainly persuasive that if trained legal minds are unable to agree as to whether the provision is clear and unambiguous, the average insured could never clearly understand what his or her benefits are. In Security Ins. Co. Of Hartford v. Investors Diversified Ltd., Inc., 407 So.2d 314 (Fla. 4th DCA 1981), the court stated:

*“The insurance company contends that the language is not ambiguous, but we cannot agree and offer as proof of that pudding the fact that the Supreme Court of California and the Fifth Circuit in New Orleans have arrived at opposite conclusions from a study of the essentially the same language.”*

Security Insurance, supra at 316 (Emphasis in original).

The “proof of the pudding” in the instant case is that Quantum Imaging has demonstrated multiple orders and circuit court appellate opinions have reached diverse conclusions with regard to Allstate's policy language. In and of itself, that diversity demonstrates that Allstate's policy is far from clear and unambiguous in its purported attempt to “elect” the reimbursement limitations set forth in §627.736 (5)(a)2. Similarly, in Stroehmann v. Mutual Life Ins. Co. of New York, 300 U.S. 435, 57 S. Ct. 607, 81 L. Ed. 732 (1937), the Supreme Court found a life insurance policy ambiguous, stating in pertinent part:

*“Examination of the words relied upon to show an exception to the incontestability clause of the policy discloses ample cause for doubt concerning their meaning. The*

*arguments of counsel have emphasized the uncertainty. The District Court and the circuit Court of Appeals reached different conclusions, and elsewhere there is diversity of opinion. . . . Without difficulty respondent could have expressed in plain words the exception for which it now contends. It has failed, we think, so to do. And applying the settled rule, the insured is entitled to the benefit of the resulting doubt."*

Stroehman, supra at 441 (Emphasis added).

Based on these findings, this Court concludes that Allstate's policy fails to satisfy the Virtual requirements for a clear and unambiguous election of the Medicare cap methodology as its payment method. Accordingly, the policy at issue is construed against Allstate and Allstate is obligated to pay 80% of the "reasonable expenses."

ORDERED AND ADJUDGED that the Plaintiff. QUANTUM IMAGING OLDINGS, LLC A/A/O CHRISTINE MADIA recover from the Defendant ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY the sum of \$ 898.69, together with prejudgment interest in the amount of \$ 38.59, for a total amount of \$ 937.28 for all of which sums let execution issue.

The Plaintiff is entitled to recover the costs of this action and reasonable attorney's fees under 627.428, Florida Statutes. This Court retains jurisdiction to determine the amounts of costs and attorney's fees due Plaintiff.

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*Dussault v. Windhaven Ins. Co.*, 21 Fla. L. Weekly Supp. 436b  
(Hillsborough County July 9, 2013)

21 Fla. L. Weekly Supp. 436b

**Online Reference: FLWSUPP 2105DUSS**

**Insurance -- Personal injury protection -- Coverage -- Medical expenses -- Deductible -- PIP statute and policy require that deductible be subtracted from total expenses and losses before statutory percentage limitations are applied**

HEATHER DUSSAULT, an insured individual by and through his/her assignee, TAMPA BAY IMAGING, LLC, Plaintiff, v. WINDHAVEN INSURANCE COMPANY, a Florida corporation, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 12-CC-010093, Division I. July 9, 2013. Honorable Joelle, A. Ober, Judge. Counsel: Philip A. Friedman, FL Legal Group, Tampa, for Plaintiff. Dan Smith, Charles J. Grimsley & Assoc. P.A., Miami, for Defendant.

ORDER ON THE PARTIES CROSS-MOTIONS

FOR SUMMARY JUDGMENT

THIS CAUSE having come before the Court on the morning of April 30, 2013, present for the Plaintiff, Philip A. Friedman, Esq. and Melissa N. Gonzalez, Esq, and for Defendant Dan Smith, Esq and the Court having reviewed the file, including the parties stipulated facts, and argument being advised on statute and case law hereby makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The controversy between the parties is whether the \$1,000.00 deductible should be applied and subtracted from the total billing *before or after* any formula for payment or "percentage limitation" in the policy is applied. Pursuant to a stipulation of facts and other evidence in this Court's file which show there are no genuine issues as to any material fact, Plaintiff is entitled to judgment as a matter of law.

Heather Dussault (DUSSAULT) purchased a policy of insurance from Defendant, Windhaven Insurance Company (WINDHAVEN), which provided personal injury protection coverage to a limit of \$10,000.00 subject to a deductible of \$1,000.00, a policy which is subject to the Florida Insurance Code, more specifically §627.730-627.7405 (Florida No-Fault Act). Dussault was involved in a motor vehicle accident on October 20, 2011 where she sustained bodily injury. She sought treatment with Plaintiff, her medical provider, Tampa Bay Imaging, LLC (TBI) on November 1, 2011, where she also assigned her rights to recover under the policy. TBI charged a reasonable amount for a causally related and medically necessary service, \$1650.00, and timely submitted same in its notice of covered loss to Windhaven, which received the bill on November 17, 2011. This was the first bill received by Windhaven for this loss, thus it was subject to a deductible of \$1000.00. Windhaven first limited TBI's charge from \$1,650.00 to \$854.00, then applied the deductible, rendering the bill entirely subject to and within the deductible amount, making no payment. Both TBI's charge and Windhaven's limitation amount are reasonable.

TBI contends Windhaven should have first applied the deductible before limiting the charge, which would have resulted in payment of \$520.00 (\$1,650.00 bill less \$1000.00 deductible = \$650.00 at 80% = \$520.00), stating both Windhaven's policy and Fla. Stat. §627.739 requires this calculation. As such, TBI brings both a count for declaratory judgment pursuant to chapter 86, Fla. Stat. regarding the

proper interpretation of the policy, Fla. Stat. §§627.739 and 627.736, and a breach of contract action for the balance claimed of \$520.00 plus interest and other costs.

STATUTE AND POLICY

The relevant statutes applicable to these facts.

Fla. Stat. §627.739(2) (2010) (*emphasis added*) states:

Insurers shall offer to each applicant and to each policyholder, upon the renewal of an existing policy, deductibles, in amounts of \$250, \$500, and \$1,000. *The deductible amount must be applied to 100 percent of the expenses and losses described in s. 627.736.* After the deductible is met, each insured is eligible to receive up to \$10,000 in total benefits described in s. 627.736(1). However, this subsection shall not be applied to reduce the amount of any benefits received in accordance with s. 627.736(1)(c).

Fla. Stat. 627.736 (5)a (5) (2010) (*emphasis added*) states:

If an insurer limits payment as authorized by subparagraph 2., the person providing such services, supplies, or care may not bill or attempt to collect from the insured any amount in excess of such limits, *except for amounts that are not covered by the insured's personal injury protection coverage due to the coinsurance amount or maximum policy limits*

The parties agree and this Court concurs the relevant statutes are clear and unambiguous. Windhaven's policy (FL ASIM 01 07 03 08) states:

**II. Personal Injury Protection Coverage**

**INSURING AGREEMENT**

A. . . .

B. Subject to the limits shown in the Schedule or Declarations, personal injury protection benefits consist of the following:

**MEDICAL EXPENSES**

80 percent of the following schedule of maximum charges which must be "medically necessary:

. . .

6. For all other medical services, supplies, and care, 200 percent of the allowable amount under the participating physicians schedule of Medicare Part B. . . .

7. The applicable fee schedule or payment limitation under Medicare is the fee schedule or payment limitation in effect . . . At p. 19, (**Bold** and CAPS in original, *Italics* as emphasis)

under Limits of Liability, paragraph C, p. 20(*emphasis added*):



The amount of any deductible shown in the Schedule of Declarations shall be deducted from the total amount of expenses and losses listed in all applicable parts of Paragraph B. of the Personal Injury Protection Coverage Insuring Agreement, *before the application of any percentage limitation for each "insured" to whom the deductible applies.*

#### CONCLUSIONS OF LAW

The plain, unambiguous and unequivocal language of §627.739(2) requires *the deductible amount must be applied to 100 percent of the expenses and losses described in s. 627.736.* This Court is not permitted to employ other rules of statutory construction. While payment of PIP benefits under Windhaven's policy is payable at a percentage limitation of 80% and then 200% of the Medicare fee schedule, the Court finds for Plaintiff and declare as a matter of law that *both* of these limitations are "percentage limitations" as described in §627.739(2) and Windhaven's policy and as such, Windhaven was required to apply 100% of the expenses and losses (\$1,650.00) to the \$1,000.00 deductible *before* taking any percentage limitation. As such, \$650.00 of TBI's bill was subject to payment pursuant to Windhaven's insuring agreement. The Court further finds for the Plaintiff in damages of \$520.00 in breach of contract, pre judgment interest of \$45.30<sup>1</sup>, together with attorney's fees and costs and all other matters consistent with this Summary Judgment, and for all which let execution lie.

Defendant's Motion for Summary Judgment is DENIED for reasons consistent with the findings herein.

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<sup>1</sup>\$520.00 x 6% per annum (.0001644) x 530 days (from 11/17/2011-4/30/2013) = \$45.30

\* \* \*

*Unique Chiropractic LLC v. Southern-Owners Ins. Co.*, [FLWSupp Online Ref. 2301BALD] No. 2013SC-003005 (Polk County March 19, 2015)

**Online Reference: FLWSUPP 2301BALD**

**Insurance -- Personal injury protection -- Coverage -- Medical expenses -- PIP policy endorsement that states that insurer will pay benefits at 80% of maximum charges set forth by PIP law and 80% of other reasonable expenses clearly and unambiguously elects to limit reimbursement for services covered by statutory fee schedule to amount established by that fee schedule**

UNIQUE CHIROPRACTIC, LLC, d/b/a FLORIDA SPINAL & INJURY, a/a/o TERRY BALDWIN, Plaintiff, vs. SOUTHERN-OWNERS INSURANCE COMPANY, Defendant. County Court, 10th Judicial Circuit in and for Polk County. Case No. 2013SC-003005. March 19, 2015. Honorable Susan B. Flood, Judge. Counsel: Stephen D. Deitsch, Deitsch & Wright, P.A., Lake Worth, for Plaintiff. Birdy V. Vanasupa, Vernis & Bowling of the Gulf Coast, P.A., Tampa, for Defendant.

**ORDER GRANTING DEFENDANT'S**

**MOTION FOR FINAL SUMMARY JUDGMENT**

THIS CAUSE, having come before the Court on Defendant, SOUTHERN-OWNERS INSURANCE COMPANY'S (hereinafter "Southern-Owners"), Motion for Final Summary Judgment and Supporting Memorandum of Law, on Friday, March 13, 2015, beginning at 3:30 p.m., and the Court having reviewed said Motion and Supporting Memorandum and supporting attachments thereto, and being otherwise fully advised on the premises, the Court FINDS, ORDERS, and ADJUDGES as follows:

**FACTUAL BACKGROUND**

Plaintiff, UNIQUE CHIROPRACTIC, LLC, d/b/a Florida Spinal & Injury, filed suit against Southern-Owners for additional Personal Injury Protection (i.e. PIP) benefits on behalf of Southern-Owners' Insured, Mr. Terry Baldwin. Plaintiff contends that the PIP Endorsement of the automobile insurance policy issued by Southern-Owners to Mr. Baldwin is ambiguous and, therefore, failed to properly elect payment of PIP benefits at fee schedule. As such, Plaintiff further contends that Southern-Owners should have paid 80% of the total amount that it charged Southern-Owners for various treatments rendered to Mr. Baldwin. It is undisputed that the treatments Plaintiff rendered to Mr. Baldwin were in connection with a motor vehicle accident that occurred on February 8, 2013 (hereinafter "subject accident"). It is also undisputed that the subject accident occurred.

The automobile insurance policy in question (hereinafter "subject policy") was in full force and effect at the time of the subject accident. It is undisputed that the following were provided to Mr. Baldwin at the time the subject policy was renewed on or around July 2, 2012:

1. the subject policy;
2. the applicable declarations page;
3. all applicable endorsements, including the PIP Endorsement, identified by Endorsement Number 79255 (01-11) (hereinafter "01-11 Endorsement" or "PIP Endorsement"), which gave Mr. Baldwin notice that Southern-Owners would pay PIP benefits at 80% of the fee schedule set forth in § 627.736(a)1 of Florida's No-Fault Statute, 2012; and
4. all applicable notices, including the Policyholder Notice, identified by Notice Number 69121 (5-12) (hereinafter "5-12 Notice"), which also gave Mr. Baldwin notice that Southern-Owners would pay PIP benefits at 80% of the fee schedule set forth in §

627.736(a)1 of Florida's No-Fault Statute, 2012.

It is also undisputed that the subject policy, as evidenced by its Declarations Page, provided \$10,000.00 in PIP benefits, but did not provide Medical Payments Coverage (i.e. MedPay). It is further undisputed that the 01-11 Endorsement provided, in relevant part, as follows:

\*

2. If Personal Injury Protection is shown in the Declarations, the benefits shall consist of:

a. Medical Benefits, meaning:

(1) 80% of the schedule of maximum charges set forth by Florida Motor Vehicle No-Fault Law for medically necessary medical, surgical, X-ray, dental, and rehabilitative services, including prosthetic devices and medically necessary ambulance, hospital, and nursing services; and

(2) 80% of all other reasonable expenses for medically necessary medical, surgical, X-ray, dental, and rehabilitative services, including prosthetic devices and medically necessary ambulance, hospital, and nursing services NOT set forth in the schedule of maximum charges by Florida Motor Vehicle No-Fault Law.

(emphasis added). Additionally, it is also undisputed that: (1) Southern-Owners paid Plaintiff's charges at 80% of 200% of the participating physician's fee schedule under Medicare Part B for services rendered by Plaintiff to Mr. Baldwin; (2) none of the CPT Codes charged by Plaintiff were denied; and (3) every single CPT Code charged by Plaintiff was covered under the Medicare Part B fee schedule. Southern-Owners contends that the 01-11 Endorsement properly elected payment of Mr. Baldwin's PIP benefits at fee schedule and that notice of such election was provided to Mr. Baldwin at the time the subject policy was renewed.

### DISCUSSION AND CONCLUSIONS OF LAW

#### *Summary Judgment Standard*

The burden of proving entitlement to Summary Judgment is on the movant, regardless of who has the burden at trial. *Nowicki v. Cessna Aircraft Co.*, 69 So.3d 406, 409 (Fla. 4th DCA 2011) [32 Fla. L. Weekly D2082a] (internal citation omitted). Summary Judgment is proper "only if there is no genuine issue of material fact, viewing every possible inference in favor of the party against whom summary judgment has been entered." *Poe v. IMC Phosphates MP, Inc.*, 885 So.2d 397, 400 (Fla. 2nd DCA 2004) [29 Fla. L. Weekly D2304a]; *see also* Fla. R. Civ. P. 1.510(c).

#### *Florida's Rules regarding Insurance Policy Interpretation*

##### Policy Interpretation

Contract interpretation is a question of law for courts to decide. *See, e.g., Penzer v. Transportation Ins. Co.*, 29 So.3d 1000, 1005 (Fla. 2010) [35 Fla. L. Weekly S73a]. In so interpreting, Florida courts construe insurance contracts according to their plain meaning, with any ambiguities construed against the insurer and in favor of coverage. *Penzer* at 1005. Florida courts, however, will not interpret an insurance contract so as to provide more coverage, even where the contract contains provisions that tend to limit liability, if the contract's language is clear and unambiguous on its face. *See, e.g., State Farm Fire and Cas. Co. v. Metropolitan Dade County, et al.*, 639 So.2d 63, 65 (Fla. 3rd DCA 1994); *see also Penzer* 29 So.3d at 1005 (stating that: (1) ambiguity is present where the relevant contract language is susceptible to more than one reasonable interpretation, with one interpretation providing coverage and another limiting

coverage; (2) an insurance contract must actually be ambiguous, in order to find in the insured's favor on the basis of ambiguity; (3) an insurance contract provision is not ambiguous simply because it is complex or requires analysis; and (4) an insurance contract should be enforced according to its terms if its provisions are clear and unambiguous) (internal citations omitted).

### Inclusion of Applicable Statutes into Insurance Contracts

Parties to an insurance contract are presumed to have entered into the contract with reference to a statute, when the contract is entered into on a matter that is "surrounded" by statutory limitations and requirements, thereby making the statutory provision a part of the contract. *See, e.g., Grant v. State Farm Fire and Cas. Co.*, 638 So.2d 936, 938 (Fla. 1994) (internal citations omitted). Furthermore, the "statute in effect at the time an insurance contract is executed governs substantive issues arising in connection with that contract." *Menendez v. Progressive Exp. Ins. Co.*, 35 So.3d 873, 876 (Fla. 2010) [35 Fla. L. Weekly S81a].

### Southern-Owners' Payment of PIP

#### Benefits pursuant Fee Schedule was Proper

Based on *Menendez* and on the fact that the subject policy was renewed in 2012, the Court finds that the 2012 version of Florida's No-Fault Statute, § 627.736, applies in the instant matter. Under the 2012 version, a PIP carrier may not pay PIP benefits at fee schedule unless the carrier's policy elects such payment and notice of such election is provided to the insured. § 627.736(a)1 and 5, Fla. Stat. (2012).

In reviewing the 01-11 Endorsement to the subject policy, the Court finds that the 01-11 Endorsement clearly and unambiguously elected payment under the fee schedule set forth by Florida's No-Fault Statute, 2012. Specifically, the Court finds that the language in subsections (1) and (2) of the relevant portion of the 01-11 Endorsement, as quoted above, are clear and unambiguous. Simply put, if any of the services provided by Plaintiff are covered by the schedule of maximum charges set forth by Florida's No-Fault Statute, then Southern-Owners will pay 80% of said schedule. If, on the other hand, any of the services provided by Plaintiff are NOT covered by the schedule of maximum charges set forth by Florida's No-Fault Statute, then Southern-Owners will pay 80% of reasonable charges. There is no other way of interpreting the applicable provision in the 01-11 Endorsement.

The Court further finds that the relevant portion of the 01-11 Endorsement provided Mr. Baldwin with notice of Southern-Owners' election to pay his PIP benefits at 80% of the fee schedule set forth by Florida's No-Fault Statute. Further, the 5-12 Notice also provided additional notice of such election. Both the 01-11 Endorsement and the 5-12 Notice were provided to Mr. Baldwin at the time the subject policy was renewed and, therefore, Southern-Owners provided proper notice of its election to pay PIP benefits at fee schedule.

Additionally, the schedule of maximum charges set forth by Florida's No-Fault Statute is deemed part of the subject policy. Such schedule includes the participating physician's fee schedule under Medicare Part B, the fee schedule that applies in this matter. As noted in Affidavit of Ms. Kalyn Jones, attached as Exhibit C to Southern-Owners' Supporting Memorandum of Law, every CPT Code billed by Plaintiff in this matter was covered by, and paid under, the participating physician's fee schedule under Medicare Part B. None of the CPT Codes charged by Plaintiff were denied. The Court, therefore, finds that Southern-Owners met its contractual obligation in this matter by paying Plaintiff's charges at 80% of 200% of the participating physicians' fee schedule under Medicare Part B.

Based on the foregoing, it ORDERED AND ADJUDGED that Defendant, SOUTHERN-OWNERS

**INSURANCE COMPANY's, Motion for Final Summary Judgment is hereby GRANTED. Final judgment is entered in Defendant's favor and against Plaintiff, with Plaintiff taking nothing in this action and Defendant going hence without day.**

**\* \* \***

*Orthopedic Specialists LLP v. Nationwide Affinity Ins. Co. of Amer.*, 23 Fla. L.  
Week Supp. 154a (Pinellas County June 12, 2015)

23 Fla. L. Weekly Supp. 154a

Online Reference: FLWSUPP 2302LEVI

**Insurance -- Personal injury protection -- Coverage -- Medical expenses -- PIP policy that states that insurer will pay 80% of the rate of schedule of maximum charges pursuant to No-Fault Law and references Medicare, workers' compensation, and No-Fault Law schedule clearly and unambiguously elects to limit reimbursement to permissive statutory fee schedule**

ORTHOPEDIC SPECIALISTS, LLP, as assignee of Lawrence Levine, Plaintiff, v. NATIONWIDE AFFINITY INSURANCE COMPANY OF AMERICA, Defendant. County Court, 6th Judicial Circuit in and for Pinellas County, Civil Division. Case No. 15-000154-SC-SOUTH. June 12, 2015. Honorable Kathleen T. Hessinger, Judge. Counsel: Stephen D. Deitsch, Deitsch & Wright, P.A., Lake Worth, for Plaintiff. Michael G. Rabinowitz, Banker Lopez Gassler, Plantation, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT AND  
FINAL JUDGMENT IN DEFENDANT'S FAVOR

This matter having come before the Court on Defendant's Motion for Final Summary Judgment, and the parties having heard argument in the premises on this May 28, 2015, the Court finds as follows:

I. BACKGROUND

ORTHOPEDIC SPECIALISTS, LLP ("Plaintiff") filed a suit for personal injury protection ("PIP") benefits against NATIONWIDE AFFINITY INSURANCE COMPANY OF AMERICA ("Defendant"). Defendant's position is that it properly elected the schedule of maximum charges set forth in Fla. Stat. § 627.736(5)(a)(2). Defendant now moves for final summary judgment, arguing it the subject policy clearly and unambiguously elects the schedule of maximum charges. For the reasons that follow, summary judgment should be granted in Defendant's favor.

II. UNDISPUTED FACTS

1. Defendant issued the claimant, LAWRENCE LEVINE (the "Claimant") an automobile insurance policy that provided PIP benefits.
2. The policy was in effect on the alleged date of loss: 12/20/12.

3. The relevant portion of the policy states (page 10 of 23 of policy 1155):

MEDICAL BENEFITS

Benefits will be paid to or for the benefit of the injured person at 80% of the rate of the schedule of maximum charges pursuant to the Florida Motor Vehicle No-Fault Law. Medical expenses that are not reimbursable under Medicare or Florida's worker's compensation are not covered and will not be paid. If the Florida Motor Vehicle No-Fault Law schedule does not apply to covered medical expenses or does not exist, then benefits will be paid at 80% of the reasonable amount billed.

4. Plaintiff submitted bills to Defendant for date of service 4/24/13, and Defendant paid 80% of 200% of the applicable Medicare Part B fee schedule for the year of service.
5. Plaintiff sued Defendant for breach of contract for failing to pay 80 percent of reasonable and necessary medical expense, pursuant to policy of insurance as well as violation of the PIP statute, § 627.736.

6. The amount in controversy is \$463.10.

### III. ANALYSIS

Interpretation of an insurance contract is a question of law for the court. *Coleman v. Florida Ins. Guar. Ass'n, Inc.*, 517 So. 2d 686, 690 (Fla. 1988). When interpreting an insurance contract, the court is required to interpret the policy based on the plain and unambiguous language therein. *GEICO v. Virtual Imaging Servs., Inc.*, 141 So. 3d 147, 157 (Fla. 2013) [38 Fla. L. Weekly S517a]. “[T]erms of an insurance policy should be taken and understood in their ordinary sense and the policy should receive a reasonable, practical and sensible interpretation consistent with the intent of the parties -- not a strained, forced or unrealistic construction.” *Siegle v. Progressive Consumers Ins. Co.*, 819 So. 2d 732, 736 (Fla. 2002) [27 Fla. L. Weekly S492a] (quoting *General Accident Fire & Life Assurance Corp. v. Liberty Mut. Ins. Co.*, 260 So. 2d 249, 253 (Fla. 4th DCA 1972)).

The Court is bound by *Geico General Insurance Company v. Virtual Imaging Services, Inc.*, 141 So. 3d 147 (Fla. 2013) [38 Fla. L. Weekly S517a]. In *Virtual Imaging*, the Court held that an insurer must clearly and unambiguously give notice to its insured that the insurer elected the permissive fee schedule set forth in § 627.736(5)(a)(2) before availing itself of the benefits of paying the statutory amount. *Id.* at 150.

Per *Virtual*, there are two different methodologies for calculating reimbursements under the PIP statute. The first methodology is a fact dependent methodology that takes into account the service provider's usual and customary charges, community-specific reimbursement levels, and other relevant information. See § 627.736(5)(a)(1), Fla. Stat. (2012); *Virtual Imaging*, 141 So. 3d at 155-56; *Allstate Fire and Casualty Insurance v. Stand-Up MRI of Tallahassee, P.A.* (Case No. 1D14-1213, Fla. 1st DCA 2015) [40 Fla. L. Weekly D693b]. The second methodology, introduced by the Legislature in 2008, allows reimbursement for medical services to be limited via the use of fee schedules identified in § 627.736(5)(a)2 Fla. Stat. (2012); *Virtual* 141 So. 3d at 156. To use the fee schedules to limit reimbursements, however, the Florida Supreme Court held that insurers must first give notice to their insureds within the policy. *Id.* at 158; *Stand-Up MRI of Tallahassee*, page 4.

The question for this Court, therefore, is whether Defendant clearly and unambiguously elected the statutory fee schedule.

In this Court's decision in *David Wall, M.D. (Patient: Pavel Khvorostov) v. Allstate Fire and Casualty Insurance Co.*, 21 Fla. L. Weekly Supp. 285b (Pin. Co. Ct. November 19, 2013) the question was whether Allstate properly elected the fee schedules under § 627.736(5)(a)(2) in its policy. The language Allstate issued in the PIP portion of the insured's policy was the following:

Any amounts payable under this coverage shall be subject to any and all limitations authorized by section 672.736, or any other provisions of the Florida Motor Vehicle No-Fault Law, as enacted, amended or otherwise continued in the law, including, but not limited, all fee schedules.

This Court found in *David Wall, M.D.* that Allstate's policy specifically advises the insured that any amounts payable shall be subject to any and all limitations, authorizer by s. 627.736 or any other provisions of the Florida Motor Vehicle No-Fault Law, including all fee schedules. It is clear and unambiguous that Allstate elected the fee schedules under § 627.736(5)(a)(2) as there can be no other limiting fee schedules under the PIP statute.

The 6th Circuit Court, Appellate Division, in and for Pinellas County, agreed with this Court's decision in *David Wall, M.D.* In *Allstate Fire and Casualty Insurance Company v. Orthopedic Specialists, as assignee of Eoanna Spyropoulos*, Case no. 13-000003AP-88B [21 Fla. L. Weekly Supp 470a] (Fla. 6th Cir. Ct. App. Div. December 10, 2013), that Court also found Allstate's policy to clearly and unambiguously elect the fee schedules under § 627.736(5)(a)(2) based on the words “shall” and “fee schedules. As an appellate decision out of the 6th Circuit, I find that case to be binding upon this Court.

Also, the First District Court of Appeal recently ruled in favor of Allstate's policy and the election of the fee schedules. See *Allstate Fire and Casualty Insurance v. Stand-Up MRI of Tallahassee, P.A.* (Case No. 1D14-1213, Fla. 1st DCA 2015) [40 Fla. L. Weekly D693b]: “We agree with Allstate that the policy gives sufficient

notice of its election to limit reimbursements by use of the fee schedules. Our conclusion stems from the policy's plan statement that reimbursements "shall" be subject to the limitations in § 627.736, including 'all fee schedules.' "

This Court finds that like Allstate's policy, Defendant's policy made a clear and unambiguous election to apply the reimbursement limitations permissible under § 627.736(5)(a)(2). The policy states it will pay eighty percent of the "rate of the schedule of maximum charges pursuant to the Florida Motor Vehicle No-Fault Law." In addition, the following sentence clearly refers to "Medicare or Florida's worker's compensation." The third sentence in the portion of the policy refers to the "Florida Motor Vehicle No-Fault Law schedule." The Court cannot construe the first sentence on its own; rather, it must consider applicable provisions collectively. *Matthews v. Ranger Ins. Co.*, 281 So. 2d 345, 348 (Fla. 1973) ("We have held that a single insurance policy provision should not be considered in isolation, but should be construed with other policy provisions against the background of the case.); *General Acc. Fire & Life Assur. Corp.*, 260 So. 2d at 252 ("[T]he policy must be construed according to the entirety of its terms and conditions.").

Contrary to Plaintiff's arguments, there are not "two fee schedules" within § 627.736. Per *Virtual and Stand-Up MRI*, there are two "methodologies." There is only one fee schedule and that is located within § 627.736(5)(a)(2) Fla. Stat. (2012). The mentioning of these "maximum schedule of charges" and additional language in Defendant's policy is enough to put its insured (and Plaintiff via the assignment of benefits) on notice of such fee schedule limitations.

The Court finds that Defendant's policy language complies with the requirements set forth by the Florida Supreme Court in *Virtual Imaging*. Defendant affirmatively and expressly adopted the fee schedule limitations that the Legislature authorized. It issued a policy that affirmatively informed its insured that PIP benefits under that policy would be limited to the fee schedules set forth in the Florida Motor Vehicle No-Fault Law. Accordingly, Defendant did not breach its policy or violate the No-Fault Law when it paid pursuant to the Medicare Part B fee schedule.

#### IV. CONCLUSION

Based on the foregoing reasons, it is ORDERED and ADJUDGED that Defendant's Motion for Summary Judgment is GRANTED. Plaintiff shall take nothing in this action and Plaintiff shall go hence without day. The Court reserves jurisdiction on the issue of attorney's fees and costs.

\* \* \*

*In Re Amendments to the Florida Rules of Civil Procedure*, No. SC16-155  
(Fla. Sep. 1, 2016)

# Supreme Court of Florida

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No. SC16-155

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## **IN RE: AMENDMENTS TO THE FLORIDA RULES OF CIVIL PROCEDURE.**

[September 1, 2016]

PER CURIAM.

This matter is before the Court for consideration of proposed amendments to the Florida Rules of Civil Procedure. We have jurisdiction. See art. V, § 2(a), Fla. Const.

The Civil Procedure Rules Committee (Committee) has filed its regular-cycle report of proposed rule and form amendments. See Fla. R. Jud. Admin. 2.140(b). The Committee proposes amending existing rules 1.020 (Privacy and Court Records); 1.071 (Constitutional Challenge to State Statute or County or Municipal Charter, Ordinance, or Franchise; Notice by Party); 1.100 (Pleadings and Motions); 1.130 (Attaching Copy of Cause of Action and Exhibits); 1.140 (Defenses); 1.170 (Counterclaims and Crossclaims); 1.200 (Pretrial Procedure); 1.310 (Depositions Upon Oral Examination); 1.320 (Depositions Upon Written

Questions); 1.340 (Interrogatories to Parties); 1.410 (Subpoena); 1.431 (Trial Jury); 1.500 (Defaults and Final Judgments Thereon); 1.510 (Summary Judgment); 1.625 (Proceedings Against Surety on Judicial Bonds); 1.630 (Extraordinary Remedies); and 1.900 (Forms). The Committee also proposes the addition of new rule 1.545 (Final Disposition Form).

In addition, the Committee proposes amending existing forms 1.910 (Subpoena for Trial); 1.911 (Subpoena Duces Tecum for Trial); 1.912 (Subpoena for Deposition); 1.913 (Subpoena Duces Tecum for Deposition); 1.918 (Lis Pendens); 1.921 (Notice of Production from Nonparty); 1.922 (Subpoena Duces Tecum Without Deposition); 1.975 (Notice of Compliance When Constitutional Challenge is Brought); 1.980 (Default); and 1.997 (Civil Cover Sheet).

Consistent with Florida Rule of Judicial Administration 2.140(b)(2), the Committee published its proposals for comment prior to filing them with the Court. The Committee received a comment on its proposed amendments to rules 1.100(c)(1) and 1.140(a). Upon consideration of the comment, the Committee did not alter its proposals. After submission to the Court, we republished the Committee's proposals for comment. No comments were received.

Having considered the Committee's report and the comment filed with the Committee, we adopt these straightforward amendments to the Florida Rules of Civil Procedure as proposed by the Committee. Notable changes to the rules are

discussed below.

Rule 1.100(c) (Pleadings and Motions; Caption) is amended to require that all parties to an action be named in the caption. Rule 1.100 is also amended to place the civil cover sheet filing requirement, currently contained in subdivision (c)(2), in its own separate subdivision and to delete the final disposition form filing requirement contained in subdivision (c)(3). The final disposition form filing requirement is now contained in new rule 1.545 (Final Disposition Form). Rule 1.140 (Defenses) is amended to require that the ten-day period to file responsive pleadings under subdivisions (a)(3) and (a)(4) begins when an order is filed by the court instead of when notice of the court's actions is received. The amendments to rule 1.320 (Depositions Upon Written Questions) incorporate language from rule 1.330(d)(3)(C) (Use of Depositions in Court Proceedings; Effect of Errors and Irregularities) regarding objections to the form of written questions and from rule 1.310(b)(4) (Depositions Upon Oral Examination; Notice; Method of Taking; Production at Deposition) regarding the videotaping of depositions. Lastly, rule 1.431 (Trial Jury) is amended to permit the impaneling of more than two alternate jurors under subdivision (g)(1), and the time period to file a motion to interview jurors under subdivision (h) is extended from ten days to fifteen days.

Accordingly, the Florida Rules of Civil Procedure are hereby amended as set forth in the appendix to this opinion. New language is underscored; deleted

language is struck through. The committee notes are offered as an explanation only and are not adopted as an official part of the rules. The amendments shall become effective January 1, 2017, at 12:01 a.m.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON, and PERRY, JJ., concur.

**THE FILING OF A MOTION FOR REHEARING SHALL NOT ALTER THE EFFECTIVE DATE OF THESE AMENDMENTS.**

Original Proceeding – Florida Rules of Civil Procedure

Roger James Haughey, II, Chair, Civil Procedure Rules Committee, Sivyer Barlow & Watson, Tampa, Florida; Judge Jacqueline Hogan Scola, Past Chair, Civil Procedure Rules Committee, Miami, Florida; and John F. Harkness, Jr., Executive Director, James M. Barclay, Bar Staff Liaison, and Gregory Allan Zhelesnik, Bar Staff Liaison, The Florida Bar, Tallahassee, Florida,

for Petitioner

## Appendix

### **RULE 1.020. PRIVACY AND COURT RECORDS**

Every pleading or other ~~paper~~document filed with the court ~~shall~~must comply with Florida Rules of Judicial Administration 2.420, Public Access to and Protection of Judicial Branch Records and 2.425, Minimization of the Filing of Sensitive Information.

### **RULE 1.071. CONSTITUTIONAL CHALLENGE TO STATE STATUTE OR COUNTY OR MUNICIPAL CHARTER, ORDINANCE, OR FRANCHISE; NOTICE BY PARTY**

A party that files a pleading, written motion, or other ~~paper~~document drawing into question the constitutionality of a state statute or a county or municipal charter, ordinance, or franchise must promptly

(a) file a notice of constitutional question stating the question and identifying the ~~paper~~document that raises it; and

(b) serve the notice and the pleading, written motion, or other ~~paper~~document drawing into question the constitutionality of a state statute or a county or municipal charter, ordinance, or franchise on the Attorney General or the state attorney of the judicial circuit in which the action is pending, by either certified or registered mail.

Service of the notice and pleading, written motion, or other ~~paper~~document does not require joinder of the Attorney General or the state attorney as a party to the action.

#### **Committee Notes**

**[NO CHANGE]**

### **RULE 1.100. PLEADINGS AND MOTIONS**

(a) **Pleadings.** There ~~shall~~must be a complaint or, when so designated by a statute or rule, a petition, and an answer to it; an answer to a counterclaim denominated as such; an answer to a crossclaim if the answer contains a

crossclaim; a third-party complaint if a person who was not an original party is summoned as a third-party defendant; and a third-party answer if a third-party complaint is served. If an answer or third-party answer contains an affirmative defense and the opposing party seeks to avoid it, the opposing party ~~shall~~must file a reply containing the avoidance. No other pleadings ~~shall~~will be allowed.

**(b) Motions.** An application to the court for an order ~~shall~~must be by motion which ~~shall~~must be made in writing unless made during a hearing or trial, ~~shall~~must state with particularity the grounds ~~therefor~~for it, and ~~shall~~must set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion. All notices of hearing ~~shall~~must specify each motion or other matter to be heard.

**(c) Caption.**

(1) Every pleading, ~~motion, order, judgment, or other paper shall~~ must have a caption containing the name of all of the parties, the name of the court, the file number, and a designation identifying the party filing it.

(2) Every motion, order, judgment, or other document must have a caption containing the name of the court, the case number except for in rem proceedings, including forfeiture proceedings, the name of the first party on each side with an appropriate indication of other parties, and a designation identifying the party filing it and its nature or the nature of the order, as the case may be.

(3) In any in rem proceeding, every pleading, motion, order, judgment, or other ~~paper~~document ~~shall~~must have a caption containing the name of the court, the ~~file~~case number, the style “In re” (followed by the name or general description of the property), and a designation of the person or entity filing it and its nature or the nature of the order, as the case may be.

(4) In an in rem forfeiture proceeding, the style ~~shall~~must be “In re forfeiture of” (followed by the name or general description of the property).

(5) All ~~papers~~documents filed in the action ~~shall~~must be styled in such a manner as to indicate clearly the subject matter of the ~~paper~~document and the party requesting or obtaining relief.

**(d) Civil Cover Sheet.** (2)—A civil cover sheet (form 1.997) ~~shall~~must be completed and filed with the clerk at the time an initial complaint or petition is filed by the party initiating the action. If the cover sheet is not filed, the clerk

~~shall~~must accept the complaint or petition for filing; but all proceedings in the action ~~shall~~must be abated until a properly executed cover sheet is completed and filed. The clerk ~~shall~~must complete the civil cover sheet for a party appearing pro se.

~~(3) — A final disposition form (form 1.998) shall be filed with the clerk by the prevailing party at the time of the filing of the order or judgment which disposes of the action. If the action is settled without a court order or judgment being entered, or dismissed by the parties, the plaintiff or petitioner immediately shall file a final disposition form (form 1.998) with the clerk. The clerk shall complete the final disposition form for a party appearing pro se, or when the action is dismissed by court order for lack of prosecution pursuant to rule 1.420(e).~~

~~(de)~~ **Motion in Lieu of Scire Facias.** Any relief available by scire facias may be granted on motion after notice without the issuance of a writ of scire facias.

### Committee Notes

#### 1971 - 2010 Amendments [NO CHANGE]

2016 Amendment. Subdivision (c) is amended to address the naming of parties in pleadings and amended pleadings similarly to Federal Rule of Civil Procedure 10(a). Subdivision (c)(2) on Civil Cover Sheets is moved to subdivision (d), and subdivision (c)(3) on Final Disposition Forms is moved to new rule 1.545.

### **RULE 1.130. ATTACHING COPY OF CAUSE OF ACTION AND EXHIBITS**

**(a) Instruments Attached.** All bonds, notes, bills of exchange, contracts, accounts, or documents upon which action may be brought or defense made, or a copy thereof or a copy of the portions thereof material to the pleadings, ~~shall~~must be incorporated in or attached to the pleading. No ~~papers~~documents shall be unnecessarily annexed as exhibits. The pleadings ~~shall~~must contain no unnecessary recitals of deeds, documents, contracts, or other instruments.

**(b) Part for All Purposes.** Any exhibit attached to a pleading ~~shall~~must be considered a part thereof for all purposes. Statements in a pleading may be adopted by reference in a different part of the same pleading, in another pleading, or in any motion.

## **RULE 1.140. DEFENSES**

### **(a) When Presented.**

(1) Unless a different time is prescribed in a statute of Florida, a defendant ~~shall~~must serve an answer within 20 days after service of original process and the initial pleading on the defendant, or not later than the date fixed in a notice by publication. A party served with a pleading stating a crossclaim against that party ~~shall~~must serve an answer to it within 20 days after service on that party. The plaintiff ~~shall~~must serve an answer to a counterclaim within 20 days after service of the counterclaim. If a reply is required, the reply ~~shall~~must be served within 20 days after service of the answer.

(2)(A) Except when sued pursuant to section 768.28, Florida Statutes, the state of Florida, an agency of the state, or an officer or employee of the state sued in an official capacity ~~shall~~must serve an answer to the complaint or crossclaim, or a reply to a counterclaim, within 40 days after service.

(B) When sued pursuant to section 768.28, Florida Statutes, the Department of Financial Services or the defendant state agency ~~shall have~~has 30 days from the date of service within which to serve an answer to the complaint or crossclaim or a reply to a counterclaim.

(3) The service of a motion under this rule, except a motion for judgment on the pleadings or a motion to strike under subdivision (f), alters these periods of time so that if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleadings ~~shall~~must be served within 10 days after ~~notice of the court's action~~the filing of the court's order or, if the court grants a motion for a more definite statement, the responsive pleadings ~~shall~~must be served within 10 days after service of the more definite statement unless a different time is fixed by the court in either case.

(4) If the court permits or requires an amended or responsive pleading or a more definite statement, the pleading or statement ~~shall~~must be served within 10 days after ~~notice of the court's action~~the filing of the court's order unless a different time is fixed by the court. Responses to the pleadings or statements ~~shall~~must be served within 10 days of service of the pleadings or statements.

**(b) How Presented.** Every defense in law or fact to a claim for relief in a pleading ~~shall~~must be asserted in the responsive pleading, if one is required, but the following defenses may be made by motion at the option of the pleader: (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. A motion making any of these defenses ~~shall~~must be made before pleading if a further pleading is permitted. The grounds on which any of the enumerated defenses are based and the substantial matters of law intended to be argued ~~shall~~must be stated specifically and with particularity in the responsive pleading or motion. Any ground not stated ~~shall~~must be deemed to be waived except any ground showing that the court lacks jurisdiction of the subject matter may be made at any time. No defense or objection is waived by being joined with other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert any defense in law or fact to that claim for relief at the trial, except that the objection of failure to state a legal defense in an answer or reply ~~shall~~must be asserted by motion to strike the defense within 20 days after service of the answer or reply.

**(c) [NO CHANGE]**

**(d) Preliminary Hearings.** The defenses 1 to 7 in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment in subdivision (c) of this rule ~~shall~~must be heard and determined before trial on application of any party unless the court orders that the hearing and determination ~~shall~~must be deferred until the trial.

**(e) Motion for More Definite Statement.** If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, that party may move for a more definite statement before interposing a responsive pleading. The motion ~~shall~~must point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after ~~notice~~the filing of the order or such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

**(f) – (h) [NO CHANGE]**

## Committee Notes

[NO CHANGE]

**RULE 1.170. COUNTERCLAIMS AND CROSSCLAIMS**

(a) **Compulsory Counterclaims.** A pleading ~~shall~~must state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, provided it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction. But the pleader need not state a claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit ~~upon~~ that party's claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on the claim and the pleader is not stating a counterclaim under this rule.

(b) – (f) [NO CHANGE]

(g) **Crossclaim against Co-Party.** A pleading may state as a crossclaim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter of either the original action or a counterclaim therein, or relating to any property that is the subject matter of the original action. The crossclaim may include a claim that the party against whom it is asserted is or may be liable to the crossclaimant for all or part of a claim asserted in the action against the crossclaimant. Service of a crossclaim on a party who has appeared in the action ~~shall~~must be made pursuant to rule 1.080. Service of a crossclaim against a party who has not appeared in the action ~~shall~~must be made in the manner provided for service of summons.

(h) **Additional Parties May Be Brought In.** When the presence of parties other than those to the original action is required to grant complete relief in the determination of a counterclaim or crossclaim, they ~~shall~~must be named in the counterclaim or crossclaim and be served with process and ~~shall~~must be parties to the action thereafter if jurisdiction of them can be obtained and their joinder will not deprive the court of jurisdiction of the action. Rules 1.250(b) and (c) apply to parties brought in under this subdivision.

(i) [NO CHANGE]

**(j) Demand Exceeding Jurisdiction; Transfer of Action.** If the demand of any counterclaim or crossclaim exceeds the jurisdiction of the court in which the action is pending, the action ~~shall~~must be transferred ~~forthwith~~immediately to the court of the same county having jurisdiction of the demand in the counterclaim or crossclaim with only such alterations in the pleadings as are essential. The court ~~shall~~must order the transfer of the action and the transmittal of all ~~papers~~documents in it to the proper court if the party asserting the demand exceeding the jurisdiction deposits with the court having jurisdiction a sum sufficient to pay the clerk's service charge in the court to which the action is transferred at the time of filing the counterclaim or crossclaim. Thereupon the original ~~papers~~documents and deposit ~~shall~~must be transmitted and filed with a certified copy of the order. The court to which the action is transferred shall have full power and jurisdiction over the demands of all parties. Failure to make the service charge deposit at the time the counterclaim or crossclaim is filed, or within such further time as the court may allow, ~~shall~~will reduce a claim for damages to an amount within the jurisdiction of the court where the action is pending and waive the claim in other cases.

#### **Committee Notes**

**[NO CHANGE]**

### **RULE 1.200. PRETRIAL PROCEDURE**

**(a) Case Management Conference.** At any time after responsive pleadings or motions are due, the court may order, or a party by serving a notice may convene, a case management conference. The matter to be considered ~~shall~~must be specified in the order or notice setting the conference. At such a conference the court may:

- (1) schedule or reschedule the service of motions, pleadings, and other ~~papers~~documents;
- (2) set or reset the time of trials, subject to rule 1.440(c);
- (3) coordinate the progress of the action if the complex litigation factors contained in rule 1.201(a)(2)(A)–(a)(2)(H) are present;

- (4) limit, schedule, order, or expedite discovery;
- (5) consider the possibility of obtaining admissions of fact and voluntary exchange of documents and electronically stored information, and stipulations regarding authenticity of documents and electronically stored information;
- (6) consider the need for advance rulings from the court on the admissibility of documents and electronically stored information;
- (7) discuss as to electronically stored information, the possibility of agreements from the parties regarding the extent to which such evidence should be preserved, the form in which such evidence should be produced, and whether discovery of such information should be conducted in phases or limited to particular individuals, time periods, or sources;
- (8) schedule disclosure of expert witnesses and the discovery of facts known and opinions held by such experts;
- (9) schedule or hear motions in limine;
- (10) pursue the possibilities of settlement;
- (11) require filing of preliminary stipulations if issues can be narrowed;
- (12) consider referring issues to a magistrate for findings of fact; and
- (13) schedule other conferences or determine other matters that may aid in the disposition of the action.

**(b) [NO CHANGE]**

**(c) Notice.** Reasonable notice ~~shall~~must be given for a case management conference, and 20 days' notice ~~shall~~must be given for a pretrial conference. On failure of a party to attend a conference, the court may dismiss the action, strike the pleadings, limit proof or witnesses, or take any other appropriate action. Any documents that the court requires for any conference ~~shall~~must be specified in the order. Orders setting pretrial conferences ~~shall~~must be uniform throughout the territorial jurisdiction of the court.

(d) **Pretrial Order.** The court ~~shall~~must make an order reciting the action taken at a conference and any stipulations made. The order ~~shall~~controls the subsequent course of the action unless modified to prevent injustice.

**Committee Notes**

[NO CHANGE]

**Court Commentary**

[NO CHANGE]

**RULE 1.310. DEPOSITIONS UPON ORAL EXAMINATION**

(a) **When Depositions May Be Taken.** After commencement of the action any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition within 30 days after service of the process and initial pleading ~~upon~~ any defendant, except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in subdivision (b)(2) of this rule. The attendance of witnesses may be compelled by subpoena as provided in rule 1.410. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) **Notice; Method of Taking; Production at Deposition.**

(1) A party desiring to take the deposition of any person ~~upon~~ oral examination ~~shall~~must give reasonable notice in writing to every other party to the action. The notice ~~shall~~must state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced under the subpoena ~~shall~~must be attached to or included in the notice.

(2) Leave of court is not required for the taking of a deposition by plaintiff if the notice states that the person to be examined is about to go out of the state and will be unavailable for examination unless a deposition is taken before expiration of the 30-day period under subdivision (a). If a party shows that when served with notice under this subdivision that party was unable through the exercise of diligence to obtain counsel to represent the party at the taking of the deposition, the deposition may not be used against that party.

(3) For cause shown the court may enlarge or shorten the time for taking the deposition.

(4) Any deposition may be recorded by videotape without leave of the court or stipulation of the parties, provided the deposition is taken in accordance with this subdivision.

**(A) Notice.** A party intending to videotape a deposition ~~shall~~must state in the notice that the deposition is to be videotaped and ~~shall~~must give the name and address of the operator. Any subpoena served on the person to be examined ~~shall~~must state the method or methods for recording the testimony.

**(B) Stenographer.** Videotaped depositions ~~shall~~must also be recorded stenographically, unless all parties agree otherwise.

**(C) Procedure.** At the beginning of the deposition, the officer before whom it is taken ~~shall~~must, on camera: (i) identify the style of the action, (ii) state the date, and (iii) swear the witness.

**(D) Custody of Tape and Copies.** The attorney for the party requesting the videotaping of the deposition ~~shall~~must take custody of and be responsible for the safeguarding of the videotape, ~~shall~~must permit the viewing of it by the opposing party, and, if requested, ~~shall~~must provide a copy of the videotape at the expense of the party requesting the copy.

**(E) Cost of Videotaped Depositions.** The party requesting the videotaping ~~shall~~must bear the initial cost of videotaping.

(5) The notice to a party deponent may be accompanied by a request made in compliance with rule 1.350 for the production of documents and tangible things at the taking of the deposition. The procedure of rule 1.350 ~~shall~~apply~~applies~~ to the request. Rule 1.351 provides the exclusive procedure for

obtaining documents or things by subpoena from nonparties without deposing the custodian or other person in possession of the documents.

(6) In the notice a party may name as the deponent a public or private corporation, a partnership or association, or a governmental agency, and designate with reasonable particularity the matters on which examination is requested. The organization so named ~~shall~~must designate one or more officers, directors, or managing agents, or other persons who consent to do so, to testify on its behalf and may state the matters on which each person designated will testify. The persons so designated ~~shall~~must testify about matters known or reasonably available to the organization. This subdivision does not preclude taking a deposition by any other procedure authorized in these rules.

(7) On motion the court may order that the testimony at a deposition be taken by telephone. The order may prescribe the manner in which the deposition will be taken. A party may also arrange for a stenographic transcription at that party's own initial expense.

(8) Any minor subpoenaed for testimony ~~shall have~~has the right to be accompanied by a parent or guardian at all times during the taking of testimony notwithstanding the invocation of the rule of sequestration of section 90.616, Florida Statutes, except ~~up~~ upon a showing that the presence of a parent or guardian is likely to have a material, negative impact on the credibility or accuracy of the minor's testimony, or that the interests of the parent or guardian are in actual or potential conflict with the interests of the minor.

**(c) Examination and Cross-Examination; Record of Examination; Oath; Objections.** Examination and cross-examination of witnesses may proceed as permitted at the trial. The officer before whom the deposition is to be taken ~~shall~~must put the witness on oath and ~~shall~~must personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness, except that when a deposition is being taken by telephone, the witness ~~shall~~must be sworn by a person present with the witness who is qualified to administer an oath in that location. The testimony ~~shall~~must be taken stenographically or recorded by any other means ordered in accordance with subdivision (b)(4) of this rule. If requested by one of the parties, the testimony ~~shall~~must be transcribed at the initial cost of the requesting party and prompt notice of the request ~~shall~~must be given to all other parties. All objections made at time of the examination to the qualifications of the officer taking the deposition, the manner of taking it, the evidence presented, or the conduct of any party, and any

other objection to the proceedings ~~shall~~must be noted by the officer ~~upon~~ the deposition. Any objection during a deposition ~~shall~~must be stated concisely and in a nonargumentative and nonsuggestive manner. A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under subdivision (d). Otherwise, evidence objected to ~~shall~~must be taken subject to the objections. Instead of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and that party ~~shall~~must transmit them to the officer, who ~~shall~~must propound them to the witness and record the answers verbatim.

**(d) Motion to Terminate or Limit Examination.** At any time during the taking of the deposition, on motion of a party or of the deponent and ~~upon~~ a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, or that objection and instruction to a deponent not to answer are being made in violation of rule 1.310(c), the court in which the action is pending or the circuit court where the deposition is being taken may order the officer conducting the examination to cease ~~forthwith~~immediately from taking the deposition or may limit the scope and manner of the taking of the deposition under rule 1.280(c). If the order terminates the examination, it shall be resumed thereafter only ~~upon~~ the order of the court in which the action is pending. Upon demand of any party or the deponent, the taking of the deposition ~~shall~~must be suspended for the time necessary to make a motion for an order. The provisions of rule 1.380(a) apply to the award of expenses incurred in relation to the motion.

**(e) Witness Review.** If the testimony is transcribed, the transcript ~~shall~~must be furnished to the witness for examination and ~~shall~~must be read to or by the witness unless the examination and reading are waived by the witness and by the parties. Any changes in form or substance that the witness wants to make ~~shall~~must be listed in writing by the officer with a statement of the reasons given by the witness for making the changes. The changes ~~shall~~must be attached to the transcript. It ~~shall~~must then be signed by the witness unless the parties waived the signing or the witness is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within a reasonable time after it is furnished to the witness, the officer ~~shall~~must sign the transcript and state on the transcript the waiver, illness, absence of the witness, or refusal to sign with any reasons given therefor. The deposition may then be used as fully as though signed unless the court holds that the reasons given for the refusal to sign require rejection of the deposition wholly or partly, on motion under rule 1.330(d)(4).

**(f) Filing; Exhibits.**

(1) If the deposition is transcribed, the officer ~~shall~~must certify on each copy of the deposition that the witness was duly sworn by the officer and that the deposition is a true record of the testimony given by the witness. Documents and things produced for inspection during the examination of the witness ~~shall~~must be marked for identification and annexed to and returned with the deposition ~~upon~~ the request of a party, and may be inspected and copied by any party, except that the person producing the materials may substitute copies to be marked for identification if that person affords to all parties fair opportunity to verify the copies by comparison with the originals. If the person producing the materials requests their return, the officer ~~shall~~must mark them, give each party an opportunity to inspect and copy them, and return them to the person producing them and the materials may then be used in the same manner as if annexed to and returned with the deposition.

(2) Upon payment of reasonable charges therefor the officer ~~shall~~must furnish a copy of the deposition to any party or to the deponent.

(3) A copy of a deposition may be filed only under the following circumstances:

(A) It may be filed in compliance with Florida Rule of Judicial Administration 2.425 and rule 1.280(~~fg~~) by a party or the witness when the contents of the deposition must be considered by the court on any matter pending before the court. Prompt notice of the filing of the deposition ~~shall~~must be given to all parties unless notice is waived. A party filing the deposition ~~shall~~must furnish a copy of the deposition or the part being filed to other parties unless the party already has a copy.

(B) If the court determines that a deposition previously taken is necessary for the decision of a matter pending before the court, the court may order that a copy be filed by any party at the initial cost of the party, and the filing party ~~shall~~must comply with rules 2.425 and 1.280(~~fg~~).

**(g) Obtaining Copies.** A party or witness who does not have a copy of the deposition may obtain it from the officer taking the deposition unless the court orders otherwise. If the deposition is obtained from a person other than the officer, the reasonable cost of reproducing the copies ~~shall~~must be paid to the person by the requesting party or witness.

**(h) Failure to Attend or to Serve Subpoena; Expenses.**

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to the other party the reasonable expenses incurred by the other party and the other party's attorney in attending, including reasonable attorneys' fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon the witness and the witness because of the failure does not attend and if another party attends in person or by attorney because that other party expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to the other party the reasonable expenses incurred by that other party and that other party's attorney in attending, including reasonable attorneys' fees.

**Court Commentary**

**[NO CHANGE]**

**Committee Notes**

**[NO CHANGE]**

**RULE 1.320. DEPOSITIONS UPON WRITTEN QUESTIONS**

**(a) Serving Questions; Notice.** After commencement of the action any party may take the testimony of any person, including a party, by deposition upon written questions. The attendance of witnesses may be compelled by the use of subpoena as provided in rule 1.410. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes. A party desiring to take a deposition upon written questions ~~shall~~must serve them with a notice stating (1) the name and address of the person who is to answer them, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which that person belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or

private corporation, a partnership or association, or a governmental agency in accordance with rule 1.310(b)(6). Within 30 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 10 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 10 days after being served with redirect questions, a party may serve recross questions upon all other parties. Notwithstanding any contrary provision of rule 1.310(c), objections to the form of written questions are waived unless served in writing on the party propounding them within the time allowed for serving the succeeding cross or other questions and within 10 days after service of the last questions authorized. The court may for cause shown enlarge or shorten the time.

**(b) Officer to Take Responses and Prepare Record.** A copy of the notice and copies of all questions served ~~shall~~must be delivered by the party taking the depositions to the officer designated in the notice, who ~~shall~~must proceed promptly to take the testimony of the witness in the manner provided by rules 1.310(c), (e), and (f) in response to the questions and to prepare the deposition, attaching the copy of the notice and the questions received by the officer. The questions ~~shall~~must not be filed separately from the deposition unless a party seeks to have the court consider the questions before the questions are submitted to the witness. Any deposition may be recorded by videotape without leave of the court or stipulation of the parties, provided the deposition is taken in accordance with rule 1.310(b)(4).

### Committee Notes

[NO CHANGE]

### **RULE 1.340. INTERROGATORIES TO PARTIES**

**(a) Procedure for Use.** Without leave of court, any party may serve upon any other party written interrogatories to be answered (1) by the party to whom the interrogatories are directed, or (2) if that party is a public or private corporation or partnership or association or governmental agency, by any officer or agent, who ~~shall~~must furnish the information available to that party. Interrogatories may be served on the plaintiff after commencement of the action and on any other party with or after service of the process and initial pleading upon that party. The interrogatories ~~shall~~must not exceed 30, including all subparts, unless the court permits a larger number on motion and notice and for good cause. If the supreme court has approved a form of interrogatories for the type of action, the initial

interrogatories on a subject included ~~therein shall~~ within must be from the form approved by the court. A party may serve fewer than all of the approved interrogatories within a form. Other interrogatories may be added to the approved forms without leave of court, so long as the total of approved and additional interrogatories does not exceed 30. Each interrogatory ~~shall~~ must be answered separately and fully in writing under oath unless it is objected to, in which event the grounds for objection ~~shall~~ must be stated and signed by the attorney making it. The party to whom the interrogatories are directed ~~shall~~ must serve the answers and any objections within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the process and initial pleading ~~upon~~ that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under rule 1.380(a) on any objection to or other failure to answer an interrogatory.

**(b) Scope; Use at Trial.** Interrogatories may relate to any matters that can be inquired into under rule 1.280(b), and the answers may be used to the extent permitted by the rules of evidence except as otherwise provided in this subdivision. An interrogatory otherwise proper is not objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or calls for a conclusion or asks for information not within the personal knowledge of the party. A party ~~shall~~ must respond to such an interrogatory by giving the information the party has and the source on which the information is based. Such a qualified answer may not be used as direct evidence for or impeachment against the party giving the answer unless the court finds it otherwise admissible under the rules of evidence. If a party introduces an answer to an interrogatory, any other party may require that party to introduce any other interrogatory and answer that in fairness ought to be considered with it.

**(c) Option to Produce Records.** When the answer to an interrogatory may be derived or ascertained from the records (including electronically stored information) of the party to whom the interrogatory is directed or from an examination, audit, or inspection of the records or from a compilation, abstract, or summary based on the records and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party to whom it is directed, an answer to the interrogatory specifying the records from which the answer may be derived or ascertained and offering to give the party serving the interrogatory a reasonable opportunity to examine, audit, or inspect the records and to make copies, compilations, abstracts, or summaries is a sufficient answer. An answer ~~shall~~ must be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party interrogated, the records

from which the answer may be derived or ascertained, or ~~shall~~must identify a person or persons representing the interrogated party who will be available to assist the interrogating party in locating and identifying the records at the time they are produced. If the records to be produced consist of electronically stored information, the records ~~shall~~must be produced in a form or forms in which they are ordinarily maintained or in a reasonably usable form or forms.

**(d) [NO CHANGE]**

**(e) Service and Filing.** Interrogatories ~~shall~~must be arranged so that a blank space is provided after each separately numbered interrogatory. The space ~~shall~~must be reasonably sufficient to enable the answering party to insert the answer within the space. If sufficient space is not provided, the answering party may attach additional ~~papers~~documents with answers and refer to them in the space provided in the interrogatories. The interrogatories ~~shall~~must be served on the party to whom the interrogatories are directed and copies ~~shall~~must be served on all other parties. A certificate of service of the interrogatories ~~shall~~must be filed, giving the date of service and the name of the party to whom they were directed. The answers to the interrogatories ~~shall~~must be served ~~up~~ upon the party originally propounding the interrogatories and a copy ~~shall~~must be served on all other parties by the answering party. The original or any copy of the answers to interrogatories may be filed in compliance with Florida Rule of Judicial Administration 2.425 and rule 1.280(g) by any party when the court should consider the answers to interrogatories in determining any matter pending before the court. The court may order a copy of the answers to interrogatories filed at any time when the court determines that examination of the answers to interrogatories is necessary to determine any matter pending before the court.

#### **Committee Notes**

**[NO CHANGE]**

#### **Court Commentary**

**[NO CHANGE]**

**RULE 1.410. SUBPOENA**

(a) [NO CHANGE]

(b) **Subpoena for Testimony before the Court.**

(1) Every subpoena for testimony before the court ~~shall~~must be issued by an attorney of record in an action or by the clerk under the seal of the court and ~~shall~~must state the name of the court and the title of the action and ~~shall~~must command each person to whom it is directed to attend and give testimony at a time and place specified in it.

(2) On oral request of an attorney or party and without praecipe, the clerk ~~shall~~must issue a subpoena for testimony before the court or a subpoena for the production of documentary evidence before the court signed and sealed but otherwise in blank, both as to the title of the action and the name of the person to whom it is directed, and the subpoena ~~shall~~must be filled in before service by the attorney or party.

(c) **For Production of Documentary Evidence.** A subpoena may also command the person to whom it is directed to produce the books, ~~papers,~~ documents (including electronically stored information), or tangible things designated therein, but the court, ~~upon~~ motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive, or (2) condition denial of the motion ~~upon~~ the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, ~~papers,~~ documents, or tangible things. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms. A person responding to a subpoena may object to discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue costs or burden. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought or the form requested is not reasonably accessible because of undue costs or burden. If that showing is made, the court may nonetheless order discovery from such sources or in such forms if the requesting party shows good cause, considering the limitations set out in rule 1.280(d)(2). The court may specify conditions of the discovery, including ordering that some or all of the expenses of the discovery be paid by the party seeking the discovery. A party seeking a production of evidence at trial which would be subject to a subpoena may compel such production by serving a notice to produce such evidence on an adverse party

as provided in rule 1.080. Such notice shall have the same effect and be subject to the same limitations as a subpoena served on the party.

**(d) Service.** A subpoena may be served by any person authorized by law to serve process or by any other person who is not a party and who is not less than 18 years of age. Service of a subpoena ~~upon~~ a person named ~~therein shall~~ within must be made as provided by law. Proof of such service ~~shall~~ must be made by affidavit of the person making service except as applicable under rule 1.351(c) for the production of documents and things by a nonparty without deposition, if not served by an officer authorized by law to do so.

**(e) Subpoena for Taking Depositions.**

(1) Filing a notice to take a deposition as provided in rule 1.310(b) or 1.320(a) with a certificate of service on it showing service on all parties to the action constitutes an authorization for the issuance of subpoenas for the persons named or described in the notice by the clerk of the court in which the action is pending or by an attorney of record in the action. The subpoena ~~shall~~ must state the method for recording the testimony. The subpoena may command the person to whom it is directed to produce designated books, ~~papers,~~ documents, or tangible things that constitute or contain evidence relating to any of the matters within the scope of the examination permitted by rule 1.280(b), but in that event the subpoena will be subject to the provisions of rule 1.280(c) and subdivision (c) of this rule. Within 10 days after its service, or on or before the time specified in the subpoena for compliance if the time is less than 10 days after service, the person to whom the subpoena is directed may serve written objection to inspection or copying of any of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court from which the subpoena was issued. If objection has been made, the party serving the subpoena may move for an order at any time before or during the taking of the deposition ~~upon~~ notice to the deponent.

(2) A person may be required to attend an examination only in the county wherein the person resides or is employed or transacts business in person or at such other convenient place as may be fixed by an order of court.

**(f) Contempt.** Failure by any person without adequate excuse to obey a subpoena served ~~upon~~ that person may be deemed a contempt of the court from which the subpoena issued.

**(g) Depositions before Commissioners Appointed in this State by Courts of Other States; Subpoena Powers; etc.** When any person authorized by the laws of Florida to administer oaths is appointed by a court of record of any other state, jurisdiction, or government as commissioner to take the testimony of any named witness within this state, that witness may be compelled to attend and testify before that commissioner by witness subpoena issued by the clerk of any circuit court at the instance of that commissioner or by other process or proceedings in the same manner as if that commissioner had been appointed by a court of this state; provided that no document ~~or paper writing~~ shall be compulsorily annexed as an exhibit to such deposition or otherwise permanently removed from the possession of the witness producing it, but in lieu thereof a photostatic copy may be annexed to and transmitted with such executed commission to the court of issuance.

**(h) Subpoena of Minor.** Any minor subpoenaed for testimony ~~shall have~~has the right to be accompanied by a parent or guardian at all times during the taking of testimony notwithstanding the invocation of the rule of sequestration of section 90.616, Florida Statutes, except ~~upon~~ a showing that the presence of a parent or guardian is likely to have a material, negative impact on the credibility or accuracy of the minor's testimony, or that the interests of the parent or guardian are in actual or potential conflict with the interests of the minor.

### **Committee Notes**

**[NO CHANGE]**

## **RULE 1.431. TRIAL JURY**

### **(a) Questionnaire.**

(1) The circuit court may direct the authority charged by law with the selection of prospective jurors to furnish each prospective juror with a questionnaire in the form approved by the supreme court from time to time to assist the authority in selecting prospective jurors. The questionnaire ~~shall~~must be used after the names of jurors have been selected as provided by law but before certification and the placing of the names of prospective jurors in the jury box. The questionnaire ~~shall~~must be used to determine those who are not qualified to serve as jurors under any statutory ground of disqualification.

(2) To assist in voir dire examination at trial, any court may direct the clerk to furnish prospective jurors selected for service with a questionnaire in the form approved by the supreme court from time to time. The prospective jurors ~~shall~~must be asked to complete and return the forms. Completed forms may be inspected in the clerk's office and copies ~~shall~~must be available in court during the voir dire examination for use by parties and the court.

**(b) Examination by Parties.** The parties have the right to examine jurors orally on their voir dire. The order in which the parties may examine each juror ~~shall~~must 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~~must be preserved.

**(c) Challenge for Cause.**

(1) On motion of any party, the court ~~shall~~must examine any prospective juror on oath to determine whether that person is related, within the third degree, to (i) any party, (ii) the attorney of any party, or (iii) any other person or entity against whom liability or blame is alleged in the pleadings, or is related to any person alleged to have been wronged or injured by the commission of the wrong for the trial of which the juror is called, or has any interest in the action, or has formed or expressed any opinion, or is sensible of any bias or prejudice concerning it, or is an employee or has been an employee of any party or any other person or entity against whom liability or blame is alleged in the pleadings, within 30 days before the trial. A party objecting to the juror may introduce any other competent evidence to support the objection. If it appears that the juror does not stand indifferent to the action or any of the foregoing grounds of objection exists or that the juror is otherwise incompetent, another ~~shall~~must be called in that juror's place.

(2) The fact that any person selected for jury duty from bystanders or the body of the county and not from a jury list lawfully selected has served as a juror in the court in which that person is called at any other time within 1 year is a ground of challenge for cause.

(3) When the nature of any civil action requires a knowledge of reading, writing, and arithmetic, or any of them, to enable a juror to understand the evidence to be offered, the fact that any prospective juror does not possess the qualifications is a ground of challenge for cause.

**(d) Peremptory Challenges.** Each party is entitled to 3 peremptory challenges of jurors, but when the number of parties on opposite sides is unequal, the opposing parties are entitled to the same aggregate number of peremptory challenges to be determined on the basis of 3 peremptory challenges to each party on the side with the greater number of parties. The additional peremptory challenges accruing to multiple parties on the opposing side ~~shall~~must be divided equally among them. Any additional peremptory challenges not capable of equal division ~~shall~~must be exercised separately or jointly as determined by the court.

**(e) Exercise of Challenges.** All challenges ~~shall~~must be addressed to the court outside the hearing of the jury in a manner selected by the court so that the jury panel is not aware of the nature of the challenge, the party making the challenge, or the basis of the court's ruling on the challenge, if for cause.

**(f) [NO CHANGE]**

**(g) Alternate Jurors.**

(1) The court may direct that 1 or 2~~more~~ jurors be impaneled to sit as alternate jurors in addition to the regular panel. Alternate jurors in the order in which they are called ~~shall~~must replace jurors who have become unable or disqualified to perform their duties before the jury retires to consider its verdict. Alternate jurors ~~shall~~must be drawn in the same manner, have the same qualifications, be subject to the same examination, take the same oath, and have the same functions, powers, facilities, and privileges as principal jurors. An alternate juror who does not replace a principal juror ~~shall~~must be discharged when the jury retires to consider the verdict.

(2) If alternate jurors are called, each party ~~shall be~~is entitled to one peremptory challenge in the selection of the alternate juror or jurors, but when the number of parties on opposite sides is unequal, the opposing parties ~~shall be~~are entitled to the same aggregate number of peremptory challenges to be determined on the basis of 1 peremptory challenge to each party on the side with the greater number of parties. The additional peremptory challenges allowed pursuant to this subdivision may be used only against the alternate jurors. The peremptory challenges allowed pursuant to subdivision (d) of this rule ~~shall~~must not be used against the alternate jurors.

**(h) Interview of a Juror.** A party who believes that grounds for legal challenge to a verdict exist may move for an order permitting an interview of a juror or jurors to determine whether the verdict is subject to the challenge. The

motion ~~shall~~must be served within ~~10~~15 days after rendition of the verdict unless good cause is shown for the failure to make the motion within that time. The motion ~~shall~~must state the name and address of each juror to be interviewed and the grounds for challenge that the party believes may exist. After notice and hearing, the trial judge ~~shall~~must enter an order denying the motion or permitting the interview. If the interview is permitted, the court may prescribe the place, manner, conditions, and scope of the interview.

(i) **Communication with the Jury.** This rule governs all communication between the judge or courtroom personnel and jurors.

(1) **Communication to be on the Record.** The court ~~shall~~must notify the parties of any communication from the jury pertaining to the action as promptly as practicable and in any event before responding to the communication. Except as set forth below, all communications between the court or courtroom personnel and the jury ~~shall~~must be on the record in open court or ~~shall~~must be in writing and filed in the action. The court or courtroom personnel ~~shall~~must note on any written communication to or from the jury the date and time it was delivered.

(2) **Exception for Certain Routine Communication.** The court ~~shall~~must, by pretrial order or by statement on the record with opportunity for objection, set forth the scope of routine ex parte communication to be permitted and the limits imposed by the court with regard to such communication.

(A) Routine ex parte communication between the bailiff or other courtroom personnel and the jurors, limited to juror comfort and safety, may occur off the record.

(B) In no event shall ex parte communication between courtroom personnel and jurors extend to matters that may affect the outcome of the trial, including statements containing any fact or opinion concerning a party, attorney, or procedural matter or relating to any legal issue or lawsuit.

(3) **Instructions to Jury.** During voir dire, the court ~~shall~~must instruct the jurors and courtroom personnel regarding the limitations on communication between the court or courtroom personnel and jurors. ~~Upon~~On empanelling the jury, the court ~~shall~~must instruct the jurors that their questions are to be submitted in writing to the court, which will review them with the parties and counsel before responding.

(4) **Notification of Jury Communication.** Courtroom personnel ~~shall~~must immediately notify the court of any communication to or from a juror or among jurors in contravention of the court's orders or instructions, including all communication contrary to the requirements of this rule.

**Committee Notes**

**[NO CHANGE]**

**RULE 1.500. DEFAULTS AND FINAL JUDGMENTS THEREON**

(a) **By the Clerk.** When a party against whom affirmative relief is sought has failed to file or serve any ~~paper~~document in the action, the party seeking relief may have the clerk enter a default against the party failing to serve or file such ~~paper~~document.

(b) **By the Court.** When a party against whom affirmative relief is sought has failed to plead or otherwise defend as provided by these rules or any applicable statute or any order of court, the court may enter a default against such party; provided that if such party has filed or served any ~~paper~~document in the action, that party ~~shall~~must be served with notice of the application for default.

(c) **Right to Plead.** A party may plead or otherwise defend at any time before default is entered. If a party in default files any ~~paper~~document after the default is entered, the clerk ~~shall~~must notify the party of the entry of the default. The clerk ~~shall~~must make an entry on the progress docket showing the notification.

(d) **[NO CHANGE]**

(e) **Final Judgment.** Final judgments after default may be entered by the court at any time, but no judgment may be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other representative who has appeared in it or unless the court has made an order under rule 1.210(b) providing that no representative is necessary for the infant or incompetent. If it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter to enable the court to enter judgment or to effectuate it, the court may receive affidavits, make references, or conduct

hearings as it deems necessary and ~~shall~~must accord a right of trial by jury to the parties when required by the Constitution or any statute.

### **Court Commentary**

**[NO CHANGE]**

#### **RULE 1.510. SUMMARY JUDGMENT**

(a) **For Claimant.** A party seeking to recover ~~upon~~ a claim, counterclaim, crossclaim, or third-party claim or to obtain a declaratory judgment may move for a summary judgment in that party's favor ~~upon~~ all or any part thereof with or without supporting affidavits at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party.

(b) **[NO CHANGE]**

(c) **Motion and Proceedings Thereon.** The motion ~~shall~~must state with particularity the grounds ~~upon~~ which it is based and the substantial matters of law to be argued and ~~shall~~must specifically identify any affidavits, answers to interrogatories, admissions, depositions, and other materials as would be admissible in evidence ("summary judgment evidence") on which the movant relies. The movant ~~shall~~must serve the motion at least 20 days before the time fixed for the hearing, and ~~shall~~must also serve at that time a copy of any summary judgment evidence on which the movant relies that has not already been filed with the court. The adverse party ~~shall~~must identify, by notice served pursuant to rule 1.080 at least 5 days prior to the day of the hearing, or delivered no later than 5:00 p.m. 2 business days prior to the day of the hearing, any summary judgment evidence on which the adverse party relies. To the extent that summary judgment evidence has not already been filed with the court, the adverse party ~~shall~~must serve a copy on the movant pursuant to rule 1.080 at least 5 days prior to the day of the hearing, or by delivery to the movant's attorney no later than 5:00 p.m. 2 business days prior to the day of hearing. The judgment sought ~~shall~~must be rendered ~~forthwith~~immediately if the pleadings and summary judgment evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case Not Fully Adjudicated on Motion.** On motion under this rule if judgment is not rendered upon the whole case or for all the relief asked and a trial or the taking of testimony and a final hearing is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, ~~shall~~must ascertain, if practicable, what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It ~~shall thereupon~~must then make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. On the trial or final hearing of the action the facts so specified ~~shall~~must be deemed established, and the trial or final hearing ~~shall~~must be conducted accordingly.

(e) **Form of Affidavits; Further Testimony.** Supporting and opposing affidavits ~~shall~~must be made on personal knowledge, ~~shall~~must set forth such facts as would be admissible in evidence, and ~~shall~~must show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all ~~papers~~documents or parts thereof referred to in an affidavit ~~shall~~must be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or by further affidavits.

(f) [NO CHANGE]

(g) **Affidavits Made in Bad Faith.** If it appears to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court ~~shall~~forthwith must immediately order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorneys' fees, and any offending party or attorney may be adjudged guilty of contempt.

#### Committee Notes

[NO CHANGE]

### RULE 1.545. FINAL DISPOSITION FORM

A final disposition form (form 1.998) must be filed with the clerk by the

prevailing party at the time of the filing of the order or judgment which disposes of the action. If the action is settled without a court order or judgment being entered, or dismissed by the parties, the plaintiff or petitioner immediately must file a final disposition form (form 1.998) with the clerk. The clerk must complete the final disposition form for a party appearing pro se, or when the action is dismissed by court order for lack of prosecution pursuant to rule 1.420(e).

### **Committee Note**

**2016 Amendment.** This rule is identical to former rule 1.100(c)(3).

### **RULE 1.625. PROCEEDINGS AGAINST SURETY ON JUDICIAL BONDS**

When any rule or statute requires or permits giving of bond by a party in a judicial proceeding, the surety on the bond submits to the jurisdiction of the court when the bond is approved. The surety ~~shall~~must furnish the address for the service of ~~papers~~documents affecting the surety's liability on the bond to the officer to whom the bond is given at that time. The liability of the surety may be enforced on motion without the necessity of an independent action. The motion ~~shall~~must be served on the surety at the address furnished to the officer. The surety ~~shall~~must serve a response to the motion within 20 days after service of the motion, asserting any defenses in law or in fact. If the surety fails to serve a response within the time allowed, a default may be taken. If the surety serves a response, the issues raised ~~shall~~must be decided by the court on reasonable notice to the parties. The right to jury trial shall not be abridged in any such proceedings.

### **Committee Notes**

**[NO CHANGE]**

### **RULE 1.630. EXTRAORDINARY REMEDIES**

**(a) [NO CHANGE]**

(b) **Initial Pleading.** The initial pleading ~~shall~~must be a complaint. It ~~shall~~must contain:

- (1) the facts on which the plaintiff relies for relief;
- (2) a request for the relief sought; and
- (3) if desired, argument in support of the ~~petition~~complaint with citations of authority.

The caption ~~shall~~must show the action filed in the name of the plaintiff in all cases and not on the relation of the state. When the complaint seeks a writ directed to a lower court or to a governmental or administrative agency, a copy of as much of the record as is necessary to support the plaintiff's complaint ~~shall~~must be attached.

(c) **Time.** A complaint ~~shall~~must be filed within the time provided by law.

(d) **Process.** If the complaint shows a prima facie case for relief, the court ~~shall~~must issue:

- (1) an order nisi in prohibition;
- (2) an alternative writ in mandamus that may incorporate the complaint by reference only;
- (3) a writ of quo warranto; or
- (4) a writ of habeas corpus.

The writ ~~shall~~must be served in the manner prescribed by law.

(e) **Response.** Defendant ~~shall~~must respond to the writ as provided in rule 1.140, but the answer in quo warranto ~~shall~~must show better title to the office when the writ seeks an adjudication of the right to an office held by the defendant.

## Court Commentary

[NO CHANGE]

## Committee Notes

[NO CHANGE]

**RULE 1.900. FORMS**

(a) – (b) [NO CHANGE]

(c) **Formal Matters.** Captions, except for the designation of the ~~paper~~document, are omitted from the forms. A general form of caption is the first form. Signatures are omitted from pleadings and motions.

**FORM 1.910. SUBPOENA FOR TRIAL**

**(a) For Issuance by Clerk.**

SUBPOENA

THE STATE OF FLORIDA:  
TO .....

YOU ARE COMMANDED to appear before the Honorable ....., Judge of the Court, at the ..... County Courthouse in ....., Florida, on ....., at ..... ~~m~~(a.m./p.m.), to testify in this action. If you fail to appear, you may be in contempt of court.

You are subpoenaed to appear by the following attorney, and unless excused from this subpoena by this attorney or the court, you ~~shall~~must respond to this subpoena as directed.

DATED on .....

(Name of Clerk)  
As Clerk of the Court  
By \_\_\_\_\_  
As Deputy Clerk

\_\_\_\_\_(Name of Attorney).....  
Attorney for ....(Name of Client).....  
.....  
.....  
.....(Address).....  
.....(Telephone number).....  
.....(E-mail address(es)).....  
Florida Bar No. ....

Any minor subpoenaed for testimony ~~shall have~~has the right to be accompanied by a parent or guardian at all times during the taking of testimony notwithstanding the invocation of the rule of sequestration of section 90.616, Florida Statutes, except ~~upon~~ a showing that the presence of a parent or guardian is likely to have a material, negative impact on the credibility or accuracy of the minor's testimony, or that the interests of the parent or guardian are in actual or potential conflict with the interests of the minor.

**If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact [identify applicable court personnel by name, address, and telephone number] at least 7 days before your scheduled court appearance, or immediately upon receiving this notification if the time before the scheduled appearance is less than 7 days; if you are hearing or voice impaired, call 711.**

**(b) For Issuance by Attorney of Record.**

SUBPOENA

THE STATE OF FLORIDA:  
TO .....

YOU ARE COMMANDED to appear before the Honorable ....., Judge of the Court, at the ..... County Courthouse in ....., Florida, on .....(date)....., at ..... ~~m.~~(a.m./p.m.), to testify in this action. If you fail to appear, you may be in contempt of court.

You are subpoenaed to appear by the following attorney, and unless excused from this subpoena by this attorney or the court, you ~~shall~~must respond to this subpoena as directed.

DATED on .....

(Name of Attorney)  
For the Court

.....(Name of Attorney).....  
Attorney for .....(Name of Client).....

.....

.....

.....(Address).....

.....(Telephone number).....

.....(E-mail address(es)).....

Florida Bar No. ....

Any minor subpoenaed for testimony ~~shall have~~has the right to be accompanied by a parent or guardian at all times during the taking of testimony notwithstanding the invocation of the rule of sequestration of section 90.616, Florida Statutes, except ~~upon~~ a showing that the presence of a parent or guardian is likely to have a material, negative impact on the credibility or accuracy of the minor's testimony, or that the interests of the parent or guardian are in actual or potential conflict with the interests of the minor.

**If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact [identify applicable court personnel by name, address, and telephone number] at least 7 days before your scheduled court appearance, or immediately upon receiving this notification if the time before the scheduled appearance is less than 7 days; if you are hearing or voice impaired, call 711.**

**Committee Notes**

**1996 Amendment.** Form (b) was added to comply with amendments to rule 1.410.

**2013 Amendment.** The notice to persons with disabilities was amended to comply with amendments to Fla. R. Jud. Admin. 2.540.

**FORM 1.911. SUBPOENA DUCES TECUM FOR TRIAL**

**(a) For Issuance by Clerk.**

**SUBPOENA DUCES TECUM**

THE STATE OF FLORIDA:  
TO .....

YOU ARE COMMANDED to appear before the Honorable ....., Judge of the Court, at the ..... County Courthouse in ....., Florida, on .....(date)....., at ..... ~~m.~~(a.m./p.m.), to testify in this action and to have with you at that time and place the following: ..... If you fail to appear, you may be in contempt of court.

You are subpoenaed to appear by the following attorney, and unless excused from this subpoena by this attorney or the court, you ~~shall~~must respond to this subpoena as directed.

DATED on .....

(Name of Clerk)  
As Clerk of the Court  
By \_\_\_\_\_  
As Deputy Clerk

\_\_\_\_\_(Name of Attorney).....  
Attorney for ....(Name of Client).....  
.....  
.....  
.....(Address).....  
.....(Telephone number).....  
.....(E-mail address(es)).....  
Florida Bar No. ....

Any minor subpoenaed for testimony ~~shall have~~has the right to be accompanied by a parent or guardian at all times during the taking of testimony notwithstanding the invocation of the rule of sequestration of section 90.616, Florida Statutes, except ~~upon~~ a showing that the presence of a parent or guardian is likely to have a material, negative impact on the credibility or accuracy of the minor’s testimony, or that the interests of the parent or guardian are in actual or potential conflict with the interests of the minor.

**If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact [identify applicable court personnel by name, address, and telephone number] at least 7 days before your scheduled court appearance, or immediately upon receiving this notification if the time before the scheduled appearance is less than 7 days; if you are hearing or voice impaired, call 711.**

**(b) For Issuance by Attorney of Record.**

SUBPOENA DUCES TECUM

THE STATE OF FLORIDA:  
TO .....

YOU ARE COMMANDED to appear before the Honorable ....., Judge of the Court, at the ..... County Courthouse in ....., Florida, on .....(date)....., at ..... ~~m.~~(a.m./p.m.), to testify in this action and to have with you at that time and place the following: ..... If you fail to appear, you may be in contempt of court.

You are subpoenaed to appear by the following attorney, and unless excused from this subpoena by this attorney or the court, you ~~shall~~must respond to this subpoena as directed.

DATED on .....

(Name of Attorney)  
For the Court

.....(Name of Attorney).....  
Attorney for .....(Name of Client).....

.....  
.....

.....(Address).....  
.....(Telephone number).....  
.....(E-mail address(es)).....  
Florida Bar No. ....

Any minor subpoenaed for testimony ~~shall have~~has the right to be accompanied by a parent or guardian at all times during the taking of testimony notwithstanding the invocation of the rule of sequestration of section 90.616, Florida Statutes, except upon a showing that the presence of a parent or guardian is likely to have a material, negative impact on the credibility or accuracy of the minor's testimony, or that the interests of the parent or guardian are in actual or potential conflict with the interests of the minor.

**If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact [identify applicable court personnel by name, address, and telephone number] at least 7 days before your scheduled court appearance, or immediately upon receiving this notification if the time before the scheduled appearance is less than 7 days; if you are hearing or voice impaired, call 711.**

**Committee Notes**

**1996 Amendment.** Form (b) was added to comply with amendments to rule 1.410.

**2013 Amendment.** The notice to persons with disabilities was amended to comply with amendments to Fla. R. Jud. Admin. 2.540.

**FORM 1.912. SUBPOENA FOR DEPOSITION**

(a) For Issuance by Clerk.

SUBPOENA FOR DEPOSITION

THE STATE OF FLORIDA:  
TO .....

YOU ARE COMMANDED to appear before a person authorized by law to take depositions at ..... in ....., Florida, on ....(date)...., at ..... ~~m.~~(a.m./p.m.), for the taking of your deposition in this action. If you fail to appear, you may be in contempt of court.

You are subpoenaed to appear by the following attorney, and unless excused from this subpoena by this attorney or the court, you ~~shall~~must respond to this subpoena as directed.

DATED on .....

(Name of Clerk)  
As Clerk of the Court  
By \_\_\_\_\_  
As Deputy Clerk

\_\_\_\_\_(Name of Attorney)....  
Attorney for ....(Name of Client)....  
.....  
.....  
....(Address)....  
....(Telephone number)....  
....(E-mail address(es))....  
Florida Bar No. ....

Any minor subpoenaed for testimony ~~shall have~~has the right to be accompanied by a parent or guardian at all times during the taking of testimony notwithstanding the invocation of the rule of sequestration of section 90.616, Florida Statutes, except ~~upon~~ a showing that the presence of a parent or guardian is likely to have a material, negative impact on the credibility or accuracy of the minor’s testimony, or that the interests of the parent or guardian are in actual or potential conflict with the interests of the minor.

**If you are a person with a disability who needs any accommodation in order to participate in this deposition, you are entitled, at no cost to you, to the provision of certain assistance. Please contact [identify attorney or party taking the deposition by name, address, and telephone number] at least 7 days before your scheduled deposition, or immediately upon receiving this notification if the time before the scheduled appearance is less than 7 days; if you are hearing or voice impaired, call 711.**

**(b) For Issuance by Attorney of Record.**

SUBPOENA FOR DEPOSITION

THE STATE OF FLORIDA:  
TO .....

YOU ARE COMMANDED to appear before a person authorized by law to take depositions at ..... in ....., Florida, on .....(date)....., at ..... ~~m.~~(a.m./p.m.), for the taking of your deposition in this action. If you fail to appear, you may be in contempt of court.

You are subpoenaed to appear by the following attorney, and unless excused from this subpoena by this attorney or the court, you ~~shall~~must respond to this subpoena as directed.

DATED on .....

(Name of Attorney)  
For the Court

.....(Name of Attorney).....  
Attorney for .....(Name of Client).....

.....

.....

.....(Address).....

.....(Telephone number).....

.....(E-mail address(es)).....

Florida Bar No. ....

Any minor subpoenaed for testimony ~~shall have~~has the right to be accompanied by a parent or guardian at all times during the taking of testimony notwithstanding the invocation of the rule of sequestration of section 90.616, Florida Statutes, except ~~upon~~ a showing that the presence of a parent or guardian is likely to have a material, negative impact on the credibility or accuracy of the minor's testimony, or that the interests of the parent or guardian are in actual or potential conflict with the interests of the minor.

**If you are a person with a disability who needs any accommodation in order to participate in this deposition, you are entitled, at no cost to you, to the provision of certain assistance. Please contact [identify attorney or party taking the deposition by name, address, and telephone number] at least 7 days before your scheduled deposition, or immediately upon receiving this notification if the time before the scheduled deposition is less than 7 days; if you are hearing or voice impaired, call 711.**

**Committee Notes**

**1996 Amendment.** Form (b) was added to comply with amendments to rule 1.410.

**2013 Amendment.** The notice to persons with disabilities was amended to make the procedure for obtaining accommodation consistent with the procedure required in court proceedings.

**FORM 1.913. SUBPOENA DUCES TECUM FOR DEPOSITION**

**(a) For Issuance by Clerk.**

SUBPOENA DUCES TECUM FOR DEPOSITION

THE STATE OF FLORIDA:  
TO .....

YOU ARE COMMANDED to appear before a person authorized by law to take depositions at ..... in ....., Florida, on ...(date)..., at ..... ~~m~~(a.m./p.m.), for the taking of your deposition in this action and to have with you at that time and place the following: ..... If you fail to appear, you may be in contempt of court.

You are subpoenaed to appear by the following attorney, and unless excused from this subpoena by this attorney or the court, you ~~shall~~must respond to this subpoena as directed.

DATED on .....

(Name of Clerk)  
As Clerk of the Court  
By \_\_\_\_\_  
As Deputy Clerk

\_\_\_\_\_(Name of Attorney).....  
Attorney for .....(Name of Client).....  
.....  
.....  
.....(Address).....  
.....(Telephone number).....  
.....(E-mail address(es)).....  
Florida Bar No. ....

Any minor subpoenaed for testimony ~~shall have~~has the right to be accompanied by a parent or guardian at all times during the taking of testimony notwithstanding the invocation of the rule of sequestration of section 90.616, Florida Statutes, except ~~upon~~ a showing that the presence of a parent or guardian is likely to have a material, negative impact on the credibility or accuracy of the minor’s testimony, or that the interests of the parent or guardian are in actual or potential conflict with the interests of the minor.

**If you are a person with a disability who needs any accommodation in order to participate in this deposition, you are entitled, at no cost to you, to the provision of certain assistance. Please contact [identify attorney or party taking the deposition by name, address, and telephone number] at least 7 days before your scheduled deposition, or immediately upon receiving this notification if the time before the scheduled deposition is less than 7 days; if you are hearing or voice impaired, call 711.**

**(b) For Issuance by Attorney of Record.**

SUBPOENA DUCES TECUM FOR DEPOSITION

THE STATE OF FLORIDA:  
TO .....

YOU ARE COMMANDED to appear before a person authorized by law to take depositions at ..... in ....., Florida, on ....(date)...., at ..... ~~m.~~(a.m./p.m.), for the taking of your deposition in this action and to have with you at that time and place the following: ..... If you fail to appear, you may be in contempt of court.

You are subpoenaed to appear by the following attorney, and unless excused from this subpoena by this attorney or the court, you ~~shall~~must respond to this subpoena as directed.

DATED on .....

(Name of Attorney)  
For the Court

.....(Name of Attorney).....  
Attorney for .....(Name of Client).....

.....  
.....

.....(Address).....  
.....(Telephone number).....  
.....(E-mail address(es)).....  
Florida Bar No. ....

Any minor subpoenaed for testimony ~~shall have~~has the right to be accompanied by a parent or guardian at all times during the taking of testimony notwithstanding the invocation of the rule of sequestration of section 90.616, Florida Statutes, except ~~upon~~ a showing that the presence of a parent or guardian is likely to have a material, negative impact on the credibility or accuracy of the minor's testimony, or that the interests of the parent or guardian are in actual or potential conflict with the interests of the minor.

**If you are a person with a disability who needs any accommodation in order to participate in this deposition, you are entitled, at no cost to you, to the provision of certain assistance. Please contact [identify attorney or party taking the deposition by name, address, and telephone number] at least 7 days before your scheduled deposition, or immediately upon receiving this notification if the time before the scheduled appearance is less than 7 days; if you are hearing or voice impaired, call 711.**

**Committee Notes**

**1996 Amendment.** Form (b) was added to comply with amendments to rule 1.410.

**2013 Amendment.** The notice to persons with disabilities was amended to make the procedure for obtaining accommodation consistent with the procedure required in court proceedings.

**FORM 1.918. LIS PENDENS**

NOTICE OF LIS PENDENS

TO DEFENDANT(S) ....., AND ALL OTHERS WHOM IT MAY CONCERN:

YOU ARE NOTIFIED OF THE FOLLOWING:

(a) The plaintiff has instituted this action against you seeking (“to foreclose a mortgage” or “to partition” or “to quiet title” or other type of action) with respect to the property described below.

(b) The plaintiff(s) in this action is/are:

(1) .....

(2) .....

(c) The date of the institution of this action is ..... OR: the date on the clerk’s electronic receipt for the action’s filing is ..... OR: the case number of the action is as shown in the caption.

(d) The property that is the subject matter of this action is in ..... County, Florida, and is described as follows:

(legal description of property)

DATED ON .....

\_\_\_\_\_(Name of Attorney).....

Attorney for .....(Name of Client).....

.....

.....

.....(Address).....

.....(Telephone number).....

.....(E-mail address(es)).....

Florida Bar No. ....

**NOTE:** This form is not to be recorded without the clerk’s case number.

**Committee Notes**

**2009 Amendment.** This form was substantially rewritten due to the amendments to section 48.23, Florida Statutes (2009). Section 48.23 provides that the notice must contain the names of all of the parties, the name of the court in which the action is instituted, a description of the property involved or affected, a description of the relief sought as to the property, and one of the following: the date of the institution of the action, the date of the clerk's electronic receipt, or the case number. If the case number is used to satisfy the requirements of section 48.23, it should be inserted in the case caption of the notice.

**FORM 1.921. NOTICE OF PRODUCTION FROM NONPARTY**

**NOTICE OF PRODUCTION**

To .....

YOU ARE NOTIFIED that after 10 days from the date of service of this notice, if service is by delivery, or 15 days from the date of service, if service is by mail, and if no objection is received from any party, the undersigned will issue or apply to the clerk of this court for issuance of the attached subpoena directed to ....., who is not a party and whose address is ....., to produce the items listed at the time and place specified in the subpoena.

DATED on .....

\_\_\_\_\_  
.....(Name of Attorney).....  
Attorney for .....(Name of Client).....  
.....  
.....  
.....(Address).....  
.....(Telephone Number).....  
.....(E-mail address(es)).....  
Florida Bar No. ....

**NOTE:** This form of notice is for use with rule 1.351. A copy of the subpoena must be attached to this form for it to comply with the rule.

**Committee Notes**

**1980 Adoption.** This form is new.

**1996 Amendment.** This form was amended to comply with amendments to rules 1.351 and 1.410.

**FORM 1.922. SUBPOENA DUCES TECUM WITHOUT DEPOSITION**

**(a) When Witness Has Option to Furnish Records Instead of Attending Deposition; Issuance by Clerk.**

SUBPOENA DUCES TECUM

THE STATE OF FLORIDA:  
TO .....

YOU ARE COMMANDED to appear at ..... in ....., Florida, on ....(date)....., at ..... ~~m~~(a.m./p.m.), and to have with you at that time and place the following: .....

These items will be inspected and may be copied at that time. You will not be required to surrender the original items. You may comply with this subpoena by providing legible copies of the items to be produced to the attorney whose name appears on this subpoena on or before the scheduled date of production. You may condition the preparation of the copies upon the payment in advance of the reasonable cost of preparation. You may mail or deliver the copies to the attorney whose name appears on this subpoena and thereby eliminate your appearance at the time and place specified above. You have the right to object to the production pursuant to this subpoena at any time before production by giving written notice to the attorney whose name appears on this subpoena. THIS WILL NOT BE A DEPOSITION. NO TESTIMONY WILL BE TAKEN.

If you fail to:

- (1) appear as specified; or
- (2) furnish the records instead of appearing as provided above; or
- (3) object to this subpoena,

you may be in contempt of court. You are subpoenaed to appear by the following attorney, and unless excused from this subpoena by this attorney or the court, you ~~shall~~must respond to this subpoena as directed.

DATED on .....

(Name of Clerk)  
As Clerk of the Court  
By \_\_\_\_\_  
As Deputy Clerk

\_\_\_\_\_(Name of Attorney).....  
Attorney for ....(Name of Client).....  
.....

.....  
.....(Address).....  
.....(Telephone number).....  
.....(E-mail address(es)).....  
Florida Bar No. ....

**If you are a person with a disability who needs any accommodation in order to respond to this subpoena, you are entitled, at no cost to you, to the provision of certain assistance. Please contact [identify attorney or party taking the deposition by name, address, and telephone number] at least 7 days before your scheduled appearance, or immediately upon receiving this notification if the time before the scheduled appearance is less than 7 days; if you are hearing or voice impaired, call 711.**

**(b) When Witness Must Appear and Produce the Records; Issuance by Clerk.**

SUBPOENA DUCES TECUM

THE STATE OF FLORIDA:  
TO: .....

YOU ARE COMMANDED to appear at ..... in ....., Florida, on ... (date) ....., at ..... ~~m~~(a.m./p.m.), and to have with you at that time and place the following: .....

These items will be inspected and may be copied at that time. You will not be required to surrender the original items. You have the right to object to the production pursuant to this subpoena at any time before production by giving written notice to the attorney whose name appears on this subpoena. THIS WILL NOT BE A DEPOSITION. NO TESTIMONY WILL BE TAKEN.

If you fail to:

- (1) appear or furnish the records at the time and place specified instead of appearing;
- or
- (2) object to this subpoena,

you may be in contempt of court. You are subpoenaed by the attorney whose name appears on this subpoena, and unless excused from this subpoena by the attorney or the court, you ~~shall~~must respond to this subpoena as directed.

DATED on .....

(Name of Clerk)  
As Clerk of the Court

By \_\_\_\_\_  
As Deputy Clerk

\_\_\_\_\_(Name of Attorney).....

Attorney for \_\_\_\_\_(Name of Client).....

.....

.....

\_\_\_\_\_(Address).....

\_\_\_\_\_(Telephone number).....

\_\_\_\_\_(E-mail address(es)).....

Florida Bar No. ....

**If you are a person with a disability who needs any accommodation in order to respond to this subpoena, you are entitled, at no cost to you, to the provision of certain assistance. Please contact [identify attorney or party taking the deposition by name, address, and telephone number] at least 7 days before your scheduled appearance, or immediately upon receiving this notification if the time before the scheduled appearance is less than 7 days; if you are hearing or voice impaired, call 711.**

**(c) When Witness Has Option to Furnish Records Instead of Attending Deposition; Issuance by Attorney of Record.**

#### SUBPOENA DUCES TECUM

THE STATE OF FLORIDA:

TO .....

YOU ARE COMMANDED to appear at ..... in ....., Florida, on \_\_\_(date)\_\_\_, at ..... ~~m~~(a.m./p.m.), and to have with you at that time and place the following: .....

These items will be inspected and may be copied at that time. You will not be required to surrender the original items. You may comply with this subpoena by providing legible copies of the items to be produced to the attorney whose name appears on this subpoena on or before the scheduled date of production. You may condition the preparation of the copies upon the payment in advance of the reasonable cost of preparation. You may mail or deliver the copies to the attorney whose name appears on this subpoena and thereby eliminate your appearance at the time and place specified above. You have the right to object to the production pursuant to this subpoena at any time before production by giving written notice to the attorney whose name appears on this subpoena. THIS WILL NOT BE A DEPOSITION. NO TESTIMONY WILL BE TAKEN.

If you fail to:

- (1) appear as specified; or

- (2) furnish the records instead of appearing as provided above; or
- (3) object to this subpoena,

you may be in contempt of court. You are subpoenaed to appear by the following attorney, and unless excused from this subpoena by this attorney or the court, you ~~shall~~must respond to this subpoena as directed.

DATED on .....

(Name of Attorney)  
For the Court

\_\_\_\_\_(Name of Attorney).....  
Attorney for ....(Name of Client).....  
.....  
.....  
.....(Address).....  
.....(Telephone number).....  
.....(E-mail address(es)).....  
Florida Bar No. ....

**If you are a person with a disability who needs any accommodation in order to respond to this subpoena, you are entitled, at no cost to you, to the provision of certain assistance. Please contact [identify attorney or party taking the deposition by name, address, and telephone number] at least 7 days before your scheduled appearance, or immediately upon receiving this notification if the time before the scheduled appearance is less than 7 days; if you are hearing or voice impaired, call 711.**

**(d) When Witness Must Appear and Produce the Records; Issuance by Attorney of Record.**

THE STATE OF FLORIDA:  
TO .....

YOU ARE COMMANDED to appear at ..... in ....., Florida, on ....(date)....., at ..... ~~m~~(a.m./p.m.), and to have with you at that time and place the following: .....

These items will be inspected and may be copied at that time. You will not be required to surrender the original items. You have the right to object to the production pursuant to this subpoena at any time before production by giving written notice to the attorney whose name appears on this subpoena. THIS WILL NOT BE A DEPOSITION. NO TESTIMONY WILL BE TAKEN.

If you fail to:

(1) appear or furnish the records at the time and place specified instead of appearing;  
or

(2) object to this subpoena,

you may be in contempt of court. You are subpoenaed by the attorney whose name appears on this subpoena, and unless excused from this subpoena by the attorney or the court, you ~~shall~~must respond to this subpoena as directed.

DATED on .....

(Name of Attorney)  
For the Court

\_\_\_\_\_(Name of Attorney)\_\_\_\_\_

Attorney for \_\_\_\_\_(Name of Client)\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_(Address)\_\_\_\_\_

\_\_\_\_\_(Telephone number)\_\_\_\_\_

\_\_\_\_\_(E-mail address(es))\_\_\_\_\_

Florida Bar No. ....

**If you are a person with a disability who needs any accommodation in order to respond to this subpoena, you are entitled, at no cost to you, to the provision of certain assistance. Please contact [identify attorney or party taking the deposition by name, address, and telephone number] at least 7 days before your scheduled appearance, or immediately upon receiving this notification if the time before the scheduled appearance is less than 7 days; if you are hearing or voice impaired, call 711.**

**NOTE:** These forms are to be used for production of documents under rule 1.351. Form (a) is used when the person having the records may furnish copies to the attorney requesting the subpoena instead of appearing at the time and place specified in the subpoena and the subpoena is to be issued by the clerk. Form (b) is used when the records must be produced at the time and place specified in the subpoena and the subpoena is to be issued by the clerk. Form (c) is used when the person having the records may furnish copies to the attorney requesting the subpoena instead of appearing at the time and place specified in the subpoena and the subpoena is to be issued by an attorney of record. Form (d) is used when the records must be produced at the time and place specified in the subpoena and the subpoena is to be issued by an attorney of record.

### Committee Notes

**1980 Adoption.** This form is new.

**1996 Amendment.** Forms (a) and (b) were amended and forms (c) and (d) were added to comply with amendments to rules 1.351 and 1.410.

**2013 Amendment.** The notice to persons with disabilities was amended to make the procedure for obtaining accommodation consistent with the procedure required in court proceedings.

**FORM 1.975. NOTICE OF COMPLIANCE WHEN CONSTITUTIONAL CHALLENGE IS BROUGHT**

NOTICE OF COMPLIANCE WITH  
SECTION 86.091, FLORIDA STATUTES

The undersigned hereby gives notice of compliance with Fla. R. Civ. P. 1.071, with respect to the constitutional challenge brought pursuant to .....(Florida statute, charter, ordinance, or franchise challenged)..... The undersigned complied by serving the .....(Attorney General for the state of Florida or State Attorney for the ..... Judicial Circuit)..... with a copy of the pleading or motion challenging .....(Florida statute, charter, ordinance, or franchise challenged)....., by .....(certified or registered mail)..... on .....(date).....

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.....(Name of Attorney).....  
Attorney for .....(Name of Client).....  
~~Florida Bar No. ....~~  
.....(Address)-.....  
.....(Telephone No.)-.....  
.....(E-mail Address(es)).....  
~~Florida Bar No. ....~~

**Committee Notes**

**2010 Adoption.** This form is to be used to provide notice of a constitutional challenge as required by section 86.091, Florida Statutes. See rule 1.071. This form is to be used when the Attorney General or the State Attorney is not a named party to the action, but must be served solely in order to comply with the notice requirements set forth in section 86.091.

**FORM 1.980.     DEFAULT**

MOTION FOR DEFAULT

Plaintiff moves for entry of a default by the clerk against defendant \_\_\_\_\_ for failure to serve any ~~paper~~document on the undersigned or file any ~~paper~~document as required by law.

\_\_\_\_\_  
Attorney for Plaintiff

DEFAULT

A default is entered in this action against the defendant named in the foregoing motion for failure to serve or file any ~~paper~~document as required by law.

Dated on \_\_\_\_\_.

(Name of Clerk)  
As Clerk of the Court  
By \_\_\_\_\_.  
As Deputy Clerk

**FORM 1.997. CIVIL COVER SHEET**

The civil cover sheet and the information contained in it neither replace nor supplement the filing and service of pleadings or other ~~papers~~documents as required by law. This form ~~shall~~must be filed by the plaintiff or petitioner for the use of the Clerk of Court for the purpose of reporting judicial workload data pursuant to ~~Florida Statutes~~ section 25.075, Florida Statutes. (See instructions for completion.)

---

**I. CASE STYLE**

(Name of Court) \_\_\_\_\_

Plaintiff \_\_\_\_\_  
\_\_\_\_\_

Case #: \_\_\_\_\_  
Judge: \_\_\_\_\_

vs.

Defendant \_\_\_\_\_  
\_\_\_\_\_

---

**II. TYPE OF CASE** (If the case fits more than one type of case, select the most definitive category.) If the most descriptive label is a subcategory (is indented under a broader category), place an x on both the main category and subcategory lines.

- Condominium
- Contracts and indebtedness
- Eminent domain
- Auto negligence
- Negligence—other
  - Business governance
  - Business torts
  - Environmental/Toxic tort
  - Third party indemnification
  - Construction defect
  - Mass tort
  - Negligent security
  - Nursing home negligence
  - Premises liability—commercial
  - Premises liability—residential
- Products liability
- Real property/Mortgage foreclosure
  - Commercial foreclosure \$0–\$50,000
  - Commercial foreclosure \$50,001–\$249,999

- Commercial foreclosure \$250,000 or more
- Homestead residential foreclosure \$0–\$50,000
- Homestead residential foreclosure \$50,001–\$249,999
- Homestead residential foreclosure \$250,000 or more
- Nonhomestead residential foreclosure \$0–\$50,000
- Nonhomestead residential foreclosure \$50,001–\$249,999
- Nonhomestead residential foreclosure \$250,000 or more
- Other real property actions \$0–\$50,000
- Other real property actions \$50,001–\$249,999
- Other real property actions \$250,000 or more
- Professional malpractice
  - Malpractice—business
  - Malpractice—medical
  - Malpractice—other professional
- Other
  - Antitrust/Trade regulation
  - Business transactions
  - Constitutional challenge—statute or ordinance
  - Constitutional challenge—proposed amendment
  - Corporate trusts
  - Discrimination—employment or other
  - Insurance claims
  - Intellectual property
  - Libel/Slander
  - Shareholder derivative action
  - Securities litigation
  - Trade secrets
  - Trust litigation

**III. REMEDIES SOUGHT (check all that apply):**

- Monetary;
- Nonmonetary declaratory or injunctive relief;
- Punitive

**IV. NUMBER OF CAUSES OF ACTION: [ ]**

(specify) \_\_\_\_\_  
 \_\_\_\_\_

**V. IS THIS CASE A CLASS ACTION LAWSUIT?**

- yes
- no

**VI. HAS NOTICE OF ANY KNOWN RELATED CASE BEEN FILED?**

- no
- yes If “yes,” list all related cases by name, case number, and court.

\_\_\_\_\_



FORM 1.997. INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET

Plaintiff must file this cover sheet with the first paperwork document filed in the action or proceeding (except small claims cases or other county court cases, probate, or family cases). Domestic and juvenile cases should be accompanied by a completed Florida Family Law Rules of Procedure Form 12.928, Cover Sheet for Family Court Cases. Failure to file a civil cover sheet in any civil case other than those excepted above may result in sanctions.

**I. Case Style.** Enter the name of the court, the appropriate case number assigned at the time of filing of the original complaint or petition, the name of the judge assigned (if applicable), and the name (last, first, middle initial) of plaintiff(s) and defendant(s).

**II. Type of Case.** Place an “X” on the appropriate line. If the cause fits more than one type of case, select the most definitive. If the most definitive label is a subcategory (indented under a broader category label), place an “X” on the category and subcategory lines. Definitions of the cases are provided below in the order they appear on the form.

(A) Condominium—all civil lawsuits pursuant to Chapter 718, Florida Statutes, in which a condominium association is a party.

(B) Contracts and indebtedness—all contract actions relating to promissory notes and other debts, including those arising from the sale of goods, but excluding contract disputes involving condominium associations.

(C) Eminent domain—all matters relating to the taking of private property for public use, including inverse condemnation by state agencies, political subdivisions, or public service corporations.

(D) Auto negligence—all matters arising out of a party’s allegedly negligent operation of a motor vehicle.

(E) Negligence—other—all actions sounding in negligence, including statutory claims for relief on account of death or injury, that are not included in other main categories.

(F) Business governance—all matters relating to the management, administration, or control of a company.

(G) Business torts—all matters relating to liability for economic loss allegedly caused by interference with economic or business relationships.

(H) Environmental/Toxic tort—all matters relating to claims that violations of environmental regulatory provisions or exposure to a chemical caused injury or disease.

(I) Third party indemnification—all matters relating to liability transferred to a third party in a financial relationship.

(J) Construction defect—all civil lawsuits in which damage or injury was allegedly caused by defects in the construction of a structure.

(K) Mass tort—all matters relating to a civil action involving numerous plaintiffs against one or more defendants.

(L) Negligent security—all matters involving injury to a person or property allegedly resulting from insufficient security.

(M) Nursing home negligence—all matters involving injury to a nursing home resident resulting from negligence of nursing home staff or facilities.

(N) Premises liability—commercial—all matters involving injury to a person or property allegedly resulting from a defect on the premises of a commercial property.

(O) Premises liability—residential—all matters involving injury to a person or property allegedly resulting from a defect on the premises of a residential property.

(P) Products liability—all matters involving injury to a person or property allegedly resulting from the manufacture or sale of a defective product or from a failure to warn.

(Q) Real property/Mortgage foreclosure—all matters relating to the possession, title, or boundaries of real property. All matters involving foreclosures or sales of real property, including foreclosures associated with condominium associations or condominium units.

(R) Commercial foreclosure—all matters relating to the termination of a business owner's interest in commercial property by a lender to gain title or force a sale to satisfy the unpaid debt secured by the property. Check the category that includes the estimate of the amount in controversy of the claim (section 28.241, Florida Statutes).

(S) Homestead residential foreclosure—all matters relating to the termination of a residential property owner's interest by a lender to gain title or force a sale to satisfy the unpaid debt secured by the property where the property has been granted a homestead exemption. Check the category that includes the estimate of the amount in controversy of the claim (section 28.241, Florida Statutes).

(T) Nonhomestead residential foreclosure—all matters relating to the termination of a residential property owner's interest by a lender to gain title or force a sale to satisfy the unpaid debt secured by the property where the property has not been granted a homestead exemption. Check the category that includes the estimate of the amount in controversy of the claim (section 28.241, Florida Statutes).

(U) Other real property actions—all matters relating to land, land improvements, or property rights not involving commercial or residential foreclosure. Check the category that includes the estimate of the amount in controversy of the claim (section 28.241, Florida Statutes).

(V) Professional malpractice—all professional malpractice lawsuits.

(W) Malpractice—business—all matters relating to a business’s or business person’s failure to exercise the degree of care and skill that someone in the same line of work would use under similar circumstances.

(X) Malpractice—medical—all matters relating to a doctor’s failure to exercise the degree of care and skill that a physician or surgeon of the same medical specialty would use under similar circumstances.

(Y) Malpractice—other professional—all matters relating to negligence of those other than medical or business professionals.

(Z) Other—all civil matters not included in other categories.

(AA) Antitrust/Trade regulation—all matters relating to unfair methods of competition or unfair or deceptive business acts or practices.

(AB) Business transactions—all matters relating to actions that affect financial or economic interests.

(AC) Constitutional challenge—statute or ordinance—a challenge to a statute or ordinance, citing a violation of the Florida Constitution.

(AD) Constitutional challenge—proposed amendment—a challenge to a legislatively initiated proposed constitutional amendment, but excluding challenges to a citizen-initiated proposed constitutional amendment because the Florida Supreme Court has direct jurisdiction of such challenges.

(AE) Corporate trusts—all matters relating to the business activities of financial services companies or banks acting in a fiduciary capacity for investors.

(AF) Discrimination—employment or other—all matters relating to discrimination, including employment, sex, race, age, handicap, harassment, retaliation, or wages.

(AG) Insurance claims—all matters relating to claims filed with an insurance company.

(AH) Intellectual property—all matters relating to intangible rights protecting commercially valuable products of the human intellect.

(AI) Libel/Slander—all matters relating to written, visual, oral, or aural defamation of character.

(AJ) Shareholder derivative action—all matters relating to actions by a corporation’s shareholders to protect and benefit all shareholders against corporate management for improper management.

(AK) Securities litigation—all matters relating to the financial interest or instruments of a company or corporation.

(AL) Trade secrets—all matters relating to a formula, process, device, or other business information that is kept confidential to maintain an advantage over competitors.

(AM) Trust litigation—all civil matters involving guardianships, estates, or trusts and not appropriately filed in probate proceedings.

**III. Remedies Sought.** Place an “X” on the appropriate line. If more than one remedy is sought in the complaint or petition, check all that apply.

**IV. Number of Causes of Action.** If the complaint or petition alleges more than one cause of action, note the number and the name of the cause of action.

**V. Class Action.** Place an “X” on the appropriate line.

**VI. Related Cases.** Place an “X” on the appropriate line.

**VII. Is Jury Trial Demanded In Complaint?** Check the appropriate line to indicate whether a jury trial is being demanded in the complaint.

**ATTORNEY OR PARTY SIGNATURE.** Sign the civil cover sheet. Print legibly the name of the person signing the civil cover sheet. Attorneys must include a Florida Bar number. Insert the date the civil cover sheet is signed. Signature is a certification that the filer has provided accurate information on the civil cover sheet, **and has read and complied with the requirements of Florida Rule of Judicial Administration 2.425.**

*Hastie v. Eckholm*, --- So.3d ---, 2016 WL 4539922, No. 4D15-289  
(Fla. 4th DCA Aug. 31, 2016)

2016 WL 4539922

Only the Westlaw citation is currently available.

**NOTICE: THIS OPINION HAS NOT BEEN  
RELEASED FOR PUBLICATION IN THE  
PERMANENT LAW REPORTS. UNTIL RELEASED,  
IT IS SUBJECT TO REVISION OR WITHDRAWAL.**

District Court of Appeal of Florida,  
Fourth District.

Charles HASTIE, Appellant,

v.

Richard EKHOLM, Clifford C. Thomas, Mary Jane  
Thomas, Ellen V. Carson, Kevin Calhoun, and  
Leslie Calhoun, Appellees.

No. 4D15-289.

Aug. 31, 2016.

Appeal from the Circuit Court for the Fifteenth Judicial  
Circuit, Palm Beach County; Edward Fine, Judge; L.T.  
Case Nos. 502012CA007699XXXXMB AE and  
502012CA020095XXXXMB AE.

#### Attorneys and Law Firms

Carl A. Cascio and Gary S. Gaffney of Carl A. Cascio,  
P.A., Delray Beach, for appellant.

Gary J. Nagle of the Law Office of Gary J. Nagle, Juno  
Beach, for appellees.

#### Opinion

LEVINE, J.

\*1 The issue presented in this case is whether appellees possess an easement on appellant's property. We find the deeds purporting to grant an easement are ambiguous and thus the trial court correctly considered extrinsic evidence in its interpretation of the deeds. We further find that the trial court's interpretation of the ambiguous deeds is supported by competent substantial evidence. Therefore, we affirm.

The appellant, Charles Hastie, owns Lot 1, a lot on the unrecorded plat of Clark Lane. Lot 1 is located at the north tip of Clark Lane, next to the water. Lots 2 through 8 are located to the south in descending order. Appellees are the owners of lots 2, 4, 7, and 8.

Historically, the area that is now known as Clark Lane was originally owned by the common grantors Basil and Mildred Staley. About sixty years ago, the common grantors began dividing the individual lots on Clark Lane and selling them. In 1955, they sold Lot 2, and in the deed the common grantors included the following: "The grantee herein shall have the perpetual use of the private road adjoining said land on the East." Over the next few years, the common grantors sold the remaining lots on Clark Lane with the exception of Lot 1, which they retained until 1968. The deeds to Lots 3 to 8 all provided that the lots were "SUBJECT TO an easement for road purposes over the East 30.0 feet" of the lot.<sup>1</sup> Additionally, Lots 4, 7, and 8 all state that the "[g]rantees herein are hereby given the right and privilege ... of free dockage on the waterfront at the north end of the 30 foot road on the East side of the Property." In 1968, the common grantors conveyed Lot 1 and included the following language in the deed: "SUBJECT TO a Right of Way for ingress and egress over the East 30 feet, measured at right angles, thereto."

<sup>1</sup> The five deeds all have minor variations though are substantively uniform.

After Lot 1 was conveyed to several different owners, Hastie came to own it. After he purchased it, he installed a fence along its southern border. Appellees objected to the installation of the fence, claiming they possessed an easement to enter onto Lot 1 and that the fence obstructed their use of the easement.

Following a bench trial, the trial court concluded that because nearly every single deed included language indicating the lot was "subject to" a thirty foot road, including the 1968 Lot 1 Deed, that Lot 1 was burdened by an easement for the benefit of the other seven lots on Clark Lane. The lower court also concluded that the owners of Lots 4, 7, and 8 all had "dockage rights" and could dock their crafts on the north end of Clark Lane and travel through Lot 1 to reach their crafts. Hastie appealed.

On appeal, Hastie argues that the lower court lacked competent substantial evidence to find the other Clark Lane residents have an easement to enter onto Lot 1.

Deeds are analyzed in the same manner as contracts. *See Branscombe v. Jupiter Harbour, LLC*, 76 So.3d 942, 947 (Fla. 4th DCA 2011). "There are no magical words that one must divine in order to create an express easement. All that is necessary are words showing the intention of

the parties to create an easement on a sufficiently identifiable estate.” *Id.* (quoting *Am. Quick Sign, Inc. v. Reinhardt*, 899 So.2d 461, 465 (Fla. 5th DCA 2005)). “[I]n reviewing the documents creating an easement, if the language is clear, concise, and unambiguous, we must give effect to the terms as stated without resort to other rules of construction to ascertain their meaning.” *Am. Quick Sign*, 899 So.2d at 465.

\*2 If a deed is “ambiguous” the court may consider extrinsic evidence to determine “the intent of the parties at the time the document establishing the easement was created.” *Branscombe*, 76 So.3d at 947 (quoting *Am. Quick Sign*, 899 So.2d at 465). “ ‘[E]vidence relating to the character of the dominant and servient land, its use, and the situation of the parties to the easement, at the time the easement was created’ are thus properly considered where there is ambiguity.” *Id.* (quoting *Corrigans v. Sebastian River Drainage Dist.*, 223 So.2d 57, 58 (Fla. 4th DCA 1969)).

We review whether a deed is ambiguous or unambiguous de novo. *Am. Quick Sign*, 899 So.2d at 467. If a deed is unambiguous, our review of the trial court’s interpretation of the deed is de novo. *Branscombe*, 76 So.3d at 946. If a deed is ambiguous, we review the trial court’s interpretation of the deed for competent substantial evidence. *Id.*

X  
The words “subject to” in a deed or contract generally create an ambiguous deed or contract. *Procacci v. Zacco*, 324 So.2d 180, 182 (Fla. 4th DCA 1975); see also *Robertia v. Pine Tree Water Control Dist.*, 516 So.2d 1012, 1013 (Fla. 4th DCA 1987); *Orthopedic Specialists v. Allstate Ins. Co.*, 177 So.3d 19, 24–25 (Fla. 4th DCA 2015), rev. granted SC15–2298, 2016 WL 282060 (Fla. Jan. 20, 2016) (the court determining that the words “shall be subject to” in an insurance policy resulted in an ambiguity). The words “subject to” “are generally words of qualification, rather than of contract.” *Robertia*, 516 So.2d at 1013; see also *Am. Quick Sign*, 899 So.2d at 468 (concluding that “subject to” referred to a pre-existing easement and was not intended to create an entirely new easement). In some circumstances however, the “facts and circumstances” of a case may show the grantor intended to use the words “subject to” to create an easement. See *Procacci*, 324 So.2d at 182; *Behm v. Saeli*, 560 So.2d 431, 432 (Fla. 5th DCA 1990) (finding the words “subject to” established an easement where the extrinsic evidence of intent showed the grantor intended to “create and reserve” an easement).

Because the deeds in this case contain the ambiguous “subject to” language, the deeds are ambiguous. See

*Procacci*, 324 So.2d at 182. Thus, the trial court properly considered extrinsic evidence to ascertain the original grantor’s intent.

The trial court was correct in looking at the circumstances surrounding the common grantor’s original conveyance of the lots on Clark Lane. The deeds in this case demonstrated that the common grantors intended that private road run up and down the east side of the lots on Clark Lane. The deed to Lot 2 says this explicitly by stating, “The grantee herein shall have the perpetual use of the private road adjoining said land on the East.”

The trial court correctly found that private road extended onto Lot 1. The deeds to Lots 3 through 8 all state they are “SUBJECT TO an easement for road purposes over the East 30.0 feet.” Although the 1968 Lot 1 Deed is slightly different and states the lot is “SUBJECT TO a Right of Way for ingress and egress over the East 30 feet, measured at right angles, thereto,” the fact that the 1968 Lot 1 Deed contains exactly the same dimensions as the other deeds indicates the common grantors intended for the road to extend onto Lot 1.

\*3 Furthermore, the evidence also supports the trial court’s conclusion that the common grantors intended to grant the residents on Clark Lane access to all of Clark Lane, including that part on Lot 1. None of the deeds expressly limits the grantee’s use of Clark Lane to only that part necessary for ingress and egress to one’s own property. Furthermore, the deed to Lot 1 also has language indicating it is “subject to” an easement. If the common grantors had not intended to grant an easement to the other residents, there would have been no need to include this provision. *Branscombe*, 76 So.3d at 947 (“[A]n interpretation which gives a reasonable meaning to all provisions [of a contract] is preferred to one which leaves a part useless or inexplicable.”) (citation omitted).

We therefore conclude that the trial court correctly found the aforementioned circumstances evidences the common grantors’ intent to grant the residents of Clark Lane an easement on Lot 1.

As for the “dockage rights,” the deeds to Lots 4, 7 and 8 state the grantees have the “right and privilege of free dockage” on Lot 1. Hastie contends the common grantors had not intended to create an easement but had intended only to covenant that common grantors would not charge the grantees to dock their boats on Lot 1. However, the unambiguous terms of the deeds grant the “right and privilege” to dock a boat on Lot 1 without needing to compensate the owner of Lot 1. Thus, the lower court, once again, did not err in concluding appellees possessed

an easement to dock their boats on Lot 1.

Hastie argues there is insufficient evidence of the common grantors' intent because there is no evidence from the common grantors themselves or those who interacted with the common grantors directly. In the present case, we recognize there is little direct evidence of what the common grantors intended, but this comes as a result of the fact that it has been several decades since the Clark Lane lots were conveyed.

Nevertheless, as discussed above, the language in the deeds as well as the circumstances surrounding the original conveyances support the finding of the trial court. Although Hastie prefers alternative interpretations of the deeds and alternative inferences from this evidence, this court is concerned with "[l]egal sufficiency alone, as opposed to evidentiary weight." *Tibbs v. State*, 397 So.2d 1120, 1123 (Fla.1981). We therefore do "not retry a case or reweigh conflicting evidence submitted to a jury or other trier of fact." *Id.* Instead, we draw "all reasonable

inferences ... in favor of the verdict on appeal." *Id.* After applying this standard, we find the lower court's final judgment is supported by competent substantial evidence.

In summary, we affirm the lower court's final judgment and its finding that the Clark Lane residents have an easement to enter onto Hastie's property.

*Affirmed.*

CIKLIN, C.J., and FORST, J., concur.

**All Citations**

--- So.3d ----, 2016 WL 4539922

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Florida Statutes § 627.736(5)(a)5, Fla. Stat. (2008-12)

# 1. The 2008 Florida Statutes

[Title XXXVII](#)  
INSURANCE

[Chapter 627](#)  
INSURANCE RATES AND CONTRACTS

[View Entire Chapter](#)

627.736 Required personal injury protection benefits; exclusions; priority; claims.--

(1) REQUIRED BENEFITS.--Every insurance policy complying with the security requirements of s. [627.733](#) shall provide personal injury protection to the named insured, relatives residing in the same household, persons operating the insured motor vehicle, passengers in such motor vehicle, and other persons struck by such motor vehicle and suffering bodily injury while not an occupant of a self-propelled vehicle, subject to the provisions of subsection (2) and paragraph (4)(e), to a limit of \$10,000 for loss sustained by any such person as a result of bodily injury, sickness, disease, or death arising out of the ownership, maintenance, or use of a motor vehicle as follows:

(a) *Medical benefits*.--Eighty percent of all reasonable expenses for medically necessary medical, surgical, X-ray, dental, and rehabilitative services, including prosthetic devices, and medically necessary ambulance, hospital, and nursing services. However, the medical benefits shall provide reimbursement only for such services and care that are lawfully provided, supervised, ordered, or prescribed by a physician licensed under chapter 458 or chapter 459, a dentist licensed under chapter 466, or a chiropractic physician licensed under chapter 460 or that are provided by any of the following persons or entities:

1. A hospital or ambulatory surgical center licensed under chapter 395.
2. A person or entity licensed under ss. [401.2101](#)-401.45 that provides emergency transportation and treatment.
3. An entity wholly owned by one or more physicians licensed under chapter 458 or chapter 459, chiropractic physicians licensed under chapter 460, or dentists licensed under chapter 466 or by such practitioner or practitioners and the spouse, parent, child, or sibling of that practitioner or those practitioners.
4. An entity wholly owned, directly or indirectly, by a hospital or hospitals.
5. A health care clinic licensed under ss. [400.990](#)-400.995 that is:
  - a. Accredited by the Joint Commission on Accreditation of Healthcare Organizations, the American Osteopathic Association, the Commission on Accreditation of Rehabilitation Facilities, or the Accreditation Association for Ambulatory Health Care, Inc.; or
  - b. A health care clinic that:

- (I) Has a medical director licensed under chapter 458, chapter 459, or chapter 460;
- (II) Has been continuously licensed for more than 3 years or is a publicly traded corporation that issues securities traded on an exchange registered with the United States Securities and Exchange Commission as a national securities exchange; and
- (III) Provides at least four of the following medical specialties:
  - (A) General medicine.
  - (B) Radiography.
  - (C) Orthopedic medicine.
  - (D) Physical medicine.
  - (E) Physical therapy.
  - (F) Physical rehabilitation.
  - (G) Prescribing or dispensing outpatient prescription medication.
  - (H) Laboratory services.

The Financial Services Commission shall adopt by rule the form that must be used by an insurer and a health care provider specified in subparagraph 3., subparagraph 4., or subparagraph 5. to document that the health care provider meets the criteria of this paragraph, which rule must include a requirement for a sworn statement or affidavit.

(b) *Disability benefits.*--Sixty percent of any loss of gross income and loss of earning capacity per individual from inability to work proximately caused by the injury sustained by the injured person, plus all expenses reasonably incurred in obtaining from others ordinary and necessary services in lieu of those that, but for the injury, the injured person would have performed without income for the benefit of his or her household. All disability benefits payable under this provision shall be paid not less than every 2 weeks.

(c) *Death benefits.*--Death benefits equal to the lesser of \$5,000 or the remainder of unused personal injury protection benefits per individual. The insurer may pay such benefits to the executor or administrator of the deceased, to any of the deceased's relatives by blood or legal adoption or connection by marriage, or to any person appearing to the insurer to be equitably entitled thereto.

Only insurers writing motor vehicle liability insurance in this state may provide the required benefits of this section, and no such insurer shall require the purchase of any other motor vehicle

coverage other than the purchase of property damage liability coverage as required by s. [627.7275](#) as a condition for providing such required benefits. Insurers may not require that property damage liability insurance in an amount greater than \$10,000 be purchased in conjunction with personal injury protection. Such insurers shall make benefits and required property damage liability insurance coverage available through normal marketing channels. Any insurer writing motor vehicle liability insurance in this state who fails to comply with such availability requirement as a general business practice shall be deemed to have violated part IX of chapter 626, and such violation shall constitute an unfair method of competition or an unfair or deceptive act or practice involving the business of insurance; and any such insurer committing such violation shall be subject to the penalties afforded in such part, as well as those which may be afforded elsewhere in the insurance code.

(2) AUTHORIZED EXCLUSIONS.--Any insurer may exclude benefits:

(a) For injury sustained by the named insured and relatives residing in the same household while occupying another motor vehicle owned by the named insured and not insured under the policy or for injury sustained by any person operating the insured motor vehicle without the express or implied consent of the insured.

(b) To any injured person, if such person's conduct contributed to his or her injury under any of the following circumstances:

1. Causing injury to himself or herself intentionally; or
2. Being injured while committing a felony.

Whenever an insured is charged with conduct as set forth in subparagraph 2. , the 30-day payment provision of paragraph (4)(b) shall be held in abeyance, and the insurer shall withhold payment of any personal injury protection benefits pending the outcome of the case at the trial level. If the charge is nolle prossed or dismissed or the insured is acquitted, the 30-day payment provision shall run from the date the insurer is notified of such action.

(3) INSURED'S RIGHTS TO RECOVERY OF SPECIAL DAMAGES IN TORT CLAIMS.--No insurer shall have a lien on any recovery in tort by judgment, settlement, or otherwise for personal injury protection benefits, whether suit has been filed or settlement has been reached without suit. An injured party who is entitled to bring suit under the provisions of ss. [627.730-627.7405](#), or his or her legal representative, shall have no right to recover any damages for which personal injury protection benefits are paid or payable. The plaintiff may prove all of his or her special damages notwithstanding this limitation, but if special damages are introduced in evidence, the trier of facts, whether judge or jury, shall not award damages for personal injury protection benefits paid or payable. In all cases in which a jury is required to fix damages, the court shall instruct the jury

that the plaintiff shall not recover such special damages for personal injury protection benefits paid or payable.

(4) BENEFITS; WHEN DUE.--Benefits due from an insurer under ss. 627.730-627.7405 shall be primary, except that benefits received under any workers' compensation law shall be credited against the benefits provided by subsection (1) and shall be due and payable as loss accrues, upon receipt of reasonable proof of such loss and the amount of expenses and loss incurred which are covered by the policy issued under ss. 627.730-627.7405. When the Agency for Health Care Administration provides, pays, or becomes liable for medical assistance under the Medicaid program related to injury, sickness, disease, or death arising out of the ownership, maintenance, or use of a motor vehicle, benefits under ss. 627.730-627.7405 shall be subject to the provisions of the Medicaid program.

(a) An insurer may require written notice to be given as soon as practicable after an accident involving a motor vehicle with respect to which the policy affords the security required by ss. 627.730-627.7405.

(b) Personal injury protection insurance benefits paid pursuant to this section shall be overdue if not paid within 30 days after the insurer is furnished written notice of the fact of a covered loss and of the amount of same. If such written notice is not furnished to the insurer as to the entire claim, any partial amount supported by written notice is overdue if not paid within 30 days after such written notice is furnished to the insurer. Any part or all of the remainder of the claim that is subsequently supported by written notice is overdue if not paid within 30 days after such written notice is furnished to the insurer. When an insurer pays only a portion of a claim or rejects a claim, the insurer shall provide at the time of the partial payment or rejection an itemized specification of each item that the insurer had reduced, omitted, or declined to pay and any information that the insurer desires the claimant to consider related to the medical necessity of the denied treatment or to explain the reasonableness of the reduced charge, provided that this shall not limit the introduction of evidence at trial; and the insurer shall include the name and address of the person to whom the claimant should respond and a claim number to be referenced in future correspondence. However, notwithstanding the fact that written notice has been furnished to the insurer, any payment shall not be deemed overdue when the insurer has reasonable proof to establish that the insurer is not responsible for the payment. For the purpose of calculating the extent to which any benefits are overdue, payment shall be treated as being made on the date a draft or other valid instrument which is equivalent to payment was placed in the United States mail in a properly addressed, postpaid envelope or, if not so posted, on the date of delivery. This paragraph does not preclude or limit the ability of the insurer to assert that the claim was unrelated, was not medically necessary, or was unreasonable or that the amount of the charge was in excess of that permitted under, or in violation of, subsection (5). Such assertion by the insurer may be made at any time, including after payment of the claim or after the 30-day time period for payment set forth in this paragraph.

(c) Upon receiving notice of an accident that is potentially covered by personal injury protection benefits, the insurer must reserve \$5,000 of personal injury protection benefits for payment to physicians licensed under chapter 458 or chapter 459 or dentists licensed under chapter 466 who provide emergency services and care, as defined in s. 395.002(9), or who provide hospital inpatient care. The amount required to be held in reserve may be used only to pay claims from such physicians or dentists until 30 days after the date the insurer receives notice of the accident. After the 30-day period, any amount of the reserve for which the insurer has not received notice of a claim from a physician or dentist who provided emergency services and care or who provided hospital inpatient care may then be used by the insurer to pay other claims. The time periods specified in paragraph (b) for required payment of personal injury protection benefits shall be tolled for the period of time that an insurer is required by this paragraph to hold payment of a claim that is not from a physician or dentist who provided emergency services and care or who provided hospital inpatient care to the extent that the personal injury protection benefits not held in reserve are insufficient to pay the claim. This paragraph does not require an insurer to establish a claim reserve for insurance accounting purposes.

(d) All overdue payments shall bear simple interest at the rate established under s. 55.03 or the rate established in the insurance contract, whichever is greater, for the year in which the payment became overdue, calculated from the date the insurer was furnished with written notice of the amount of covered loss. Interest shall be due at the time payment of the overdue claim is made.

(e) The insurer of the owner of a motor vehicle shall pay personal injury protection benefits for:

1. Accidental bodily injury sustained in this state by the owner while occupying a motor vehicle, or while not an occupant of a self-propelled vehicle if the injury is caused by physical contact with a motor vehicle.

2. Accidental bodily injury sustained outside this state, but within the United States of America or its territories or possessions or Canada, by the owner while occupying the owner's motor vehicle.

3. Accidental bodily injury sustained by a relative of the owner residing in the same household, under the circumstances described in subparagraph 1. or subparagraph 2., provided the relative at the time of the accident is domiciled in the owner's household and is not himself or herself the owner of a motor vehicle with respect to which security is required under ss. 627.730-627.7405.

4. Accidental bodily injury sustained in this state by any other person while occupying the owner's motor vehicle or, if a resident of this state, while not an occupant of a self-propelled vehicle, if the injury is caused by physical contact with such motor vehicle, provided the injured person is not himself or herself:

a. The owner of a motor vehicle with respect to which security is required under ss. 627.730-627.7405; or

b. Entitled to personal injury benefits from the insurer of the owner or owners of such a motor vehicle.

(f) If two or more insurers are liable to pay personal injury protection benefits for the same injury to any one person, the maximum payable shall be as specified in subsection (1), and any insurer paying the benefits shall be entitled to recover from each of the other insurers an equitable pro rata share of the benefits paid and expenses incurred in processing the claim.

(g) It is a violation of the insurance code for an insurer to fail to timely provide benefits as required by this section with such frequency as to constitute a general business practice.

(h) Benefits shall not be due or payable to or on the behalf of an insured person if that person has committed, by a material act or omission, any insurance fraud relating to personal injury protection coverage under his or her policy, if the fraud is admitted to in a sworn statement by the insured or if it is established in a court of competent jurisdiction. Any insurance fraud shall void all coverage arising from the claim related to such fraud under the personal injury protection coverage of the insured person who committed the fraud, irrespective of whether a portion of the insured person's claim may be legitimate, and any benefits paid prior to the discovery of the insured person's insurance fraud shall be recoverable by the insurer from the person who committed insurance fraud in their entirety. The prevailing party is entitled to its costs and attorney's fees in any action in which it prevails in an insurer's action to enforce its right of recovery under this paragraph.

#### (5) CHARGES FOR TREATMENT OF INJURED PERSONS.--

(a)1. Any physician, hospital, clinic, or other person or institution lawfully rendering treatment to an injured person for a bodily injury covered by personal injury protection insurance may charge the insurer and injured party only a reasonable amount pursuant to this section for the services and supplies rendered, and the insurer providing such coverage may pay for such charges directly to such person or institution lawfully rendering such treatment, if the insured receiving such treatment or his or her guardian has countersigned the properly completed invoice, bill, or claim form approved by the office upon which such charges are to be paid for as having actually been rendered, to the best knowledge of the insured or his or her guardian. In no event, however, may such a charge be in excess of the amount the person or institution customarily charges for like services or supplies. With respect to a determination of whether a charge for a particular service, treatment, or otherwise is reasonable, consideration may be given to evidence of usual and customary charges and payments accepted by the provider involved in the dispute, and reimbursement levels in the community and various federal and state medical fee schedules applicable to automobile and other insurance coverages, and other information relevant to the reasonableness of the reimbursement for the service, treatment, or supply.

2. The insurer may limit reimbursement to 80 percent of the following schedule of maximum charges:
  - a. For emergency transport and treatment by providers licensed under chapter 401, 200 percent of Medicare.
  - b. For emergency services and care provided by a hospital licensed under chapter 395, 75 percent of the hospital's usual and customary charges.
  - c. For emergency services and care as defined by s. 395.002(9) provided in a facility licensed under chapter 395 rendered by a physician or dentist, and related hospital inpatient services rendered by a physician or dentist, the usual and customary charges in the community.
  - d. For hospital inpatient services, other than emergency services and care, 200 percent of the Medicare Part A prospective payment applicable to the specific hospital providing the inpatient services.
  - e. For hospital outpatient services, other than emergency services and care, 200 percent of the Medicare Part A Ambulatory Payment Classification for the specific hospital providing the outpatient services.
  - f. For all other medical services, supplies, and care, 200 percent of the allowable amount under the participating physicians schedule of Medicare Part B. However, if such services, supplies, or care is not reimbursable under Medicare Part B, the insurer may limit reimbursement to 80 percent of the maximum reimbursable allowance under workers' compensation, as determined under s. 440.13 and rules adopted thereunder which are in effect at the time such services, supplies, or care is provided. Services, supplies, or care that is not reimbursable under Medicare or workers' compensation is not required to be reimbursed by the insurer.
3. For purposes of subparagraph 2., the applicable fee schedule or payment limitation under Medicare is the fee schedule or payment limitation in effect at the time the services, supplies, or care was rendered and for the area in which such services were rendered, except that it may not be less than the allowable amount under the participating physicians schedule <sup>1</sup>of Medicare Part B for 2007 for medical services, supplies, and care subject to Medicare Part B.
4. Subparagraph 2. does not allow the insurer to apply any limitation on the number of treatments or other utilization limits that apply under Medicare or workers' compensation. An insurer that applies the allowable payment limitations of subparagraph 2. must reimburse a provider who lawfully provided care or treatment under the scope of his or her license, regardless of whether such provider would be entitled to reimbursement under Medicare due to restrictions or limitations on the types or discipline of health care providers who may be reimbursed for particular procedures or procedure codes.

5. If an insurer limits payment as authorized by subparagraph 2., the person providing such services, supplies, or care may not bill or attempt to collect from the insured any amount in excess of such limits, except for amounts that are not covered by the insured's personal injury protection coverage due to the coinsurance amount or maximum policy limits.

(b)1. An insurer or insured is not required to pay a claim or charges:

a. Made by a broker or by a person making a claim on behalf of a broker;

b. For any service or treatment that was not lawful at the time rendered;

c. To any person who knowingly submits a false or misleading statement relating to the claim or charges;

d. With respect to a bill or statement that does not substantially meet the applicable requirements of paragraph (d);

e. For any treatment or service that is upcoded, or that is unbundled when such treatment or services should be bundled, in accordance with paragraph (d). To facilitate prompt payment of lawful services, an insurer may change codes that it determines to have been improperly or incorrectly upcoded or unbundled, and may make payment based on the changed codes, without affecting the right of the provider to dispute the change by the insurer, provided that before doing so, the insurer must contact the health care provider and discuss the reasons for the insurer's change and the health care provider's reason for the coding, or make a reasonable good faith effort to do so, as documented in the insurer's file; and

f. For medical services or treatment billed by a physician and not provided in a hospital unless such services are rendered by the physician or are incident to his or her professional services and are included on the physician's bill, including documentation verifying that the physician is responsible for the medical services that were rendered and billed.

2. The Department of Health, in consultation with the appropriate professional licensing boards, shall adopt, by rule, a list of diagnostic tests deemed not to be medically necessary for use in the treatment of persons sustaining bodily injury covered by personal injury protection benefits under this section. The initial list shall be adopted by January 1, 2004, and shall be revised from time to time as determined by the Department of Health, in consultation with the respective professional licensing boards. Inclusion of a test on the list of invalid diagnostic tests shall be based on lack of demonstrated medical value and a level of general acceptance by the relevant provider community and shall not be dependent for results entirely upon subjective patient response. Notwithstanding its inclusion on a fee schedule in this subsection, an insurer or insured is not required to pay any charges or reimburse claims for any invalid diagnostic test as determined by the Department of Health.

(c)1. With respect to any treatment or service, other than medical services billed by a hospital or other provider for emergency services as defined in s. 395.002 or inpatient services rendered at a hospital-owned facility, the statement of charges must be furnished to the insurer by the provider and may not include, and the insurer is not required to pay, charges for treatment or services rendered more than 35 days before the postmark date or electronic transmission date of the statement, except for past due amounts previously billed on a timely basis under this paragraph, and except that, if the provider submits to the insurer a notice of initiation of treatment within 21 days after its first examination or treatment of the claimant, the statement may include charges for treatment or services rendered up to, but not more than, 75 days before the postmark date of the statement. The injured party is not liable for, and the provider shall not bill the injured party for, charges that are unpaid because of the provider's failure to comply with this paragraph. Any agreement requiring the injured person or insured to pay for such charges is unenforceable.

2. If, however, the insured fails to furnish the provider with the correct name and address of the insured's personal injury protection insurer, the provider has 35 days from the date the provider obtains the correct information to furnish the insurer with a statement of the charges. The insurer is not required to pay for such charges unless the provider includes with the statement documentary evidence that was provided by the insured during the 35-day period demonstrating that the provider reasonably relied on erroneous information from the insured and either:

a. A denial letter from the incorrect insurer; or

b. Proof of mailing, which may include an affidavit under penalty of perjury, reflecting timely mailing to the incorrect address or insurer.

3. For emergency services and care as defined in s. 395.002 rendered in a hospital emergency department or for transport and treatment rendered by an ambulance provider licensed pursuant to part III of chapter 401, the provider is not required to furnish the statement of charges within the time periods established by this paragraph; and the insurer shall not be considered to have been furnished with notice of the amount of covered loss for purposes of paragraph (4)(b) until it receives a statement complying with paragraph (d), or copy thereof, which specifically identifies the place of service to be a hospital emergency department or an ambulance in accordance with billing standards recognized by the Health Care Finance Administration.

4. Each notice of insured's rights under s. 627.7401 must include the following statement in type no smaller than 12 points:

**BILLING REQUIREMENTS.**--Florida Statutes provide that with respect to any treatment or services, other than certain hospital and emergency services, the statement of charges furnished to the insurer by the provider may not include, and the insurer and the injured party are not required to pay, charges for treatment or services rendered more than 35 days before the postmark date of the statement, except for past due amounts previously billed on a timely basis, and except that, if the provider submits to

the insurer a notice of initiation of treatment within 21 days after its first examination or treatment of the claimant, the statement may include charges for treatment or services rendered up to, but not more than, 75 days before the postmark date of the statement.

(d) All statements and bills for medical services rendered by any physician, hospital, clinic, or other person or institution shall be submitted to the insurer on a properly completed Centers for Medicare and Medicaid Services (CMS) 1500 form, UB 92 forms, or any other standard form approved by the office or adopted by the commission for purposes of this paragraph. All billings for such services rendered by providers shall, to the extent applicable, follow the Physicians' Current Procedural Terminology (CPT) or Healthcare Correct Procedural Coding System (HCPCS), or ICD-9 in effect for the year in which services are rendered and comply with the Centers for Medicare and Medicaid Services (CMS) 1500 form instructions and the American Medical Association Current Procedural Terminology (CPT) Editorial Panel and Healthcare Correct Procedural Coding System (HCPCS). All providers other than hospitals shall include on the applicable claim form the professional license number of the provider in the line or space provided for "Signature of Physician or Supplier, Including Degrees or Credentials." In determining compliance with applicable CPT and HCPCS coding, guidance shall be provided by the Physicians' Current Procedural Terminology (CPT) or the Healthcare Correct Procedural Coding System (HCPCS) in effect for the year in which services were rendered, the Office of the Inspector General (OIG), Physicians Compliance Guidelines, and other authoritative treatises designated by rule by the Agency for Health Care Administration. No statement of medical services may include charges for medical services of a person or entity that performed such services without possessing the valid licenses required to perform such services. For purposes of paragraph (4)(b), an insurer shall not be considered to have been furnished with notice of the amount of covered loss or medical bills due unless the statements or bills comply with this paragraph, and unless the statements or bills are properly completed in their entirety as to all material provisions, with all relevant information being provided therein.

(e)1. At the initial treatment or service provided, each physician, other licensed professional, clinic, or other medical institution providing medical services upon which a claim for personal injury protection benefits is based shall require an insured person, or his or her guardian, to execute a disclosure and acknowledgment form, which reflects at a minimum that:

- a. The insured, or his or her guardian, must countersign the form attesting to the fact that the services set forth therein were actually rendered;
- b. The insured, or his or her guardian, has both the right and affirmative duty to confirm that the services were actually rendered;
- c. The insured, or his or her guardian, was not solicited by any person to seek any services from the medical provider;

d. The physician, other licensed professional, clinic, or other medical institution rendering services for which payment is being claimed explained the services to the insured or his or her guardian; and

e. If the insured notifies the insurer in writing of a billing error, the insured may be entitled to a certain percentage of a reduction in the amounts paid by the insured's motor vehicle insurer.

2. The physician, other licensed professional, clinic, or other medical institution rendering services for which payment is being claimed has the affirmative duty to explain the services rendered to the insured, or his or her guardian, so that the insured, or his or her guardian, countersigns the form with informed consent.

3. Countersignature by the insured, or his or her guardian, is not required for the reading of diagnostic tests or other services that are of such a nature that they are not required to be performed in the presence of the insured.

4. The licensed medical professional rendering treatment for which payment is being claimed must sign, by his or her own hand, the form complying with this paragraph.

5. The original completed disclosure and acknowledgment form shall be furnished to the insurer pursuant to paragraph (4)(b) and may not be electronically furnished.

6. This disclosure and acknowledgment form is not required for services billed by a provider for emergency services as defined in s. 395.002, for emergency services and care as defined in s. 395.002 rendered in a hospital emergency department, or for transport and treatment rendered by an ambulance provider licensed pursuant to part III of chapter 401.

7. The Financial Services Commission shall adopt, by rule, a standard disclosure and acknowledgment form that shall be used to fulfill the requirements of this paragraph, effective 90 days after such form is adopted and becomes final. The commission shall adopt a proposed rule by October 1, 2003. Until the rule is final, the provider may use a form of its own which otherwise complies with the requirements of this paragraph.

8. As used in this paragraph, "countersigned" means a second or verifying signature, as on a previously signed document, and is not satisfied by the statement "signature on file" or any similar statement.

9. The requirements of this paragraph apply only with respect to the initial treatment or service of the insured by a provider. For subsequent treatments or service, the provider must maintain a patient log signed by the patient, in chronological order by date of service, that is consistent with the services being rendered to the patient as claimed. The requirements of this subparagraph for maintaining a patient log signed by the patient may be met by a hospital that maintains medical

records as required by s. 395.3025 and applicable rules and makes such records available to the insurer upon request.

(f) Upon written notification by any person, an insurer shall investigate any claim of improper billing by a physician or other medical provider. The insurer shall determine if the insured was properly billed for only those services and treatments that the insured actually received. If the insurer determines that the insured has been improperly billed, the insurer shall notify the insured, the person making the written notification and the provider of its findings and shall reduce the amount of payment to the provider by the amount determined to be improperly billed. If a reduction is made due to such written notification by any person, the insurer shall pay to the person 20 percent of the amount of the reduction, up to \$500. If the provider is arrested due to the improper billing, then the insurer shall pay to the person 40 percent of the amount of the reduction, up to \$500.

(g) An insurer may not systematically downcode with the intent to deny reimbursement otherwise due. Such action constitutes a material misrepresentation under s. 626.9541(1)(i)2.

(6) DISCOVERY OF FACTS ABOUT AN INJURED PERSON; DISPUTES.--

(a) Every employer shall, if a request is made by an insurer providing personal injury protection benefits under ss. 627.730-627.7405 against whom a claim has been made, furnish forthwith, in a form approved by the office, a sworn statement of the earnings, since the time of the bodily injury and for a reasonable period before the injury, of the person upon whose injury the claim is based.

(b) Every physician, hospital, clinic, or other medical institution providing, before or after bodily injury upon which a claim for personal injury protection insurance benefits is based, any products, services, or accommodations in relation to that or any other injury, or in relation to a condition claimed to be connected with that or any other injury, shall, if requested to do so by the insurer against whom the claim has been made, furnish forthwith a written report of the history, condition, treatment, dates, and costs of such treatment of the injured person and why the items identified by the insurer were reasonable in amount and medically necessary, together with a sworn statement that the treatment or services rendered were reasonable and necessary with respect to the bodily injury sustained and identifying which portion of the expenses for such treatment or services was incurred as a result of such bodily injury, and produce forthwith, and permit the inspection and copying of, his or her or its records regarding such history, condition, treatment, dates, and costs of treatment; provided that this shall not limit the introduction of evidence at trial. Such sworn statement shall read as follows: "Under penalty of perjury, I declare that I have read the foregoing, and the facts alleged are true, to the best of my knowledge and belief." No cause of action for violation of the physician-patient privilege or invasion of the right of privacy shall be permitted against any physician, hospital, clinic, or other medical institution complying with the provisions of this section. The person requesting such records and such sworn statement shall pay all reasonable costs connected therewith. If an insurer makes a written request for documentation or information under this paragraph within 30 days after having received notice

of the amount of a covered loss under paragraph (4)(a), the amount or the partial amount which is the subject of the insurer's inquiry shall become overdue if the insurer does not pay in accordance with paragraph (4)(b) or within 10 days after the insurer's receipt of the requested documentation or information, whichever occurs later. For purposes of this paragraph, the term "receipt" includes, but is not limited to, inspection and copying pursuant to this paragraph. Any insurer that requests documentation or information pertaining to reasonableness of charges or medical necessity under this paragraph without a reasonable basis for such requests as a general business practice is engaging in an unfair trade practice under the insurance code.

(c) In the event of any dispute regarding an insurer's right to discovery of facts under this section, the insurer may petition a court of competent jurisdiction to enter an order permitting such discovery. The order may be made only on motion for good cause shown and upon notice to all persons having an interest, and it shall specify the time, place, manner, conditions, and scope of the discovery. Such court may, in order to protect against annoyance, embarrassment, or oppression, as justice requires, enter an order refusing discovery or specifying conditions of discovery and may order payments of costs and expenses of the proceeding, including reasonable fees for the appearance of attorneys at the proceedings, as justice requires.

(d) The injured person shall be furnished, upon request, a copy of all information obtained by the insurer under the provisions of this section, and shall pay a reasonable charge, if required by the insurer.

(e) Notice to an insurer of the existence of a claim shall not be unreasonably withheld by an insured.

#### (7) MENTAL AND PHYSICAL EXAMINATION OF INJURED PERSON; REPORTS.--

(a) Whenever the mental or physical condition of an injured person covered by personal injury protection is material to any claim that has been or may be made for past or future personal injury protection insurance benefits, such person shall, upon the request of an insurer, submit to mental or physical examination by a physician or physicians. The costs of any examinations requested by an insurer shall be borne entirely by the insurer. Such examination shall be conducted within the municipality where the insured is receiving treatment, or in a location reasonably accessible to the insured, which, for purposes of this paragraph, means any location within the municipality in which the insured resides, or any location within 10 miles by road of the insured's residence, provided such location is within the county in which the insured resides. If the examination is to be conducted in a location reasonably accessible to the insured, and if there is no qualified physician to conduct the examination in a location reasonably accessible to the insured, then such examination shall be conducted in an area of the closest proximity to the insured's residence. Personal protection insurers are authorized to include reasonable provisions in personal injury protection insurance policies for mental and physical examination of those claiming personal injury protection insurance benefits. An insurer may not withdraw payment of a treating physician without the consent of the injured person covered by the personal injury protection, unless the

insurer first obtains a valid report by a Florida physician licensed under the same chapter as the treating physician whose treatment authorization is sought to be withdrawn, stating that treatment was not reasonable, related, or necessary. A valid report is one that is prepared and signed by the physician examining the injured person or reviewing the treatment records of the injured person and is factually supported by the examination and treatment records if reviewed and that has not been modified by anyone other than the physician. The physician preparing the report must be in active practice, unless the physician is physically disabled. Active practice means that during the 3 years immediately preceding the date of the physical examination or review of the treatment records the physician must have devoted professional time to the active clinical practice of evaluation, diagnosis, or treatment of medical conditions or to the instruction of students in an accredited health professional school or accredited residency program or a clinical research program that is affiliated with an accredited health professional school or teaching hospital or accredited residency program. The physician preparing a report at the request of an insurer and physicians rendering expert opinions on behalf of persons claiming medical benefits for personal injury protection, or on behalf of an insured through an attorney or another entity, shall maintain, for at least 3 years, copies of all examination reports as medical records and shall maintain, for at least 3 years, records of all payments for the examinations and reports. Neither an insurer nor any person acting at the direction of or on behalf of an insurer may materially change an opinion in a report prepared under this paragraph or direct the physician preparing the report to change such opinion. The denial of a payment as the result of such a changed opinion constitutes a material misrepresentation under s. 626.9541(1)(i)2.; however, this provision does not preclude the insurer from calling to the attention of the physician errors of fact in the report based upon information in the claim file.

(b) If requested by the person examined, a party causing an examination to be made shall deliver to him or her a copy of every written report concerning the examination rendered by an examining physician, at least one of which reports must set out the examining physician's findings and conclusions in detail. After such request and delivery, the party causing the examination to be made is entitled, upon request, to receive from the person examined every written report available to him or her or his or her representative concerning any examination, previously or thereafter made, of the same mental or physical condition. By requesting and obtaining a report of the examination so ordered, or by taking the deposition of the examiner, the person examined waives any privilege he or she may have, in relation to the claim for benefits, regarding the testimony of every other person who has examined, or may thereafter examine, him or her in respect to the same mental or physical condition. If a person unreasonably refuses to submit to an examination, the personal injury protection carrier is no longer liable for subsequent personal injury protection benefits.

(8) APPLICABILITY OF PROVISION REGULATING ATTORNEY'S FEES.--With respect to any dispute under the provisions of ss. 627.730-627.7405 between the insured and the insurer, or between an assignee of an insured's rights and the insurer, the provisions of s. 627.428 shall apply, except as provided in subsections (10) and (15).

(9) An insurer may negotiate and enter into contracts with licensed health care providers for the benefits described in this section, referred to in this section as "preferred providers," which shall include health care providers licensed under chapters 458, 459, 460, 461, and 463. The insurer may provide an option to an insured to use a preferred provider at the time of purchase of the policy for personal injury protection benefits, if the requirements of this subsection are met. If the insured elects to use a provider who is not a preferred provider, whether the insured purchased a preferred provider policy or a nonpreferred provider policy, the medical benefits provided by the insurer shall be as required by this section. If the insured elects to use a provider who is a preferred provider, the insurer may pay medical benefits in excess of the benefits required by this section and may waive or lower the amount of any deductible that applies to such medical benefits. If the insurer offers a preferred provider policy to a policyholder or applicant, it must also offer a nonpreferred provider policy. The insurer shall provide each policyholder with a current roster of preferred providers in the county in which the insured resides at the time of purchase of such policy, and shall make such list available for public inspection during regular business hours at the principal office of the insurer within the state.

(10) DEMAND LETTER.--

(a) As a condition precedent to filing any action for benefits under this section, the insurer must be provided with written notice of an intent to initiate litigation. Such notice may not be sent until the claim is overdue, including any additional time the insurer has to pay the claim pursuant to paragraph (4)(b).

(b) The notice required shall state that it is a "demand letter under s. 627.736(10)" and shall state with specificity:

1. The name of the insured upon which such benefits are being sought, including a copy of the assignment giving rights to the claimant if the claimant is not the insured.
2. The claim number or policy number upon which such claim was originally submitted to the insurer.
3. To the extent applicable, the name of any medical provider who rendered to an insured the treatment, services, accommodations, or supplies that form the basis of such claim; and an itemized statement specifying each exact amount, the date of treatment, service, or accommodation, and the type of benefit claimed to be due. A completed form satisfying the requirements of paragraph (5)(d) or the lost-wage statement previously submitted may be used as the itemized statement. To the extent that the demand involves an insurer's withdrawal of payment under paragraph (7)(a) for future treatment not yet rendered, the claimant shall attach a copy of the insurer's notice withdrawing such payment and an itemized statement of the type, frequency, and duration of future treatment claimed to be reasonable and medically necessary.

(c) Each notice required by this subsection must be delivered to the insurer by United States certified or registered mail, return receipt requested. Such postal costs shall be reimbursed by the insurer if so requested by the claimant in the notice, when the insurer pays the claim. Such notice must be sent to the person and address specified by the insurer for the purposes of receiving notices under this subsection. Each licensed insurer, whether domestic, foreign, or alien, shall file with the office designation of the name and address of the person to whom notices pursuant to this subsection shall be sent which the office shall make available on its Internet website. The name and address on file with the office pursuant to s. 624.422 shall be deemed the authorized representative to accept notice pursuant to this subsection in the event no other designation has been made.

(d) If, within 30 days after receipt of notice by the insurer, the overdue claim specified in the notice is paid by the insurer together with applicable interest and a penalty of 10 percent of the overdue amount paid by the insurer, subject to a maximum penalty of \$250, no action may be brought against the insurer. If the demand involves an insurer's withdrawal of payment under paragraph (7)(a) for future treatment not yet rendered, no action may be brought against the insurer if, within 30 days after its receipt of the notice, the insurer mails to the person filing the notice a written statement of the insurer's agreement to pay for such treatment in accordance with the notice and to pay a penalty of 10 percent, subject to a maximum penalty of \$250, when it pays for such future treatment in accordance with the requirements of this section. To the extent the insurer determines not to pay any amount demanded, the penalty shall not be payable in any subsequent action. For purposes of this subsection, payment or the insurer's agreement shall be treated as being made on the date a draft or other valid instrument that is equivalent to payment, or the insurer's written statement of agreement, is placed in the United States mail in a properly addressed, postpaid envelope, or if not so posted, on the date of delivery. The insurer is not obligated to pay any attorney's fees if the insurer pays the claim or mails its agreement to pay for future treatment within the time prescribed by this subsection.

(e) The applicable statute of limitation for an action under this section shall be tolled for a period of 30 business days by the mailing of the notice required by this subsection.

(f) Any insurer making a general business practice of not paying valid claims until receipt of the notice required by this subsection is engaging in an unfair trade practice under the insurance code.

(11) FAILURE TO PAY VALID CLAIMS; UNFAIR OR DECEPTIVE PRACTICE.--

(a) If an insurer fails to pay valid claims for personal injury protection with such frequency so as to indicate a general business practice, the insurer is engaging in a prohibited unfair or deceptive practice that is subject to the penalties provided in s. 626.9521 and the office has the powers and duties specified in ss. 626.9561-626.9601 with respect thereto.

(b) Notwithstanding s. 501.212, the Department of Legal Affairs may investigate and initiate actions for a violation of this subsection, including, but not limited to, the powers and duties specified in part II of chapter 501.

(12) CIVIL ACTION FOR INSURANCE FRAUD.--An insurer shall have a cause of action against any person convicted of, or who, regardless of adjudication of guilt, pleads guilty or nolo contendere to insurance fraud under s. 817.234, patient brokering under s. 817.505, or kickbacks under s. 456.054, associated with a claim for personal injury protection benefits in accordance with this section. An insurer prevailing in an action brought under this subsection may recover compensatory, consequential, and punitive damages subject to the requirements and limitations of part II of chapter 768, and attorney's fees and costs incurred in litigating a cause of action against any person convicted of, or who, regardless of adjudication of guilt, pleads guilty or nolo contendere to insurance fraud under s. 817.234, patient brokering under s. 817.505, or kickbacks under s. 456.054, associated with a claim for personal injury protection benefits in accordance with this section.

(13) MINIMUM BENEFIT COVERAGE.--If the Financial Services Commission determines that the cost savings under personal injury protection insurance benefits paid by insurers have been realized due to the provisions of this act, prior legislative reforms, or other factors, the commission may increase the minimum \$10,000 benefit coverage requirement. In establishing the amount of such increase, the commission must determine that the additional premium for such coverage is approximately equal to the premium cost savings that have been realized for the personal injury protection coverage with limits of \$10,000.

(14) FRAUD ADVISORY NOTICE.--Upon receiving notice of a claim under this section, an insurer shall provide a notice to the insured or to a person for whom a claim for reimbursement for diagnosis or treatment of injuries has been filed, advising that:

(a) Pursuant to s. 626.9892, the Department of Financial Services may pay rewards of up to \$25,000 to persons providing information leading to the arrest and conviction of persons committing crimes investigated by the Division of Insurance Fraud arising from violations of s. 440.105, s. 624.15, s. 626.9541, s. 626.989, or s. 817.234.

(b) Solicitation of a person injured in a motor vehicle crash for purposes of filing personal injury protection or tort claims could be a violation of s. 817.234, s. 817.505, or the rules regulating The Florida Bar and should be immediately reported to the Division of Insurance Fraud if such conduct has taken place.

(15) ALL CLAIMS BROUGHT IN A SINGLE ACTION.--In any civil action to recover personal injury protection benefits brought by a claimant pursuant to this section against an insurer, all claims related to the same health care provider for the same injured person shall be brought in one action, unless good cause is shown why such claims should be brought separately. If the court

determines that a civil action is filed for a claim that should have been brought in a prior civil action, the court may not award attorney's fees to the claimant.

(16) SECURE ELECTRONIC DATA TRANSFER.--If all parties mutually and expressly agree, a notice, documentation, transmission, or communication of any kind required or authorized under ss. 627.730-627.7405 may be transmitted electronically if it is transmitted by secure electronic data transfer that is consistent with state and federal privacy and security laws.

**History.**--s. 7, ch. 71-252; s. 3, ch. 76-168; s. 4, ch. 76-266; s. 1, ch. 77-457; s. 33, ch. 77-468; s. 3, ch. 78-374; s. 114, ch. 79-40; s. 165, ch. 79-164; s. 239, ch. 79-400; s. 3, ch. 80-206; s. 430, ch. 81-259; ss. 2, 3, ch. 81-318; ss. 554, 563, ch. 82-243; s. 31, ch. 87-226; s. 1, ch. 87-282; ss. 19, 20, 21, 22, ch. 88-370; s. 2, ch. 89-243; s. 1, ch. 89-313; s. 40, ch. 90-119; s. 7, ch. 90-232; s. 11, ch. 90-248; s. 36, ch. 90-295; s. 7, ch. 91-106; s. 66, ch. 91-282; s. 84, ch. 92-318; s. 7, ch. 93-289; s. 1, ch. 94-123; s. 8, ch. 95-202; s. 83, ch. 95-211; s. 381, ch. 96-406; s. 1738, ch. 97-102; s. 2, ch. 98-270; s. 262, ch. 99-8; s. 62, ch. 2001-63; s. 6, ch. 2001-271; s. 1195, ch. 2003-261; ss. 8, 19, ch. 2003-411; s. 124, ch. 2004-5; s. 121, ch. 2005-2; s. 13, ch. 2006-305; ss. 13, 20, ch. 2007-324; s. 153, ch. 2008-4; s. 22, ch. 2008-220.

**<sup>1</sup>Note.**--The word "of" was inserted by the editors.