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LexisNexis® Practice Guide: Florida Pretrial Civil Procedure

Publication 1366 Release 38 November 2023

HIGHLIGHTS

Release 38 November 2023

- This release adds further refinements and new cases to the treatise's comprehensive coverage of Florida civil procedure.
- Updated authoritative commentary by civil litigation expert Ralph Artigliere on the Florida Rules of Civil Procedure.
- Many new Florida civil procedure cases analyzed and explained to assist in civil litigation.

AMENDMENTS TO FLORIDA RULES OF PROCEDURE AND STATUTES

New and Amended Statutes and Laws

A massive tort reform bill passed the legislature and was signed into law by the Governor this term. The reforms impact civil remedies and attendant issues from attorney's fees—to contributory negligence and apportionment of fault—to limitations on damages. The entire bill is enrolled as Ch. 2023-15, and the pertinent new and amended statutes are covered throughout this release. The amendments made by this act to Fla. Stat. § 95.11 (Statutes of Limitations) apply to causes of action accruing after the effective date of this act. The Act shall not be construed to impair any right under an insurance contract in effect on or before the effective date of the Act. To the extent that the Act affects a right under an insurance contract, it only applies to insurance contracts issued

or renewed after the effective date of the Act, which is March 24, 2023. Except as otherwise expressly provided in the Act, it applies only to causes of action filed after the effective date. Here are the highlights of the changes in the law covered in this work:

Attorney's fees: Fla. Stat. § 57.104 was amended to create a "strong presumption" that a lodestar fee is reasonable and sufficient and may be overcome in exceptional circumstances with evidence that competent counsel could not be otherwise retained. *See* §§ 1.13[3][e]; 14.30; 14.31.

Statute of Limitations: The statute of limitations for negligence was reduced from four to two years in Fla. Stat. § 95.11(4)(a). Also, the statute of limitations is two years for any action against any person serving as a member of the United States Armed Forces on active duty or state active duty and all members of the Florida National Guard and United States Reserve Forces during terms of federal or state active duty which materially affect the servicemember's ability to appear according to Fla. Stat. § 95.11(4)(a). *See* §§ 3.05[2][b]; 3.06; 3.07[6]; [8]; [10]; [12]; (14); 3.08; 3.09; 3.09[3]; [4]; [5]; [6]; [7]; [8]; [9]; [10]; [12]; [13]; [14]; [15]; [16][a]; [b]; [d]; [f]; [g]; [17]; [18]; [19]; [20]; [21]; [22]; 3.10[1]; [4]; [5]; [9]; 3.13; 3.15[1]; [5]; 23.14; 26.27; 26.28.

Civil Remedies Against Insurers: Effective March 24, 2023, new Fla. Stat. 624.155(6) provides that, if two or more third-party claimants have competing claims arising out of a single occurrence, which may exceed the available policy limits of one or more of the insured parties who may be liable to the third party claimants, an insurer is not liable beyond the available policy limits for failure to pay all or any portion of the available policy limits to one or more of the third-party claimants if, within 90 days after receiving notice of the competing claims in excess of the available policy limits, the insurer (1) files an interpleader action under the Florida Rules of Civil Procedure or (2) pursuant to binding arbitration that has been agreed to by the insurer and the third-party claimants, the insurer makes the entire amount of the policy limits available for payment to the competing third-party claimants before a qualified arbitrator agreed to by the insurer and such third-party claimants at the expense of the insurer. With regard to the interpleader option, if the claims of the competing third-party claimants are found to be in excess of the policy limits, the third-party claimants are entitled to a prorated share of the policy limits as determined by the trier of fact. An insurer's interpleader action does not alter or amend the insurer's obligation to defend its insured. The legislature also significantly amended bad faith remedies. *See* § 4.18.

Damages in Tort: Under new Fla. Stat. § 768.0427(4), the damages recoverable by a claimant in a personal injury or wrongful death action for medical care must be established by evidence of medical treatment and

services as limited by Fla. Stat. § 768.0427(2) (Admissibility of evidence to prove medical expenses in personal injury or wrongful death actions). Further, recovery of damages may not exceed the sum of: (a) Amounts actually paid by or on behalf of the claimant to a health care provider who rendered medical treatment or services; (b) Amounts necessary to satisfy charges for medical treatment or services that are due and owing but at the time of trial are not yet satisfied; and (c) Amounts necessary to provide for any reasonable and necessary medical treatment or services the claimant will receive in the future. *See* §§ 25.03[1]; 25.13[1]; 25.15[1]; 25.25; 25.32; 25.37.

Comparative Negligence: Under new Fla. Stat. § 768.81(6), in a negligence action to which this Fla. Stat. § 768.81(2) applies, except medical negligence and wrongful death cases under Ch. 766, any party found to be greater than 50 percent at fault for his or her own harm may not recover any damages. Fla. Stat. § 768.81(6). *See* §§ 8.18[4]; 25.33[1].

Apportionment of Fault in Premises Liability Cases: Apportionment of fault has not been applied to any action based upon an intentional tort under Fla. Stat. § 768.81[4]. Effective March 24, 2023, the legislature created an exception to this provision relating to premises liability for criminal acts of third parties. In an action for damages against the owner, lessor, operator, or manager of commercial or real property brought by a person lawfully on the property who was injured by the criminal act of a third party, the trier of fact must consider the fault of all persons who contributed to the injury according to new Fla. Stat. § 768.0701. *See* § 25.33A.

Multifamily Premises Liability Presumption: For actions filed after March 24, 2023, the owner or principal operator of a multifamily residential property who substantially implements certain statutory security measures on the property has a presumption against liability in connection with criminal acts that occur on the premises committed by third parties who are not employees or agents of the owner or operator according to Fla. Stat. § 768.076(2). *See* § 8.14.

In the 2022 legislative session, the Florida legislature amended the service of process laws effective January 2, 2023. These changes were already included in this work in a past update. The amendments resulted from significant input on Senate Bill 1062 by the Business Law Section of The Florida Bar and contain many changes for the priority of service on various representatives of the different business entities recognized under Florida law. The amendments to Fla. Stat. § 48.181 clarify the procedures for substituted service on Florida's secretary of state, when no regular representative of such an entity is available for service. The amendments permit the secretary of state to accept substituted service by electronic means, in cases of a nonresident or a person who conceals his or her whereabouts according to Fla.

Stat. § 48.161, Fla. Stat. (2023). The longarm statute itself, section 48.193, was not amended. Numerous changes to service of process effective January 2, 2023, are reflected throughout this work. *See, e.g.,* §§ 7.37A; 7.39; 7.40; 7.41; 7.43; 7.44; 7.45; 7.46; 7.48; 7.58; 7.62; 7.63; 7.66; 7.67; 7.70; 7.81; 10.43[2].

Amendments to the Florida Rules of General Practice and Judicial Administration

Amendments to Fla. R. Gen. Prac. & Jud. Admin. 2.420(d)(1)(B)(xv) added documents related to the settlement of a minor's claim or the settlement of a claim for a ward to the records afforded confidentiality in court files. In addition, modifications were made to the prescribed form Notice of Confidential Information Within a Court Filing. *See* §§ 1.17; 2.26.

Amendments to the Florida Rules of Civil Procedure

In response to statutory changes to service of process and medical malpractice laws in chapter 2022-190, Laws of Florida, the Florida Supreme Court in the case of In re Amendments to Fla. Rules of Civ. Procedure 1.070 & 1.650, 356 So. 3d 206 (Fla. 2023) amended Fla. R. Civ. P. 1.070 and 1.650 to reflect changes in the law. Changes to Fla. R. Civ. P. 1.650 now provide that a claimant in a medical malpractice action under Fla. Stat. Ch. 766 may serve a notice of intent to initiate litigation by any of the means provided in Fla. Stat. § 766.106(2)(a), Florida Statutes (2022), as opposed to only by certified mail. A notice served on any prospective defendant makes the prospective defendant and any other prospective defendant who bears a legal relationship to the prospective defendant a party to the proceeding. If service is challenged in the first response to the complaint, the court must conduct an evidentiary hearing as provided by Fla. Stat. § 766.106(2)(b)(2). *See* §§ 3.09[17]; 6.25; 6.27.

Cases of Note through June 30, 2023 Included in this Release

Anti-SLAPP Statute

The Anti-SLAPP statute protects a "person" or "entity" from lawsuits filed by governmental entities and persons to prevent abuse and to protect the rights of the citizens to participate in our government under Fla. Stat. § 768.295(3). The Anti-SLAPP statute does not protect the government entities themselves, and governmental entities cannot rely on Florida's Anti-SLAPP statute as a defense to lawsuits filed by citizens against the governmental entity. In Crosby v. Town of Indian River Shores, 358 So. 3d 444 (Fla. 4th DCA 2023), the circuit court erred when it allowed a governmental entity to rely on Florida's Anti-SLAPP statute as the ground for granting its motion to dismiss. *See* § 8.10[5].

Arbitration

In considering whether a party waived the right to arbitrate by pursuing an inconsistent remedy, the court first determines whether the movant actively participated in litiga-

tion pertaining to the issue underlying the issue at hand. Once a party has waived the right to arbitration by active participation in a lawsuit, the party may not reclaim the arbitration right without the consent of his or her adversary according to City of Miami v. FOP, 359 So. 3d 1229 (Fla. 3d DCA 2023). *See* §§ 5.16[1]; 5.28.

Notwithstanding the authority requiring "strict compliance" and timely notice requesting trial de novo in accordance with Fla. R. Civ. P. 1.820(h), courts have been less than strict in granting a trial after nonbinding arbitration. In Beyond Billing, Inc. v. Spine & Orthopedic Ctr., P.C., 2023 Fla. App. LEXIS 2979 (Fla. 2d DCA May 3, 2023), the Second District found that the parties indicated a mutual intention to proceed to trial by executing a joint stipulated motion to amend the case management order within 20 days of the arbitration order. Further, a scrivener's error in the notice for trial will not invalidate the intent and effect of the motion for purposes of Fla. R. Civ. P. 1.820(h) according to Vitesse, Inc. v. Mapl Assocs. LLC, 358 So. 3d 437 (Fla. 4th DCA 2023), also decided this term. *See* § 5.07[1].

Challenging an arbitration award on the grounds of "evident partiality" by a neutral arbitrator is an uphill battle in light of the common law policy in favor of finality of arbitration results. The standard of review of arbitration awards is quite limited. Some federal courts have held litigants to "constructive knowledge" of the background of the arbitrators, meaning they will be accountable for what they know or should have known by more thorough inquiry. At least one Florida Circuit Court has adopted the constructive knowledge standard. In Spartan Secs. Grp., Ltd. v. Reynolds, 2021 WL 6098353 (Fla. Cir. Ct. Dec. 21, 2021), *aff'd per curiam*, Reynolds v. Spartan Secs. Grp., Ltd., 353 So. 3d 58 (Fla. 4th DCA 2022), the circuit judge applied the constructive knowledge standard. While a *per curiam* affirmance does not have precedential value, the case is supported by federal precedent and persuasive in its support of the constructive knowledge standard when challenging arbitration awards based on evident partiality. *See* §§ 5.23[3]; 15.52[2].

Attorney Client Privilege-Waiver

In Florida, waiver of the attorney-client privilege is not favored, and unless the record shows a clear, intentional waiver of the privilege by a client or counsel, protection for privileged communications and work product remain intact. In Petzold v. Castro, 2023 Fla. App. LEXIS 4029 (Fla. 2d DCA Jun. 16, 2023), the Second DCA held that the circuit court departed from the essential requirements of law by treating the inadvertent disclosure of a single privileged email bearing upon no substantive issues in the case as a voluntary waiver of the privilege over all attorney-client communications with that counsel's entire office. *See* § 2.05[2][a].

Class Actions

In a 1.220(b)(3)(b)(3) class action, even when some individualized issues of proof exist in a case, where an issue raised by a common contract provision predominates, appellate courts may find that the better reasoned approach is to maintain the suit as a class action and, if required after further development of the issues, permit the lower court to create subclasses. The presence of individualized damages issues does not prevent a finding that the common issues in the case predominate according to Fla. Power & Light Co. v. Velez, 2023 Fla. App. LEXIS 1927 (Fla. 3d DCA Mar. 22, 2023). *See* § 14.10; 14.13[1]; [2]; [3].

In Pet Supermarket, Inc. v. Eldridge, 360 So. 3d 1201 (Fla. 3d DCA 2023), the Third DCA held that a consumer's receipt of one uninvited text message while at home, during the weekend, did not rise to the level of outrageousness required for an invasion of privacy, and therefore, his alleged statutory injury under the Federal TCPA was not akin to Florida's common law harm of intrusion upon seclusion and he lacked standing to bring a class action. *See* § 14.07.

Comity

The principle of priority due to comity does not require an absolute identity of parties between the two actions to justify entering a stay. Nor do the causes of action need to be identical. It is sufficient that the two actions involve a single set of facts and that resolution of the earlier-filed case will resolve many of the issues involved in the subsequently filed case according to Toth v. Toth, 359 So. 3d 352 (Fla. 4th DCA 2023). *See* § 8.10[8].

Damages-Punitive

Coates v. R.J. Reynolds Tobacco Co., 2023 Fla. LEXIS 17 (Fla. Jan. 5, 2023), involved a non-Engle wrongful death action governed by the 1997 version of the Florida Statutes based on the date of the decedent's death. The Fifth District Court of Appeal had reversed as excessive a punitive damages award that exceeded the net compensatory damages award by a ratio of 106.7 to 1 and certified a question of great public importance that was rephrased as follows: "Does the trial court in a wrongful death action abuse its discretion by denying remittitur of a punitive damages award that does not bear a reasonable relation to the amount of damages proved and the injury suffered by the statutory beneficiaries?" In answering the question in the affirmative, the Florida Supreme Court held that no reasonable trial court could have concluded that the necessary relation exists between a $16 million punitive damages award and $150,000 of compensatory damages, and the trial court abused its discretion by denying remittitur of the excessive award. *See* §§ 25.09; 25.13[3].

Dismissal with Prejudice

According to Lion Intelligence & Sec. Servs. v. Quicksilver Cap., LLC, 355 So. 3d 1070 (Fla. 3d DCA 2023), in order to obtain dismissal with prejudice, an evidentiary hearing is

not required in every case, as when the party appealing the decision did not ask for an evidentiary hearing before the trial court or everything the court needed was before the court to decide on dismissal with prejudice. *See* § 8.10[5].

Declaratory Judgment

A declaratory action will lie only if there is an actual present controversy. In Guttenberg v. Smith & Wesson Corp., 357 So. 3d 690, 693–694 (Fla. 4th DCA 2023), appellants' complaint for declaratory relief was deemed to be an attempt to obtain an advisory opinion on the merits of a potential affirmative defense that appellees might raise in later litigation and therefore did not constitute a justiciable controversy for which declaratory relief would be appropriate. *See* § 16.05.

Unlike a typical judgment rendered in favor of a plaintiff in a tort or contract suit, the declaratory judgment authorized by statute is distinct in that it stands by itself; that is, no executory process follows as of course. A declaratory judgment does not involve executory, coercive, or injunctive relief. Chapter 86 requires a plaintiff to obtain declaratory relief before the plaintiff seeks an injunction. Injunctive relief is ancillary to and dependent upon the existence of a declaratory judgment. The relief must be sought by motion according to City of Newberry v. Alachua County, 366 So. 3d 1176 (Fla. 1st DCA 2023). *See* § 16.18.

Garnishment

Any deposit or account made in the name of two persons who are husband and wife shall be considered a tenancy by the entirety unless otherwise specified in writing and are presumptively beyond the reach of garnishment. Spousal accounts are tenancies by the entireties as a matter of statutory law and in the absence of an express designation otherwise. An entireties ownership disclaimer for a joint spousal bank account may appear in any "writing," including any written integrated document incorporated by reference into a signature card according to Storey Mt., LLC v. George, 357 So. 3d 709, 715–716 (Fla. 4th DCA 2023). *See* § 18.21[4].

Immunity and Sovereign Immunity

In the case of Fried v. State, 355 So. 3d 899 (Fla. 2023), the Supreme Court declared that, under Fla. Stat. § 790.33(3) with regard to firearms, the Legislature preempted the field of firearms regulation and deprived local governments and officials of any authority or discretion to contravene, exceed, or evade the Legislature's regulation of this field. Because legislative immunity as applied to local officials is a common law doctrine that the Legislature abrogated in the context covered by the Preemption Statute, neither legislative immunity nor governmental function immunity prohibits the statutory penalties in Fla. Stat. § 790.33(3)(c) and (d). *See* §§ 6.07[3]; 8.10A.

Because tribal sovereign immunity waivers must be strictly construed, procedural requirements for the

waiver should be strictly followed to enforce the waiver. In Seminole Tribe v. Manzini, 361 So. 3d 883 (Fla. 4th DCA 2023), tribal immunity barred negligence claims against the Seminole Tribe as to any count asserting negligence regarding COVID-19. *See* § 8.10A.

In City of Miami v. Robinson, 364 So. 3d 1087 (Fla. 3d DCA 2023), the Third DCA held that, much like subject matter jurisdiction, sovereign immunity is not an affirmative defense and can be raised at any time. *See* § 8.10A.

Immunity from a suit for defamation is provided by Section 230 of the Communications Decency Act, 47 U.S.C. § 230, to an online service provider from claims against it which are based on alleged publication of third-party content. In White v. Discovery Communs., LLC, 365 So. 3d 379 (Fla. 1st DCA 2023), the First DCA Immunity from a suit for defamation is provided by Section 230 of the Communications Decency Act, 47 U.S.C. § 230, to an online service provider from claims against it which are based on alleged publication of third-party content. The court held that 47 U.S.C.S. § 230 clearly preempts Florida law, and section 230 of the CDA creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. *See* § 8.10A.

State universities across Florida are facing similar lawsuits concerning failure to provide contracted education services during COVID-19. In Heine v. Fla. Atl. Univ. Bd. of Trs., 360 So. 3d 412 (Fla. 4th DCA 2023), the Fourth District certified to the Florida Supreme Court the question of WHETHER SOVEREIGN IMMUNITY BARS A BREACH OF CONTRACT CLAIM AGAINST A STATE UNIVERSITY BASED ON THE UNIVERSITY'S FAILURE TO PROVIDE ITS STUDENTS WITH ACCESS TO ON-CAMPUS SERVICES AND FACILITIES. *See* § 8.10A.

Motion to Dismiss

There is a split of authority on the issue of avoidance of waiver of certain defenses pursuant to Fla. R. Civ. P. 1.140. The Third, Fourth, and Fifth Districts have held that when a party files an amended motion under rule 1.140(b) before a hearing on an original motion under the rule, it may assert a previously omitted rule 1.140(b) defense in the amended motion and have it treated as timely. The First and Second Districts apply that the rule unambiguously requires personal jurisdiction to be asserted by motion to dismiss, and neither a denial of the jurisdictional allegation in an answer nor the filing of an amended motion asserting the defense excuses or cures the omission. In Retherford v. Kirkland, 363 So. 3d 132 (Fla. 1st DCA 2023), the First District Court agreed with the analysis of the Second District in Gannon v. Cuckler, 281 So. 3d 587 (Fla. 2d DCA 2019) and held that the plain language of Fla. R. Civ. P. 1.140 does not allow an amended motion to

"cure" the omission of failure to include the defense of improper service of process when the defendant failed to include it in his first motion to dismiss. *See* § 8.10[2].

Parties—Wrongful Death

Under Florida's Wrongful Death Act, the personal representative has the exclusive authority to conduct litigation and settle all claims. The survivors are not parties to the wrongful death litigation, even when the claims are brought for their benefit. According to Gomez v. R.J. Reynolds Tobacco Co., 357 So. 3d 198 (Fla. 3d DCA 2023), the trial court's order dismissing the estate's claims for the surviving children's damages does not constitute a partial final judgment disposing of an entire case as to any party because the cause of action of the only party—the personal representative on behalf of the estate—remains pending below. *See* § 4.04[11].

Pleadings; Affirmative Defenses

Affirmative defenses like collateral estoppel ordinarily must be pled in an answer unless tried by express or implied consent of the parties. An issue is tried by consent when there is no objection to the introduction of evidence on that issue. However, a failure to object cannot be construed as implicit consent to try an unpled theory when the evidence introduced is relevant to other issues properly being tried according to Fannie Mae v. Trinidad, 358 So. 3d 754 (Fla. 4th DCA 2023), in which the 4th DCA held that the trial court erred in relying on the affirmative defense of collateral estoppel where appellees had not raised collateral estoppel in their answer nor was the defense tried by implied consent). *See* §§ 8.17; 8.18[7]; 12.07[7].

In Geico Gen. Ins. Co. v. A&C Med. Ctr., 357 So. 3d 233 (Fla. 3d DCA 2023), the trial court denied defendant's motion to add the affirmative defenses of res judicata and collateral estoppel following a summary judgment hearing because the defendant waited fourteen months after obtaining a favorable declaratory judgment in federal court. In reversing the ruling below, the appellate court reasoned that the defenses were facially viable, there was no showing the parties engaged in protracted discovery, and the case was not set for trial. Lapse of time alone was not a viable reason to deny the motion to amend in the absence of dilatory tactics or bad faith. *See* § 12.11.

Receivership

A trial court with jurisdiction over receivership property may enjoin a proceeding against that property if the injunction is necessary to protect against misappropriation of, or waste relating directly to, the receivership property. However, reversal would be warranted when the party seeking the injunction fails to plead and establish the necessary four elements to obtain the injunction according to Berk-Fialkoff v. Wilmington Trust, 358 So. 3d 472 (Fla. 5th DCA 2023). *See* § 17.04[1].

Service of Process by Mail

Acceptance of service of a com-

plaint by mail by a defendant does not waive any objection to venue or to personal jurisdiction pursuant to Fla. R. Civ. P. 1.070(i)(1). However, jurisdiction is waived if process is accepted by mail through the party's attorney because Fla. R. Civ. P. 1.070(i) does not apply where a defendant's attorney agrees to accept service according to Dinardo v. Cmty. Loan Servicing, 2023 Fla. App. LEXIS 1856 (Fla. 4th DCA Mar. 22, 2023). *See* § 7.37[1]; [2].

Statute of Limitations or Repose

Negligence claims against a decedent's estate maybe time-barred by statutes of limitation and repose, including the two year statute of repose or nonclaim in Fla. Stat. § 733.710(1). In Tsuji v. H. Bart Fleet, 366 So. 3d 1020, 1026 (Fla. 2023), because the petitioners' negligence claims against Morton's estate were filed beyond Fla. Stat. § 733.710(1)'s two-year deadline and do not qualify under any exception, they were barred. *See* § 3.10[12].

Florida Statutes § 95.11(3) applies narrowly to only construction-based claims. This provision stands in contrast to Fla. Stat. § 95.11(4), which encompasses any "professional malpractice" action. The language of (3)(c), rather than (4)(a), is more specifically applicable to a case involving construction based claims according to Am. Auto. Ins. Co. v. FDH Infrastructure Servs., LLC, 364 So. 3d 1082 (Fla. 3d DCA 2023). *See* § 3.09[7].

The products liability repose period prescribed within Fla. Stat. § 95.031(2)(b) is tolled for any period during which the manufacturer through its officers, directors, partners, or managing agents had actual knowledge that the product was defective in the manner alleged by the claimant and took affirmative steps to conceal the defect. Any claim of concealment must be made with specificity and must be based upon substantial factual and legal support. A "managing agent" under Fla. Stat. § 95.031(2)(d) must be an individual of such seniority and stature within the corporation or business to have ultimate decision-making authority for the company according to Halum v. ZF Passive Safety Sys. US, 360 So. 3d 391 (Fla. 4th DCA 2023) (a managing agent is more than a mid-level employee who has some, but limited, managerial authority). *See* §§ 3.09[19]; 3.15[6].

Florida courts have held that this determination of when a person knew or reasonably should have known of the possibility of medical malpractice is fact-specific and within the province of the jury, not the trial judge. As a basis for summary judgment, it is not enough for a court to merely speculate that the party had knowledge because he or she filed a petition or a request for medical records pursuant to Chapter 766 according to Reyes v. Baptist Health S. Fla. Found., 360 So. 3d 438 (Fla. 3d DCA 2023), which held that the trial court's final summary judgment in favor of Baptist reversed and remanded because there was a genuine issue of material fact as to when the statute of limitations began to run

based on plaintiff's knowledge of a reasonable possibility of medical malpractice. *See* § 3.15[5].

An action relating to an act constituting a violation of Fla. Stat. § 794.011(sexual battery) involving a victim who was under the age of 16 at the time of the act may be commenced at any time pursuant to Fla. Stat. § 95.11(9). This provision applies to any such action except those that would have been time barred on or before July 1, 2010. In Doe v. Archdiocese of Mia., Inc., 360 So. 3d 778 (Fla. 3d DCA 2023), the Third District held that, based on the plain language of the two relevant, broad definitions of abuse concerning children, Fla. Stat. § 95.11(7) broadly applies to any act of abuse, which includes acts of abuse committed by individuals and institutions. *See* § 3.09[2].

When are construing statutes, the court must focus on the pertinent text starting with the actual language used in the statute because legislative intent is determined primarily from the statute's text. Fla. Stat. § 95.011 provides that a civil action or proceeding shall be barred unless begun within the time prescribed in Chapter 95, or, if a different time is prescribed elsewhere in these statutes, within the time prescribed elsewhere. Thus, when a plaintiff sues a government entity because one of its agents is alleged to have sexually abused a minor child, the limitation period in Fla. Stat. § 768.28(14) applies instead of the period prescribed in Fla. Stat. § 95.11(9) according to S.S. v. Sch. Bd. of Sarasota Cnty., 357 So. 3d 802 (Fla. 2d DCA 2023). *See* § 3.09(1); (2).

Absent a clear manifestation of legislative intent to the contrary, statutes of limitation are construed as prospective and not retrospective in their operation, and the presumption is against any intent on the part of the legislature to make such a statute retroactive. In Willis v. Accenture, Inc., 357 So. 3d 1269 (Fla. 3d DCA 2023), the Third DCA held that retroactive application of Fla. Stat. § 760.11 of the Florida Civil Rights Act is not supported by the expressed intent of the legislature or the chronology of the dispute. *See* § 3.01.

There is now a split of authority on application of the one-year statute of limitations in the Florida Fair Housing Act. In Hines v. Whataburger Restaurants, LLC, 301 So. 3d 473 (Fla. 1st DCA 2020), the First District held that, pursuant to Joshua v. City of Gainesville, 768 So. 2d 432 (Fla. 2000), Fla. Stat. § 95.11(3)(f)'s four-year limitation period, rather than section 760.11(5)'s one-year limitation period, applied to an employee's statutory civil rights action, even though the employee had received a notice of dismissal stating that the employee was provided a right-to-sue notice. However, in Aisy Aleu v. Nova Southeastern Univ., Inc., 357 So. 3d 134 (Fla. 4th DCA 2023), the Fourth District distinguished *Joshua* from its facts and the facts in *Hines* and held that proceeding under Fla. Stat. § 760.11(4) and, in turn, Fla. Stat. § 760.11(5), the

employee had to commence her civil action no later than one year after the date when the EEOC had issued the right-to-sue notice. The court in *Aleu* certified conflict with *Hines*. *See* § 3.10[5].

Substituted Service of Process

A process server perfects substituted service by leaving a copy of the process and initial pleading at the usual place of abode of the person to be served under Fla. Stat. § 48.031. A person's usual place of abode is that place where the person is actually living at the time of service. If a person is in prison, he or she must be served at the prison according to Dorsey v. Perretta, 357 So. 3d 815 (Fla. 3d DCA 2023), where a final judgment was void due to defective service of process. Defendant was incarcerated at the time process was served and substitute service was made on his mother at her private residence. *See* § 7.55.

Venue

Convenience of witnesses as a factor in *forum non conveniens* may now also include analysis of the now widely available means by which witnesses can testify remotely, as expressly contemplated in Fla. R. Gen. Prac. & Jud. Admin. § 2.530, "Communication Technology." Rule 2.530 was cited in Pocock v. Pocock, 360 So. 3d 1219 (Fla. 2d DCA 2023), in which the Second DCA determined that the trial court erred in transferring the case from Pinellas to Leon County despite a venue selection clause consenting to suit in Pinellas. The presumption in favor of the selected venue was not overcome by the fact that some witnesses lived in or near Leon County because the record failed to show significant inconvenience to any of them. *See* § 5.43[2][d].

If the desired venue transfer is to a court outside Florida, the common law doctrine of *forum non conveniens* as formulated by the multi-step analysis in the Florida Supreme Court *Kinney* case. Failure to conduct a full and fair private interest analysis (step 3) will render a lower court decision defective according to Gordon v. Bethel, 359 So. 3d 802 (Fla. 4th DCA 2023), in which the trial court failed to fully analyze the private interests of the parties with the presumption that the Florida plaintiff had chosen a sufficiently convenient forum. *See* § 5.43[2][a].

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Publication 1366, Release 38, November 2023

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Publication 1366, Release 38, November 2023