

**MOTION TO DISMISS  
UNVERIFIED COMPLAINT**

**CASES CITED**

**District Court of Appeal of Florida,  
Second District.**

**LUTZ LAKE FERN ROAD NEIGHBORHOOD GROUPS, INC., et al., Appellants,**

**v.**

**HILLSBOROUGH COUNTY, Florida and School Board of Hillsborough County, Florida,  
Appellees.**

**No. 2D99-1980.**

**June 21, 2000.**

Residents of area bordering tract of land that school board selected as site for new high school sought declaratory and injunctive relief. The Circuit Court, Hillsborough County, Robert H. Bonanno, J., granted county and school board's joint motion to dismiss. Residents appealed. The District Court of Appeal, Fulmer, Acting Chief Judge, held that: (1) residents stated claim for declaration that selection of site violated interlocal agreement and for injunction enjoining school board from acquiring or developing site; (2) residents stated claim for declaration that interlocal agreement contained unconstitutional delegation of legislative authority and for injunction enjoining county and school board from taking any further action toward development of site; (3) residents stated claim for declaration that interlocal agreement contained unconstitutional delegation of quasi-judicial authority and for injunction enjoining county and school board from developing site; and (4) trial court erred in making finding, that was contrary to allegations of complaint, that actions by county and school board constituted development order.

Reversed and remanded.


West Headnotes


[1]  KeyCite Citing References for this Headnote

 118A Declaratory Judgment

 118AIII Proceedings


 118AIII(D) Pleading

 118Ak312 Complaint, Petition or Bill

 118Ak319 k. Public Officers and Agencies. Most Cited Cases

Residents of area bordering tract of land that school board selected as site for new high school stated claim for declaration that selection of site violated interlocal agreement and for injunction enjoining school board from acquiring or developing site.

[2]  KeyCite Citing References for this Headnote

 118A Declaratory Judgment

 118AIII Proceedings

🔑 118AIII(D) Pleading

🔑 118Ak312 Complaint, Petition or Bill

🔑 118Ak319 k. Public Officers and Agencies. Most Cited Cases

Residents of area bordering tract of land that school board selected as site for new high school stated claim for declaration that interlocal agreement regarding selection of site contained unconstitutional delegation of legislative authority and for injunction enjoining county and school board from taking any further action toward development of site.

[3]  KeyCite Citing References for this Headnote

🔑 118A Declaratory Judgment

🔑 118AIII Proceedings

🔑 118AIII(D) Pleading

🔑 118Ak312 Complaint, Petition or Bill

🔑 118Ak319 k. Public Officers and Agencies. Most Cited Cases

Residents of area bordering tract of land that school board selected as site for new high school stated claim for declaration that interlocal agreement regarding selection of site contained unconstitutional delegation of quasi-judicial authority and for injunction enjoining county and school board from developing site.

[4]  KeyCite Citing References for this Headnote

🔑 307A Pretrial Procedure

🔑 307AIII Dismissal

🔑 307AIII(B) Involuntary Dismissal

🔑 307AIII(B)6 Proceedings and Effect

🔑 307Ak679 k. Construction of Pleadings. Most Cited Cases

When ruling on a motion to dismiss for failure to state a cause of action, a trial court must accept the allegations of a complaint as true and in the light most favorable to the plaintiffs.

[5]  KeyCite Citing References for this Headnote

🔑 30 Appeal and Error

🔑 30XVI Review

🔑 30XVI(G) Presumptions

🔑 30k915 Pleading

🔑 30k916 In General

🔑 30k916(1) k. In General. Most Cited Cases

An appellate court must accept the facts alleged in a complaint as true when reviewing an order that determines the sufficiency of the complaint.

[6]  KeyCite Citing References for this Headnote

- 🔑 30 Appeal and Error
  - 🔑 30XVI Review
    - 🔑 30XVI(F) Trial De Novo
      - 🔑 30k892 Trial De Novo
        - 🔑 30k893 Cases Triable in Appellate Court
          - 🔑 30k893(1) k. In General. Most Cited Cases

The question of whether a complaint states a cause of action is one of law, and thus, the standard of review is de novo.

[7]  KeyCite Citing References for this Headnote

- 🔑 118A Declaratory Judgment
  - 🔑 118AIII Proceedings
    - 🔑 118AIII(D) Pleading
      - 🔑 118Ak312 Complaint, Petition or Bill
        - 🔑 118Ak312.1 k. In General. Most Cited Cases

The test for sufficiency of a complaint for declaratory judgment is not whether the plaintiff will succeed in obtaining the decree he seeks favoring his position, but whether he is entitled to a declaration of rights at all.

[8]  KeyCite Citing References for this Headnote

- 🔑 307A Pretrial Procedure
  - 🔑 307AIII Dismissal
    - 🔑 307AIII(B) Involuntary Dismissal
      - 🔑 307AIII(B)6 Proceedings and Effect
        - 🔑 307Ak678 k. Hearing and Determination in General. Most Cited Cases

On motion to dismiss, trial court erred in making finding, which was contrary to allegations of complaint filed by residents of area bordering tract of land that school board selected as site for new high school, that actions by county and school board constituted development order. West's F.S.A. § 163.3164(7).

[9]  KeyCite Citing References for this Headnote

- 🔑 307A Pretrial Procedure
  - 🔑 307AIII Dismissal
    - 🔑 307AIII(B) Involuntary Dismissal

- 🔑 307AIII(B)6 Proceedings and Effect
- 🔑 307Ak679 k. Construction of Pleadings. Most Cited Cases

🔑 307A Pretrial Procedure  KeyCite Citing References for this Headnote

- 🔑 307AIII Dismissal
- 🔑 307AIII(B) Involuntary Dismissal
- 🔑 307AIII(B)6 Proceedings and Effect
- 🔑 307Ak681 k. Matters Considered in General. Most Cited Cases

On a motion to dismiss, the trial court must look only within the four corners of the complaint, accept the plaintiff's allegations as true, and resolve all inferences in the plaintiff's favor.

[10]  KeyCite Citing References for this Headnote

- 🔑 307A Pretrial Procedure
- 🔑 307AIII Dismissal
- 🔑 307AIII(B) Involuntary Dismissal
- 🔑 307AIII(B)1 In General
- 🔑 307Ak533 k. Other Remedy, Availability or Prior Use Of. Most Cited Cases

A motion to dismiss should not be used as a substitute for a motion for summary judgment or a motion for judgment on the pleadings.

\*381 Marsha G. Rydberg of The Rydberg Law Firm, P.A., Tampa and James M. Landis of Foley & Lardner, Tampa, co-counsel for Appellants.

H. Ray Allen, II, Sr., Assistant County Attorney and Julia C. Mandell, Assistant County Attorney, Tampa, for Appellee, Hillsborough County.

Thomas M. Gonzalez and Arnold B. Corsmeier of Thompson, Sizemore & Gonzalez, P.A., Tampa and W. Crosby Few of Few & Ayala, P.A., Tampa, co-counsel for Appellee, School Board of Hillsborough County.  
FULMER, Acting Chief Judge.

The sole issue presented by this appeal is whether a second amended complaint filed by a group of property owners (“Neighbors”) against Hillsborough County (“County”) and the School Board of Hillsborough County (“School Board”) states a cause of action. The Neighbors are residents of an area bordering a tract of land which the School Board selected as the site for a new high school. We conclude that the complaint does state a cause of action and, therefore, reverse the trial court's order dismissing the complaint with prejudice.

Section 235.193, Florida Statutes (1997), requires that, before acquiring property for a high school, a school board and local government must coordinate to ensure that the proposed school site complies with the county's comprehensive plan and development regulations, and it specifies a procedure for such coordination. The statute also permits a school board and a local governing body to establish "an alternative process for reviewing a proposed educational facility and site plan, and offsite impacts." § 235.193(7). The County and the School Board elected to establish such alternative process by interlocal agreement. The interlocal agreement specifies that high schools are to be located in the County's "urban service area," as defined in the comprehensive plan. However, a site may be permitted outside the urban service area if it meets certain additional criteria.

The School Board submitted five proposed school sites to the County for a review and determination of consistency with the comprehensive plan and compliance with the Hillsborough County Land Development Code (LDC). In accordance \*382 with the procedures set forth in the interlocal agreement, a land use hearing officer conducted a public hearing and rendered a written decision. Two of the sites were determined to be inconsistent with the comprehensive plan and not in compliance with the LDC. The remaining three sites, including the site at issue here, referred to as the Lutz Lake Fern Road site, were determined to be consistent with the comprehensive plan and in compliance with the LDC. The Lutz Lake Fern Road site is not located within the urban service area and, thus, is subject to additional criteria. The School Board considered the land use hearing officer's decision and, after public hearing, selected the Lutz Lake Fern Road site.

The Neighbors unsuccessfully attempted to appeal the decision of the land use hearing officer to the Board of County Commissioners, which was advised by the county attorney that the public had no right to appeal. The Neighbors filed a "Verified Complaint, or in the Alternative, Petition for Certiorari" in the circuit court on October 15, 1998, and an "Amended Verified Complaint, or in the Alternative, Petition for Certiorari" on October 16, 1998. The County and the School Board moved to dismiss the amended complaint. The trial court granted the motion, allowing the Neighbors the right to amend. On February 15, 1999, the Neighbors filed their "Second Amended Complaint, or in the Alternative, Petition for Certiorari or for Writ of Mandamus" against the County and the School Board. The Neighbors asserted taxpayer standing and alleged that they lacked an adequate legal remedy and that they were in doubt as to their rights and obligations under section 235.193 and chapter 163, Florida Statutes. They asserted that if a high school were located at the Lutz Lake Fern Road site, they would be irreparably injured by impairment of their property values and semi-rural life style, by excessive flooding, substantial traffic impacts, and by the creation of a substandard high school for their children.

In counts I, II and III, the Neighbors sought declaratory and injunctive relief pursuant to chapter 86, Florida Statutes (1997). Count I was directed against the School Board and asked the court to

declare that the selection of the Lutz Lake Fern Road site violated the interlocal agreement and to enjoin the School Board from acquiring or developing the site for a high school. Count I also included a petition for writ of mandamus whereby the court was asked to require the County to declare the Lutz Lake Fern Road site incompatible with the interlocal agreement because it lies outside the urban service area.

Count II was directed against the County and asked the court to declare that the interlocal agreement contains an unconstitutional delegation of legislative authority and to enjoin the County and School Board from taking any further action toward the development of the site. Count III was directed against the County and School Board and asked the court to declare that the interlocal agreement contained an unconstitutional delegation of quasi-judicial authority and to enjoin the County and School Board from developing the Lutz Lake Fern Road site.

Count IV was an action pursuant to section 163.3215, Florida Statutes (1997),FN1 in which the Neighbors asked the court to \*383 declare the Lutz Lake Fern Road site inconsistent with the comprehensive plan and to enjoin the County and School Board from taking any further action toward development of the site.

FN1. Section 163.3215 provides, in relevant part:

(1) Any aggrieved or adversely affected party may maintain an action for injunctive or other relief against any local government to prevent such local government from taking any action on a development order, as defined in s. 163.3164, which materially alters the use or density or intensity of use on a particular piece of property that is not consistent with the comprehensive plan adopted under this part.

....

(3)(b) Suit under this section shall be the sole action available to challenge the consistency of a development order with a comprehensive plan adopted under this part.

The County and the School Board filed a joint motion to dismiss on the grounds that counts I, II and III failed to state a cause of action for declaratory and injunctive relief because the Neighbors did not have standing to enforce the interlocal agreement between the County and the School Board. They argued that neither section 235.193 nor the interlocal agreement allowed the Neighbors to bring a viable cause of action. The County and School Board also asserted that, as to count IV, the Neighbors failed to timely file their action pursuant to section 163.3215.

The trial court granted the motion to dismiss with prejudice. In its order, the trial court stated that the Neighbors had failed to state a cause of action in counts I, II and III, and had again failed to plead the elements required to support their prayer for declaratory and injunctive relief under chapter 86. As to count IV, the trial court dismissed the action as time-barred. The trial court dismissed the petition for writ of certiorari or for writ of mandamus on the basis that “[a] cause

of action brought by third parties pursuant to section 163.3215, Florida Statutes, provides for a de novo trial only.”

[1] [2] [3] [4] [5] [6] We first address the dismissal of counts I, II and III. When ruling on a motion to dismiss for failure to state a cause of action, a trial court must accept the allegations of a complaint as true and in the light most favorable to the plaintiffs. See *Wilson v. News-Press Publ'g Co.*, 738 So.2d 1000, 1001 (Fla. 2d DCA 1999). Likewise, the appellate court must accept the facts alleged in a complaint as true when reviewing an order that determines the sufficiency of the complaint. See *Sarkis v. Pafford Oil Co.*, 697 So.2d 524, 526 (Fla. 1st DCA 1997). Thus, we have confined our review to the allegations of the complaint and the trial court's order of dismissal. Because the question of whether a complaint states a cause of action is one of law, the standard of review is de novo. See *id.*

[7] The declaratory judgment statute, section 86.021, provides:

Any person claiming to be interested or who may be in doubt about his or her rights under a deed, will, contract, or other article, memorandum, or instrument in writing or whose rights, status, or other equitable or legal relations are affected by a statute, or any regulation made under statutory authority, or by municipal ordinance, contract, deed, will, franchise, or other article, memorandum, or instrument in writing may have determined any question of construction or validity arising under such statute, regulation, municipal ordinance, contract, deed, will, franchise, or other article, memorandum, or instrument in writing, or any part thereof, and obtain a declaration of rights, status, or other equitable or legal relations thereunder.

“The test for sufficiency of a complaint for declaratory judgment is not whether the plaintiff will succeed in obtaining the decree he seeks favoring his position, but whether he is entitled to a declaration of rights at all.” *Platt v. General Dev. Corp.*, 122 So.2d 48, 50 (Fla. 2d DCA 1960). In dismissing these counts for failure to state a cause of action, the trial court gave no explanation for its ruling other than its conclusion that the Neighbors failed to plead the elements required to support their prayers for declaratory and injunctive relief. The order does not identify the missing elements. Nor does the order expressly address the issue of standing.

Our review of the second amended complaint leads us to conclude that the allegations set forth in counts I, II and III state a cause of action under chapter 86. Our reversal on this issue in no way addresses the merits of the relief sought by the Neighbors. We reiterate that whether a plaintiff is likely to succeed in obtaining \*384 the decree sought is not a factor that we consider in determining whether a complaint is sufficient to withstand a motion to dismiss.

[8] [9] [10] Turning to count IV, we begin by repeating that in ruling on a motion to dismiss, the trial court must look only within the four corners of the complaint, accept the



plaintiff's allegations as true, and resolve all inferences in the plaintiff's favor. See *Wilson*, 738 So.2d at 1001. In addition, a motion to dismiss should not be used as a substitute for a motion for summary judgment or a motion for judgment on the pleadings. See *Lowery v. Lowery*, 654 So.2d 1218, 1219 (Fla. 2d DCA 1995).

In its order dismissing count IV, the trial court made the following findings:

[T]he actions taken by the County and the School Board gave [the Neighbors] adequate notice of the alleged inconsistent action to afford [the Neighbors] the opportunity to utilize the thirty (30) day procedure set forth in section 163.3215(4), Florida Statutes. In addition, the Court finds that the actions taken by the County and the School Board constitute a "Development Order" as defined in section 163.3164(7), Florida Statutes. The Court finds that [the Neighbors] have failed to comply with the condition precedent set forth in section 163.3215(4), Florida Statutes. Consequently, [the Neighbors'] Second Amended Complaint is time-barred, this Court lacks jurisdiction to entertain Count IV of [the Neighbors'] Second Amended Complaint and it shall be dismissed with prejudice.

(Citations omitted). These findings of fact do not accept as true the allegations of the complaint. Thus, the trial court erred in making a finding, contrary to the allegations, that the actions taken constituted a development order.

Accordingly, we reverse the trial court's order of dismissal with prejudice and remand with directions that the second amended complaint be reinstated.

Reversed and remanded.

CASANUEVA and SALCINES, JJ., Concur.

**District Court of Appeal of Florida,  
Fourth District.  
Kathleen CROCKER, Appellant,  
v.  
Sean MARKS and Jamie Marks, his wife, Appellees.**

**No. 4D02-2629.  
Oct. 22, 2003.**

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; [Stephen A. Rapp](#), Judge; L.T. Case No. CA 02-1585 AN.  
[Carl A. Cascio](#) and [Gary S. Gaffney](#) of Carl A. Cascio, P.A., Boynton Beach, for appellant.

[Peter M. Arnold](#) of Gary, Dytrych & Ryan, P.A., North Palm Beach, and [Ronald L. Bornstein](#) of Kramer, Ali, Fleck, Carothers, Hughes, Gelb & Bornstein, Jupiter, for appellees.

PER CURIAM.

Appellant, Kathleen Crocker, filed her complaint for declaratory and injunctive relief against appellees, Sean and Jamie Marks, alleging that appellees violated certain covenants and restrictions that applied to their property, a building in which both parties own residential units adjacent to each other. Upon appellees' motion to dismiss for failure to state a cause of action, the trial court dismissed the complaint with prejudice.

In [Bell v. Indian River Memorial Hospital, 778 So.2d 1030 \(Fla. 4th DCA 2001\)](#), this court stated the standard of review upon a motion to dismiss:

A motion to dismiss tests whether the plaintiff has stated a cause of action. Because a ruling on a motion to dismiss for failure to state a cause of action is an issue of law, it is reviewable on appeal by the de novo standard of review. When determining the merits of a motion to dismiss, the trial court's consideration is limited to the four corners of the complaint, the allegations of which must be accepted as true and considered in the light most favorable to the nonmoving party.

*Id.* at 1032 (citations omitted).

We have reviewed the complaint and find that it does state a cause of action. \*1124 We, therefore, reverse and remand for further proceedings.

REVERSED AND REMANDED.

STONE, [SHAHOOD](#) and [HAZOURI](#), JJ., concur.

Fla.App. 4 Dist., 2003.  
Crocker v. Marks  
856 So.2d 1123, 28 Fla. L. Weekly D2425

**District Court of Appeal of Florida,  
Third District.**

**Anthony Eugene CASH, Appellant,**  
**v.**  
**AIRPORT MINI-STORAGE, Appellee.**







**No. 3D00-2581.**  
**April 18, 2001.**

Customer sued rental storage facility, alleging a violation of various state and federal constitutional rights, intentional infliction of emotional distress, breach of contract, and failure to comply with statute providing for enforcement of liens on self-storage space. The Circuit Court, Dade County, [Stuart M. Simons](#), J., dismissed action. Customer appealed. The District Court of Appeal, Third District, held that claims of emotional distress and of violations of constitutional rights could be dismissed based on customer's failure to comply with rule governing pleadings and failure to allege elements of claims.

Affirmed in part and reversed in part.






West Headnotes

[1]  [KeyCite Citing References for this Headnote](#)

-  [307A](#) Pretrial Procedure
  -  [307AIII](#) Dismissal
    -  [307AIII\(B\)](#) Involuntary Dismissal
      -  [307AIII\(B\)6](#) Proceedings and Effect
        -  [307Ak693](#) Operation and Effect
          -  [307Ak694](#) k. Adjudication on Merits. [Most Cited Cases](#)






Dismissal of action or claim for failure of an adverse party to comply with the Rules of Civil Procedure or any order of the court operates as an adjudication on the merits. [West's F.S.A. RCP Rule 1.420\(b\)](#).

[2]  [KeyCite Citing References for this Headnote](#)

-  [307A](#) Pretrial Procedure
  -  [307AIII](#) Dismissal
    -  [307AIII\(B\)](#) Involuntary Dismissal
      -  [307AIII\(B\)5](#) Particular Actions or Subject Matter, Defects in Pleading
        -  [307Ak643](#) k. Contracts; Sales. [Most Cited Cases](#)

Claims of emotional distress and of constitutional violations could be dismissed based on plaintiff's failure to comply with rule requiring a short and plain statement of facts showing he was entitled to relief and failure to allege elements of claims. [West's F.S.A. RCP Rules 1.110\(b\), 1.420\(b\)](#).

[3]  [KeyCite Citing References for this Headnote](#)

-  [307A](#) Pretrial Procedure
  -  [307AIII](#) Dismissal
    -  [307AIII\(B\)](#) Involuntary Dismissal
      -  [307AIII\(B\)5](#) Particular Actions or Subject Matter, Defects in Pleading
        -  [307Ak643](#) k. Contracts; Sales. [Most Cited Cases](#)

Where pleadings, construed most liberally, briefly stated the facts and alleged the elements of a claim for breach of contract and/or the failure of storage facility to comply with statute providing for enforcement of liens on self-storage space, storage facility was not entitled to dismissal of claims based on failure to comply with rules. [West's F.S.A. § 83.806](#); [West's F.S.A. RCP Rules 1.110\(b\)](#), [1.420\(b\)](#).

**\*983** Anthony Eugene Cash, in proper person.



Walton, Lantaff, Schroeder, & Carson, and [Michael H. Galex](#), Miami, for appellee.

Before [SCHWARTZ](#), C.J., and [RAMIREZ](#), J., and [NESBITT](#), Senior Judge.


PER CURIAM.

Anthony Eugene Cash rented self-service storage space from Airport Mini-Storage but did not keep up the rental payments. Cash claims that at the time he rented the space he was informed of the possibility of some \$10 monthly late fee, however was not informed of any other provisions or contractual arrangements. Sometime thereafter, realizing he was late in his payments, Cash maintains that he attempted to partially pay the sum then owed, but was turned away. Airport Mini Storage thereafter apparently sold off Cash's possessions to pay the past due fees. Cash filed a complaint of sorts alleging a violation of various state and federal constitutional rights as well as the company's intentional infliction of emotional distress. Also, although far from a model of clarity, the complaint also asserted a breach of contract claim and a claim that **\*984** the storage facility had failed to act in compliance with [section 83.806 Florida Statutes \(1999\)](#), the statutory section providing for enforcement of liens on self-storage space.

The trial court dismissed Cash's complaint without prejudice, concluding that the pleading was little more than rambling and did not adequately state any cause of action. Thereafter, Cash filed another complaint which the trial court again concluded did not comply with [Florida Rule of Civil Procedure 1.110\(b\)](#). The court then dismissed the action in accordance with [Florida Rule of Civil Procedure 1.420\(b\)](#).

[1]  [2]  Under [Rule 1.110\(b\)](#), a complaint is required to contain a short and plain statement of the ultimate facts showing that the pleader is entitled to relief. [Rule 1.420\(b\)](#) states that any party may move for dismissal of an action or of any claim against him for failure of an adverse party to comply with the Rules or any order of the court. A dismissal under this rule operates as an adjudication on the merits. We affirm in part, and reverse in part the order under review. As to Cash's claims of emotional distress, violation of privacy, 4th Amendment, due process and equal protection rights, we affirm the dismissal of these claims. Cash failed to comply with [Rule 1.110\(b\)](#) and also failed to allege the elements of these claims. See [Clemente v. Horne](#), 707 So.2d 865, 866 (Fla. 3d DCA 1998); see also [Davis v. Prudential Sec., Inc.](#), 59 F.3d 1186, 1186 (11th Cir.1995).

The Fifth district affirmed a dismissal based on a similar disjointed pleadings in [Dewitt v. Rossi](#), 559 So.2d 659 (Fla. 5th DCA 1990). See [Barrett v. City of Margate](#), 743 So.2d 1160, 1163 (Fla. 4th DCA 1999) (observing that notwithstanding the fundamental principle of allowing pro se litigants procedural latitude, a practice effected to ensure access to the courts for all citizens, pro se litigants are not immune from the rules of procedure).

[3]  Here, Cash's pleadings construed most liberally however do briefly state the facts and allege the elements of a claim for breach of contract and/or the failure of the facility to comply with [section 83.806](#). Accordingly we reverse the trial court's dismissal as to these claims. As to the balance of the order under review, the trial court's decision is affirmed.

Fla.App. 3 Dist., 2001.  
Cash v. Airport Mini-Storage  
782 So.2d 983, 26 Fla. L. Weekly D1024

**Supreme Court of Florida.**  
**Carolann D. KOZEL, Petitioner,**  
**v.**  
**D. Steven OSTENDORF, D.P.M., Respondent.**






**No. 80380.**  
**Oct. 28, 1993.**  
**As Clarified Jan. 13, 1994.**

Medical malpractice action was brought. The Circuit Court, Lee County, [James H. Seals, J.](#), dismissed complaint with prejudice. Plaintiff appealed. The District Court of Appeal, [McDonald](#), Associate Judge, [603 So.2d 602](#), affirmed. Plaintiff appealed. The Supreme Court, [McDonald, J.](#), held that, where attorney is responsible for procedural error, court should employ sanction less severe than dismissal with prejudice where it determines, upon consideration of certain enumerated factors, that such alternative is viable.

Decision quashed; remanded with instructions.






West Headnotes







[1]  [KeyCite Citing References for this Headnote](#)

-  [307A](#) Pretrial Procedure
  -  [307AIII](#) Dismissal
    -  [307AIII\(B\)](#) Involuntary Dismissal
      -  [307AIII\(B\)2](#) Grounds in General
        -  [307Ak551](#) k. In General. [Most Cited Cases](#)

Because dismissal is ultimate sanction of adversarial system, it should be reserved for those aggravating circumstances in which lesser sanction would fail to achieve just result.

[2]  [KeyCite Citing References for this Headnote](#)

-  [307A](#) Pretrial Procedure
  -  [307AIII](#) Dismissal
    -  [307AIII\(B\)](#) Involuntary Dismissal
      -  [307AIII\(B\)2](#) Grounds in General
        -  [307Ak551](#) k. In General. [Most Cited Cases](#)

-  [307A](#) Pretrial Procedure  [KeyCite Citing References for this Headnote](#)
  -  [307AIII](#) Dismissal
    -  [307AIII\(B\)](#) Involuntary Dismissal
      -  [307AIII\(B\)6](#) Proceedings and Effect
        -  [307Ak690](#) k. Dismissal with or Without Prejudice. [Most Cited Cases](#)

Where attorney is responsible for procedural error, court should employ sanction less severe than dismissal with prejudice, such as imposition on attorney of fine, public reprimand, or contempt order, where court determines, upon consideration of following factors, that such alternative is viable: (1) whether attorney's disobedience was willful, deliberate, or contumacious; (2) whether attorney was previously sanctioned; (3) whether client was personally involved in act of disobedience; (4) whether delay prejudiced opposing party; (5) whether attorney offered reasonable justification for noncompliance; and (6) whether delay created significant problems of judicial administration. [West's F.S.A.RCP Rules 1.010, 1.500\(b, c\)](#).

**\*817** [Kelley A. Finn](#) of Kelley Finn Law Offices, P.A., Miami, for petitioner.

[Gerald W. Pierce](#) of Henderson, Franklin, Starnes & Holt, P.A., Fort Myers, for respondent.


McDONALD, Justice.

We review [Kozel v. Ostendorf, 603 So.2d 602 \(Fla. 2d DCA 1992\)](#), which directly conflicts with [Clay v. City of Margate, 546 So.2d 434 \(Fla. 4th DCA\)](#), *review denied*, [553 So.2d 1164 \(Fla.1989\)](#). We have jurisdiction pursuant to [article V, section 3\(b\)\(3\) of the Florida Constitution](#). We quash *Kozel*.

Carolann Kozel filed a medical malpractice complaint against Steven Ostendorf on July 25, 1989 in the circuit court of Lee County. Ostendorf filed a motion to dismiss on the grounds that the complaint failed to state a cause of action and that Kozel failed to comply with [section 766.205, Florida Statutes \(1989\)](#). The court granted Ostendorf's motion to dismiss and granted Kozel twenty days to amend her complaint. By agreement of the parties, the time period to amend the complaint was extended another ten days. Kozel's attorney, Kelley A. Finn, did not file the complaint until July 23, 1990, over five months past the due date. On Ostendorf's motion the circuit court then dismissed the complaint with prejudice and the district court affirmed.


The district court properly recognized that the trial court has the discretionary power to dismiss a complaint if the plaintiff fails to timely file an amendment.<sup>FN1</sup> Although such broad power is vested in the trial court, it is not necessary or beneficial for that power to be exercised in all situations. We concur **\*818** with Judge Altenbernd's suggestion that the trial courts need a meaningful set of guidelines to assist them in their task of sanctioning parties and attorneys for acts of malfeasance and disobedience. [Kozel, 603 So.2d at 605](#) (Altenbernd, J., dissenting). Without such a framework, trial courts have no standard by which to judge the severity of the party's action or the type of sanction that should be imposed.

FN1. [New River Yachting, Inc. v. Bacchiocchi, 407 So.2d 607 \(Fla. 4th DCA 1981\)](#), *review denied*, [415 So.2d 1360 \(Fla.1982\)](#); [Neida's Boutique, Inc. v. Gabor and Co., 348 So.2d 1196 \(Fla. 3d DCA 1977\)](#), *cert. denied*, [366 So.2d 883 \(Fla.1978\)](#); [Reynolds v. Deep South Sports, Inc., 211 So.2d 37 \(Fla. 2d DCA 1968\)](#).

[1]  In the instant case, the trial court acted within the boundaries of the law. In our view, though, the court's decision to dismiss the case based solely on the attorney's neglect unduly punishes the litigant and espouses a policy that this Court does not wish to promote. The purpose of the Florida Rules of Civil Procedure is to encourage the orderly movement of litigation. [Fla.R.Civ.Pro. 1.010](#). This purpose usually can be accomplished by the imposition of a sanction that is less harsh than dismissal and that is directed toward the person responsible for the delayed filing of the complaint. *Clay*.

Dismissal "with prejudice" in effect disposes of the case, not for any dereliction on the part of the litigant, but on the part of his counsel. We are not unmindful of the rule that counsel is the litigant's agent and that his acts are the acts of the principal, but since the rule is primarily for the governance of counsel, dismissal "with prejudice" would in effect punish the litigant instead of his counsel.

[Beasley v. Girten, 61 So.2d 179, 181 \(Fla.1952\)](#). Because dismissal is the ultimate sanction in the adversarial system, it should be reserved for those aggravating circumstances in which a lesser sanction would fail to achieve a just result.

[2]  This Court is vitally concerned with the swift administration of justice at both the trial and appellate levels. In the interest of an efficient judicial system and in the interest of clients, it is essential that attorneys adhere to filing deadlines and other procedural requirements.<sup>FN2</sup> However, a fine, public reprimand, or contempt order may often be the appropriate sanction to impose on an attorney in those situations where the attorney, and not the client, is responsible for the error. To assist the trial court in determining whether dismissal with prejudice is

warranted, we have adopted the following set of factors set forth in large part by Judge Altenbernd: 1) whether the attorney's disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience; 2) whether the attorney has been previously sanctioned; 3) whether the client was personally involved in the act of disobedience; 4) whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion; 5) whether the attorney offered reasonable justification for noncompliance; and 6) whether the delay created significant problems of judicial administration. Upon consideration of these factors, if a sanction less severe than dismissal with prejudice appears to be a viable alternative, the trial court should employ such an alternative.

[FN2](#). According to [rule 1.500\(c\), Florida Rules of Civil Procedure](#), "[a] party may plead or otherwise defend at any time before default is entered." If a party against whom affirmative relief is sought has filed any paper in a civil action, the court cannot enter a default for failure to file an answer unless the defendant has been served with notice that a default may be entered. [Fla.R.Civ.Pro. 1.500\(b\)](#). However, when the circumstances involve the dismissal of the *plaintiff's* complaint, there are no similar notice requirements. The rules of civil procedure do not require the defendant to file a motion for default or the court to notify the plaintiff that an application for default is pending. Granted, the plaintiff is aware of the filing deadlines and is responsible for the action that she initiates. Nevertheless, dismissal is an unusually harsh sanction when neither the court nor the defendant is required to notify the plaintiff that dismissal is pending.

For the foregoing reasons, we quash the district court's decision, approve *Clay*, and remand the case with directions that the trial court be ordered to reconsider in light of the new factors established in this opinion.

It is so ordered.

BARKETT, C.J., and OVERTON, [SHAW](#), GRIMES, [KOGAN](#) and [HARDING](#), JJ., concur.



**Anthony Eugene CASH, Appellant,**  
**v.**  
**AIRPORT MINI-STORAGE, Appellee.**







**No. 3D00-2581.**  
**April 18, 2001.**

Customer sued rental storage facility, alleging a violation of various state and federal constitutional rights, intentional infliction of emotional distress, breach of contract, and failure to comply with statute providing for enforcement of liens on self-storage space. The Circuit Court, Dade County, [Stuart M. Simons](#), J., dismissed action. Customer appealed. The District Court of Appeal, Third District, held that claims of emotional distress and of violations of constitutional rights could be dismissed based on customer's failure to comply with rule governing pleadings and failure to allege elements of claims.

Affirmed in part and reversed in part.






West Headnotes

[1]  [KeyCite Citing References for this Headnote](#)

-  [307A](#) Pretrial Procedure
  -  [307AIII](#) Dismissal
    -  [307AIII\(B\)](#) Involuntary Dismissal
      -  [307AIII\(B\)6](#) Proceedings and Effect
        -  [307Ak693](#) Operation and Effect
          -  [307Ak694](#) k. Adjudication on Merits. [Most Cited Cases](#)






Dismissal of action or claim for failure of an adverse party to comply with the Rules of Civil Procedure or any order of the court operates as an adjudication on the merits. [West's F.S.A. RCP Rule 1.420\(b\)](#).

[2]  [KeyCite Citing References for this Headnote](#)

-  [307A](#) Pretrial Procedure
  -  [307AIII](#) Dismissal
    -  [307AIII\(B\)](#) Involuntary Dismissal
      -  [307AIII\(B\)5](#) Particular Actions or Subject Matter, Defects in Pleading
        -  [307Ak643](#) k. Contracts; Sales. [Most Cited Cases](#)

Claims of emotional distress and of constitutional violations could be dismissed based on plaintiff's failure to comply with rule requiring a short and plain statement of facts showing he was entitled to relief and failure to allege elements of claims. [West's F.S.A. RCP Rules 1.110\(b\), 1.420\(b\)](#).

[3]  [KeyCite Citing References for this Headnote](#)

-  [307A](#) Pretrial Procedure
  -  [307AIII](#) Dismissal
    -  [307AIII\(B\)](#) Involuntary Dismissal
      -  [307AIII\(B\)5](#) Particular Actions or Subject Matter, Defects in Pleading
        -  [307Ak643](#) k. Contracts; Sales. [Most Cited Cases](#)

Where pleadings, construed most liberally, briefly stated the facts and alleged the elements of a claim for breach of contract and/or the failure of storage facility to comply with statute providing for enforcement of liens on self-storage space, storage facility was not entitled to dismissal of claims based on failure to comply with rules. [West's F.S.A. § 83.806](#); [West's F.S.A. RCP Rules 1.110\(b\)](#), [1.420\(b\)](#).

**\*983** Anthony Eugene Cash, in proper person.



Walton, Lantaff, Schroeder, & Carson, and [Michael H. Galex](#), Miami, for appellee.

Before [SCHWARTZ](#), C.J., and [RAMIREZ](#), J., and [NESBITT](#), Senior Judge.


PER CURIAM.

Anthony Eugene Cash rented self-service storage space from Airport Mini-Storage but did not keep up the rental payments. Cash claims that at the time he rented the space he was informed of the possibility of some \$10 monthly late fee, however was not informed of any other provisions or contractual arrangements. Sometime thereafter, realizing he was late in his payments, Cash maintains that he attempted to partially pay the sum then owed, but was turned away. Airport Mini Storage thereafter apparently sold off Cash's possessions to pay the past due fees. Cash filed a complaint of sorts alleging a violation of various state and federal constitutional rights as well as the company's intentional infliction of emotional distress. Also, although far from a model of clarity, the complaint also asserted a breach of contract claim and a claim that **\*984** the storage facility had failed to act in compliance with [section 83.806 Florida Statutes \(1999\)](#), the statutory section providing for enforcement of liens on self-storage space.

The trial court dismissed Cash's complaint without prejudice, concluding that the pleading was little more than rambling and did not adequately state any cause of action. Thereafter, Cash filed another complaint which the trial court again concluded did not comply with [Florida Rule of Civil Procedure 1.110\(b\)](#). The court then dismissed the action in accordance with [Florida Rule of Civil Procedure 1.420\(b\)](#).

[1]  [2]  Under [Rule 1.110\(b\)](#), a complaint is required to contain a short and plain statement of the ultimate facts showing that the pleader is entitled to relief. [Rule 1.420\(b\)](#) states that any party may move for dismissal of an action or of any claim against him for failure of an adverse party to comply with the Rules or any order of the court. A dismissal under this rule operates as an adjudication on the merits. We affirm in part, and reverse in part the order under review. As to Cash's claims of emotional distress, violation of privacy, 4th Amendment, due process and equal protection rights, we affirm the dismissal of these claims. Cash failed to comply with [Rule 1.110\(b\)](#) and also failed to allege the elements of these claims. See [Clemente v. Horne, 707 So.2d 865, 866 \(Fla. 3d DCA 1998\)](#); see also [Davis v. Prudential Sec., Inc., 59 F.3d 1186, 1186 \(11th Cir.1995\)](#).

The Fifth district affirmed a dismissal based on a similar disjointed pleadings in [Dewitt v. Rossi, 559 So.2d 659 \(Fla. 5th DCA 1990\)](#). See [Barrett v. City of Margate, 743 So.2d 1160, 1163 \(Fla. 4th DCA 1999\)](#) (observing that notwithstanding the fundamental principle of allowing pro se litigants procedural latitude, a practice effected to ensure access to the courts for all citizens, pro se litigants are not immune from the rules of procedure).

[3]  Here, Cash's pleadings construed most liberally however do briefly state the facts and allege the elements of a claim for breach of contract and/or the failure of the facility to comply with [section 83.806](#). Accordingly we reverse the trial court's dismissal as to these claims. As to the balance of the order under review, the trial court's decision is affirmed.

Fla.App. 3 Dist.,2001.  
Cash v. Airport Mini-Storage  
782 So.2d 983, 26 Fla. L. Weekly D1024

**Supreme Court of Florida.**  
**Carolann D. KOZEL, Petitioner,**  
**v.**  
**D. Steven OSTENDORF, D.P.M., Respondent.**






**No. 80380.**  
**Oct. 28, 1993.**  
**As Clarified Jan. 13, 1994.**

Medical malpractice action was brought. The Circuit Court, Lee County, [James H. Seals, J.](#), dismissed complaint with prejudice. Plaintiff appealed. The District Court of Appeal, [McDonald](#), Associate Judge, [603 So.2d 602](#), affirmed. Plaintiff appealed. The Supreme Court, [McDonald, J.](#), held that, where attorney is responsible for procedural error, court should employ sanction less severe than dismissal with prejudice where it determines, upon consideration of certain enumerated factors, that such alternative is viable.

Decision quashed; remanded with instructions.






West Headnotes







[1]  [KeyCite Citing References for this Headnote](#)

-  [307A](#) Pretrial Procedure
  -  [307AIII](#) Dismissal
    -  [307AIII\(B\)](#) Involuntary Dismissal
      -  [307AIII\(B\)2](#) Grounds in General
        -  [307Ak551](#) k. In General. [Most Cited Cases](#)

Because dismissal is ultimate sanction of adversarial system, it should be reserved for those aggravating circumstances in which lesser sanction would fail to achieve just result.

[2]  [KeyCite Citing References for this Headnote](#)

-  [307A](#) Pretrial Procedure
  -  [307AIII](#) Dismissal
    -  [307AIII\(B\)](#) Involuntary Dismissal
      -  [307AIII\(B\)2](#) Grounds in General
        -  [307Ak551](#) k. In General. [Most Cited Cases](#)

-  [307A](#) Pretrial Procedure  [KeyCite Citing References for this Headnote](#)
  -  [307AIII](#) Dismissal
    -  [307AIII\(B\)](#) Involuntary Dismissal
      -  [307AIII\(B\)6](#) Proceedings and Effect
        -  [307Ak690](#) k. Dismissal with or Without Prejudice. [Most Cited Cases](#)

Where attorney is responsible for procedural error, court should employ sanction less severe than dismissal with prejudice, such as imposition on attorney of fine, public reprimand, or contempt order, where court determines, upon consideration of following factors, that such alternative is viable: (1) whether attorney's disobedience was willful, deliberate, or contumacious; (2) whether attorney was previously sanctioned; (3) whether client was personally involved in act of disobedience; (4) whether delay prejudiced opposing party; (5) whether attorney offered reasonable justification for noncompliance; and (6) whether delay created significant problems of judicial administration. [West's F.S.A.RCP Rules 1.010, 1.500\(b, c\)](#).

**\*817** [Kelley A. Finn](#) of Kelley Finn Law Offices, P.A., Miami, for petitioner.

[Gerald W. Pierce](#) of Henderson, Franklin, Starnes & Holt, P.A., Fort Myers, for respondent.


McDONALD, Justice.

We review [Kozel v. Ostendorf, 603 So.2d 602 \(Fla. 2d DCA 1992\)](#), which directly conflicts with [Clay v. City of Margate, 546 So.2d 434 \(Fla. 4th DCA\)](#), *review denied*, [553 So.2d 1164 \(Fla.1989\)](#). We have jurisdiction pursuant to [article V, section 3\(b\)\(3\) of the Florida Constitution](#). We quash *Kozel*.

Carolann Kozel filed a medical malpractice complaint against Steven Ostendorf on July 25, 1989 in the circuit court of Lee County. Ostendorf filed a motion to dismiss on the grounds that the complaint failed to state a cause of action and that Kozel failed to comply with [section 766.205, Florida Statutes \(1989\)](#). The court granted Ostendorf's motion to dismiss and granted Kozel twenty days to amend her complaint. By agreement of the parties, the time period to amend the complaint was extended another ten days. Kozel's attorney, Kelley A. Finn, did not file the complaint until July 23, 1990, over five months past the due date. On Ostendorf's motion the circuit court then dismissed the complaint with prejudice and the district court affirmed.


The district court properly recognized that the trial court has the discretionary power to dismiss a complaint if the plaintiff fails to timely file an amendment.<sup>FN1</sup> Although such broad power is vested in the trial court, it is not necessary or beneficial for that power to be exercised in all situations. We concur **\*818** with Judge Altenbernd's suggestion that the trial courts need a meaningful set of guidelines to assist them in their task of sanctioning parties and attorneys for acts of malfeasance and disobedience. [Kozel, 603 So.2d at 605](#) (Altenbernd, J., dissenting). Without such a framework, trial courts have no standard by which to judge the severity of the party's action or the type of sanction that should be imposed.

FN1. [New River Yachting, Inc. v. Bacchiocchi, 407 So.2d 607 \(Fla. 4th DCA 1981\)](#), *review denied*, [415 So.2d 1360 \(Fla.1982\)](#); [Neida's Boutique, Inc. v. Gabor and Co., 348 So.2d 1196 \(Fla. 3d DCA 1977\)](#), *cert. denied*, [366 So.2d 883 \(Fla.1978\)](#); [Reynolds v. Deep South Sports, Inc., 211 So.2d 37 \(Fla. 2d DCA 1968\)](#).

[1]  In the instant case, the trial court acted within the boundaries of the law. In our view, though, the court's decision to dismiss the case based solely on the attorney's neglect unduly punishes the litigant and espouses a policy that this Court does not wish to promote. The purpose of the Florida Rules of Civil Procedure is to encourage the orderly movement of litigation. [Fla.R.Civ.Pro. 1.010](#). This purpose usually can be accomplished by the imposition of a sanction that is less harsh than dismissal and that is directed toward the person responsible for the delayed filing of the complaint. *Clay*.

Dismissal "with prejudice" in effect disposes of the case, not for any dereliction on the part of the litigant, but on the part of his counsel. We are not unmindful of the rule that counsel is the litigant's agent and that his acts are the acts of the principal, but since the rule is primarily for the governance of counsel, dismissal "with prejudice" would in effect punish the litigant instead of his counsel.

[Beasley v. Girten, 61 So.2d 179, 181 \(Fla.1952\)](#). Because dismissal is the ultimate sanction in the adversarial system, it should be reserved for those aggravating circumstances in which a lesser sanction would fail to achieve a just result.

[2]  This Court is vitally concerned with the swift administration of justice at both the trial and appellate levels. In the interest of an efficient judicial system and in the interest of clients, it is essential that attorneys adhere to filing deadlines and other procedural requirements.<sup>FN2</sup> However, a fine, public reprimand, or contempt order may often be the appropriate sanction to impose on an attorney in those situations where the attorney, and not the client, is responsible for the error. To assist the trial court in determining whether dismissal with prejudice is

warranted, we have adopted the following set of factors set forth in large part by Judge Altenbernd: 1) whether the attorney's disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience; 2) whether the attorney has been previously sanctioned; 3) whether the client was personally involved in the act of disobedience; 4) whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion; 5) whether the attorney offered reasonable justification for noncompliance; and 6) whether the delay created significant problems of judicial administration. Upon consideration of these factors, if a sanction less severe than dismissal with prejudice appears to be a viable alternative, the trial court should employ such an alternative.

[FN2](#). According to [rule 1.500\(c\), Florida Rules of Civil Procedure](#), "[a] party may plead or otherwise defend at any time before default is entered." If a party against whom affirmative relief is sought has filed any paper in a civil action, the court cannot enter a default for failure to file an answer unless the defendant has been served with notice that a default may be entered. [Fla.R.Civ.Pro. 1.500\(b\)](#). However, when the circumstances involve the dismissal of the *plaintiff's* complaint, there are no similar notice requirements. The rules of civil procedure do not require the defendant to file a motion for default or the court to notify the plaintiff that an application for default is pending. Granted, the plaintiff is aware of the filing deadlines and is responsible for the action that she initiates. Nevertheless, dismissal is an unusually harsh sanction when neither the court nor the defendant is required to notify the plaintiff that dismissal is pending.

For the foregoing reasons, we quash the district court's decision, approve *Clay*, and remand the case with directions that the trial court be ordered to reconsider in light of the new factors established in this opinion.

It is so ordered.

BARKETT, C.J., and OVERTON, [SHAW](#), GRIMES, [KOGAN](#) and [HARDING](#), JJ., concur.

**District Court of Appeal of Florida, Third District.**  
**SER-NESTLER, INC., a Florida corporation, Appellant,**  
**v.**  
**GENERAL FINANCE LOAN COMPANY OF MIAMI NORTHWEST, a Florida corporation, and**  
**Dave and Emma Grace, Appellees.**

**No. 64-133.**  
**Sept. 15, 1964.**


Suit to recover on a promissory note executed by defendants, wherein default and final judgment were entered against defendants and writ of garnishment was directed to defendant husband's employer. From an amended final judgment of the Civil Court of Record for Dade County, Boyce F. Ezell, Jr., J., reducing the amount of final judgment against defendant garnishee entered on scire facias issued on judgment by default against garnishee from full amount of judgment against original defendants to amount paid by garnishee to original defendant after service of writ of garnishment, the garnishee appealed. The District Court of Appeal held that the judgment should be affirmed but only because judgment creditor did not question, but on the contrary conceded, the correctness of trial court's conclusion that rule, 31 F.S.A. Rules of Civil Procedure, rule 2.12(b), providing for entry of judgment by default against garnishee for full amount of judgment against original defendant, was unconstitutional, though trial court in fact had no authority to nullify rules promulgated by the Supreme Court of Florida.


Affirmed.


#### West Headnotes

[1]  [KeyCite Citing References for this Headnote](#)

 [30](#) Appeal and Error

 [30XVII](#) Determination and Disposition of Cause

 [30XVII\(B\)](#) Affirmance


 [30k1133](#) k. Insufficient Presentation of Case or Questions. [Most Cited Cases](#)  
(Formerly 30k133)


Amended final judgment reducing amount of final judgment against garnishee entered on judgment by default from full amount of judgment against original defendants to amount paid by garnishee to original defendant husband after service of writ of garnishment, which garnishee claimed were exempt under statute, would be affirmed, but only because judgment creditor did not question, but on the contrary conceded, correctness of trial court's conclusion that rule providing for entry of judgment by default against garnishee for full amount of judgment against original defendant is unconstitutional, without however approving such conclusion. 31 F.S.A. Rules of Civil Procedure, rule 2.12 and subd.(b); [F.S.A. § 222.11](#); [F.S.A.Const. art. 5, § 3](#).

[2]  [KeyCite Citing References for this Headnote](#)

 [106](#) Courts

 [106II](#) Establishment, Organization, and Procedure

 [106II\(F\)](#) Rules of Court and Conduct of Business


 [106k82](#) k. Modification, Amendment, Suspension, or Disregard of Rules. [Most Cited Cases](#)


Civil court of record had no authority to nullify as unconstitutional rule promulgated by Supreme Court of state providing for entry of judgment by default against garnishee for full amount of judgment against original defendant. 31 F.S.A. Rules of Civil Procedure, rule 2.12(b); [F.S.A.Const. art. 5, § 3](#).






[3]  [KeyCite Citing References for this Headnote](#)

 [106](#) Courts

 [106II](#) Establishment, Organization, and Procedure






 [106II\(F\)](#) Rules of Court and Conduct of Business

 [106k81](#) k. Making and Promulgation of Rules. [Most Cited Cases](#)

 [106 Courts](#)  [KeyCite Citing References for this Headnote](#)  
 [10611 Establishment, Organization, and Procedure](#)  
 [10611\(F\) Rules of Court and Conduct of Business](#)  
 [106k82 k. Modification, Amendment, Suspension, or Disregard of Rules.](#) [Most Cited Cases](#)

Supreme Court is vested with sole authority to promulgate, rescind and modify rules, which remain inviolate until changed by Supreme Court.

[4]  [KeyCite Citing References for this Headnote](#)

 [106 Courts](#)  
 [10611 Establishment, Organization, and Procedure](#)  
 [10611\(F\) Rules of Court and Conduct of Business](#)  
 [106k85 Operation and Effect of Rules](#)  
 [106k85\(2\) k. Construction and Application of Rules in General.](#) [Most Cited Cases](#)

Trial court has authority to construe rules promulgated by Supreme Court in applying them to given case, but such authority does not extend to nullification of such rules.

**\*231** Kaplan, Ser, Abrams & O'Malley and Richard A. Sicking, Miami, for appellant.

Ferer & English and William John Mason, Miami, for appellees.


Before BARKDULL, C. J., and CARROLL and HORTON, JJ.




PER CURIAM.

The appellee General Finance Loan Company sued the appellees Dave and Emma Grace in the Civil Court of Record of Dade County, to recover on a promissory note executed by the latter. Grace and his wife failed to answer the complaint and a default and final judgment were entered against them. Grace at that time was apparently employed by the appellant and a writ of garnishment was directed by the appellee General Finance Loan Company to the appellant to which writ the appellant failed to make answer or return. The trial judge then directed the issuance of a scire facias to the appellant who in turn made return to the scire facias contending (1) that the monies sought to be garnished were due the head of a family for personal services, and (2) that the garnishee was indebted to Grace for only \$20 up to the time of the service of the writ of garnishment. The appellee General Finance Loan Company then moved in accordance with Rule 2.12(b), Florida Rules of Civil Procedure, 31 F.S.A., for judgment against the garnishee and judgment in the full amount of the judgment against Grace was entered against the appellant garnishee. The appellant then filed a motion to set aside the default judgment and final judgment in garnishment contending that the sums due by it to Grace were for wages and were exempt under [§ 222.11, Fla.Stat.](#), F.S.A., since Grace was the head of a family and the monies due him were for personal services. In addition, it was urged that Rule 2.12, supra, was unconstitutional. Upon hearing these motions, the trial judge entered an amended final judgment in which he reduced the judgment against the appellant garnishee from the full amount rendered against Grace to \$480 and held that Rule 2.12(b), supra, was unconstitutional and in violation of [Article V, Section 3 of the Florida Constitution, F.S.A.](#) The reduction in the judgment was based upon the appellant's showing that it had paid Grace from June 27, 1963, up to and including August 23, 1963, the sum of \$480 as wages. The trial judge rejected the appellant's contention that as a garnishee it could urge the exemption of Grace under [§ 222.11](#), supra. This appeal is from the amended final judgment.



The appellant contends as it did in the trial court that the provisions of Rule 2.12 (b), supra, are unconstitutional. The appellee General Finance Loan Company concedes the invalidity of the rule.

[1]  We affirm the judgment appealed. However, we do so upon the basis that the appellee has not questioned, but on the contrary concedes, the correctness of the trial judge's conclusion that Rule 2.12(b), supra, is unconstitutional, and therefore the appellee is satisfied with the judgment against the appellant garnishee for \$480.

\*232 [2]  [3]  [4]  In affirming the judgment appealed, we should not be misunderstood as approving the trial judge's conclusion that Rule 2.12(b), supra, is unconstitutional for the reason that we are of the view that he was without authority to nullify a rule promulgated by the Supreme Court of this state. The Supreme Court is vested with the sole authority to promulgate, rescind and modify the rules, and until the rules are changed by the source of authority, they remain inviolate. This is not to say that a trial court is without authority to construe the rules in applying them to given cases, but this authority does not extend to nullification of the rules. See [Strong v. Clay, Fla.1951, 54 So.2d 193](#).

With the exception noted, the judgment appealed is affirmed.

Affirmed.

**Supreme Court of Florida.**  
**SER-NESTLER**  
**v.**  
**GENERAL FINANCE LOAN CO.**

**No. 33862.**  
**March 1965.**

Appeal dismissed without opinion. [167 So.2d 230](#).

Fla. 1965  
SER-NESTLER v. GENERAL FINANCE LOAN CO.  
174 So.2d 35

END OF DOCUMENT

**District Court of Appeal of Florida, Second District.**  
**STATE of Florida, Appellant,**  
**v.**  
**Vicky A. LYONS, Appellee.**

**No. 73-728.**  
**April 3, 1974.**




Criminal prosecution wherein the Circuit Court, Pinellas County, Clyde M. Kissinger, J., held unconstitutional criminal rule pertaining to motion to suppress evidence that State took

interlocutory appeal. The District Court of Appeal, Mann, C.J., held that the misapplication of settled constitutional doctrine did not amount to a construction of the Constitution, and Court of Appeals did not lack jurisdiction on theory that jurisdiction should be in the Supreme Court. The Court also held that defendant was required to make an initial showing of search's invalidity, whereupon burden of going forward would shift and remain with the State.

Vacated and remanded.

#### West Headnotes

[1]  [KeyCite Citing References for this Headnote](#)

-  [106](#) Courts
  -  [106VI](#) Courts of Appellate Jurisdiction
    -  [106VI\(B\)](#) Courts of Particular States
      -  [106k216](#) k. Florida. [Most Cited Cases](#)





A rule of criminal procedure is not a "state statute or a federal statute or treaty" so as to give the Supreme Court jurisdiction to review determination as to validity of the rule. 33 West's F.S.A. [Rules of Criminal Procedure, rule 3.190\(h\)\(3\)](#).

[2]  [KeyCite Citing References for this Headnote](#)

-  [106](#) Courts
  -  [106VI](#) Courts of Appellate Jurisdiction
    -  [106VI\(B\)](#) Courts of Particular States
      -  [106k216](#) k. Florida. [Most Cited Cases](#)


Trial court's misapplication of settled constitutional doctrine and ruling on constitutionality of rule of criminal procedure does not amount to a construction of the Constitution so as to give the Supreme Court jurisdiction to review the ruling. [West's F.S.A.Const. art. 5, § 3](#).

[3]  [KeyCite Citing References for this Headnote](#)

-  [106](#) Courts
  -  [106II](#) Establishment, Organization, and Procedure
    -  [106II\(F\)](#) Rules of Court and Conduct of Business
      -  [106k78](#) k. Power to Regulate Procedure. [Most Cited Cases](#)

Supreme Court has right to adopt a rule at variance from its own precedents. [West's F.S.A.Const. art. 5, §§ 2, 2\(a\), 3\(b\)\(3\)](#).

[4]  [KeyCite Citing References for this Headnote](#)

-  [106](#) Courts
  -  [106VI](#) Courts of Appellate Jurisdiction
    -  [106VI\(B\)](#) Courts of Particular States
      -  [106k216](#) k. Florida. [Most Cited Cases](#)

Even if rule of criminal procedure governing hearing on motion to suppress was in conflict with prior decision of the Supreme Court, Constitution did not provide ground for certiorari to the Supreme Court. [West's F.S.A.Const. art. 5, §§ 2, 2\(a\), 3\(b\)\(3\)](#).

[5]  [KeyCite Citing References for this Headnote](#)

 [110](#) Criminal Law

 [110XVII](#) Evidence

 [110XVII\(I\)](#) Competency in General

 [110k394](#) Evidence Wrongfully Obtained

 [110k394.5](#) Objections to Evidence

 [110k394.5\(4\)](#) k. Presumptions and Burden of Proof. [Most Cited Cases](#)


On motion to suppress evidence, defendant must make an initial showing of the search's invalidity, whereupon the burden of going forward shifts and remains with the State. [West's F.S.A.Const. art. 5, §§ 2, 2\(a\), 3\(b\)\(3\)](#); [Fed.Rules Crim.Proc. rule 41, 18 U.S.C.A.](#)

[6]  [KeyCite Citing References for this Headnote](#)

 [110](#) Criminal Law

 [110XVII](#) Evidence

 [110XVII\(L\)](#) Admissions

 [110k405](#) Admissions by Accused

 [110k406](#) In General

 [110k406\(4\)](#) k. Judicial Admissions. [Most Cited Cases](#)

Testimony given by a defendant at motion to suppress evidence is not admissible at trial on question of guilt or innocence. [U.S.C.A.Const. Amends. 4, 5](#).

**\*392** Robert L. Shevin, Atty. Gen., Tallahassee, and Charles Corces, Jr., Asst. Atty. Gen., Tampa, for appellant.


John A. Henninger, St. Petersburg, for appellee.

MANN, Chief Judge.

So far the trial judge has had no opportunity to find out what this case is all about. Rule 3.190(h)(3), 33 F.S.A., has been amended to read as follows:

'Hearing. Before hearing evidence, the court shall determine if the motion is legally sufficient. If it is not, the motion shall be denied. If the court hears the motion on its merits, the defendant shall present evidence supporting his position and the State may offer rebuttal evidence.'

The trial judge took this to mean that the burden of proof had been shifted to the defendant and held the rule unconstitutional. The State, which presumably appeared at the hearing with officers who had taken the time from other duties to testify concerning the allegedly invalid search, declined to play by the trial judge's rules and took this interlocutory appeal. We consider first a 'Motion for Transfer Due to Lack of Jurisdiction' filed after oral argument.

[1]  [2]  The first paragraph of the motion reads:

'Upon reading and examining the NOTICE OF RELIANCE FILED in this cause and received by the under signed on January 21, 1974, it has been discovered that when the constitutionality of a rule of criminal procedure is challenged, the jurisdiction is apparently in the Supreme Court of Florida, [State v. Lott \(286 So.2d 565\) \(FSC1973\)](#), filed December 5, 1973.'

The best evidence of the Supreme Court's jurisdiction is the [Florida Constitution, Article V, s 3, F.S.A.](#), which reads in part:



'The Supreme Court:

(1) Shall hear appeals from final judgments of trial courts imposing the death penalty and from orders of trial courts and decisions of district courts of appeal initially and directly passing on the validity of a state statute or a federal statute or treaty, or construing a provision of the state or federal constitution.

(3) May review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, that passes upon a question certified by a district court of appeal to be of great public interest, or that is in direct conflict with a decision of any district court of appeal or of the supreme court on the same question of law, and any interlocutory order passing upon a matter which upon final judgment would be directly appealable to the supreme court; and may issue writs of certiorari to commissions established by general law having statewide jurisdiction.'



Although not expressly stated, jurisdiction of the Supreme Court in *State v. Lott*, *Supra*, appeared to rest upon the trial court's construction of the equal protection clause. Certainly a rule of criminal procedure is not 'a state statute or a federal statute or treaty,' so we must assume that the trial court in *Lott* was 'construing a provision of the state or federal constitution.' There is a difference between Construing a \*393 constitutional provision and the Application of settled principle to the case at hand. [\[FN1\]](#) The question now before us is one on which there is an abundance of federal authority, none of which was inflicted on the trial judge or, for that matter, on this court. Consequently, because the trial court did not pass on the validity of a state statute or federal statute or treaty, we must consider whether the Misapplication of settled constitutional doctrine amounts to a construction of the constitution. We think it does not.

[FN1. \*Armstrong v. City of Tampa\*, Fla.1958, 106 So.2d 407; \*Carmazi v. Board of County Commissioners\*, Fla.1958, 104 So.2d 727; \*Milligan v. Wilson\*, Fla.1958, 104 So.2d 35; \*Rojas v. State\*, Fla.1973, 288 So.2d 234, 236; \*Ogle v. Pepin\*, Fla.1973, 273 So.2d 391.](#)

[\[3\]](#)  [\[4\]](#)  The second ground of the motion to transfer states:

'The undersigned further believes that the jurisdiction should be in the Supreme Court of Florida based upon [Article 5, Section 2, Constitution of the State of Florida](#), in that this cause is an interlocutory order passing upon a matter which upon final judgment would be directly appealable to the Supreme Court of Florida. It is the Appellee's contention that the portion of [RCrP 3.190\(h\)\(3\)](#) challenged in this cause is in direct conflict with [Earman v. State, 265 So.2d 695 \(FSC 1972\)](#), and therefore directly appealable to said Court.'

Even if the rule is in conflict with *Earman v. State*, the Supreme Court has a perfect right to adopt a rule at variance from its own precedents. It is given that right by [Article V, s 2\(a\) of the Florida Constitution](#), and even if the rule is in conflict with a prior decision of the Supreme Court, no ground for certiorari under [Fla.Const. Article V, s 3\(b\)\(3\)](#) appears. Consequently, we deny the motion to transfer due to lack of jurisdiction.

[\[5\]](#)  [\[6\]](#)  We think that the interpretation of Federal [Rule 41](#) is pertinent here. [\[FN2\]](#) 8A Moore, Federal Practice s 41.08(4) states:

[FN2. Federal Rule of Criminal Procedure 41\(f\)](#) provides that: 'A motion to suppress evidence may be made in the court of the district of trial as provided in Rule 12.' Rule 12(b)(4) provides: 'A motion before trial raising defenses or objections shall be determined before trial unless the

court orders that it be deferred for determination at the trial of the general issue. An issue of fact shall be tried by a jury if a jury trial is required under the Constitution or an act of Congress. All other issues of fact shall be determined by the court with or without a jury or on affidavits or in such other manner as the court may direct.' Despite the textual difference between the Florida and Federal Rules, we consider the federal court cases construing [Rule 41](#) as highly persuasive in interpreting the analogous Florida rule.

'The burden is on the moving party, i.e., the defendant, to prove that the search was invalid; however, if it is established that the search was made without a warrant, the burden shifts to the government to produce 'clear and convincing evidence' that the warrantless search meets constitutional requirements.'

Thus what is required of the defendant is an initial showing of the search's invalidity, whereupon the burden of going forward shifts to the state. [\[FN3\]](#) Two aspects of the rule would require, first of all, a pleading sufficient within itself to allege an unlawful search, and secondly, at the hearing, a Prima facie showing of invalidity. The Fifth Amendment question seems to have been resolved satisfactorily in the federal courts and, after referring the parties to Moore, Supra; 5 Orfield, Criminal Procedure Under the Federal Rules, s \*394 41:54; and 3 Wright, Federal Practice and Procedure, s 675, and emphasizing that the burden of proving the search to be a valid one remains upon the State once the initial showing is made by the defendant, we are confident that the trial judge will now proceed in this matter in accordance with the law. This will include Mr. Justice Harlan's opinion in [Simmons v. United States, 1968, 390 U.S. 377, 88 S.Ct. 967, 974, 19 L.Ed.2d 1247](#), especially at 390, where he states that petitioner 'contends that testimony given by a defendant to meet such requirements should not be admissible against him at trial on the question of guilt or innocence.' We agree. Thus, Fifth Amendment rights are protected by excluding evidence given in support of Fourth Amendment claims.

[FN3](#). We refrain from deciding what Degree of proof is required in a suppression hearing, but note that the 'clear and convincing' standard cited in Moore has been abandoned by the federal courts. [United States v. Matlock, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 \(1974\)](#); See also [Lego v. Twomey, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 \(1972\)](#); Accord [McDole v. State, Fla.1973, 283 So.2d 553](#), holding a preponderance of evidence sufficient to establish the voluntariness of a confession.

Vacated and remanded.

McNULTY and GRIMES, JJ., concur.

**District Court of Appeal of Florida,  
Fourth District.**

**Joshua A. MUSS, as Trustee under Land Trust Agreement dated March 16, 1990,  
Appellant,**

**v.**

**LENNAR FLORIDA PARTNERS I, L.P., a Delaware limited partnership, Appellee.**

**No. 95-1181.**

**April 10, 1996.**

**Rehearing Denied May 30, 1996.**






Partnership brought complaint for summary foreclosure of interest in property. Trustee of land trust filed verified answer, swearing only that facts were "true to the best of his knowledge and

belief." The Fifteenth Judicial Circuit Court, Palm Beach County, Moses Baker, J., entered judgment for partnership, and trustee appealed. The District Court of Appeal held that answer to foreclosure complaint was insufficient.

Affirmed.






#### West Headnotes

[1]  [KeyCite Citing References for this Headnote](#)

-  [266](#) Mortgages
  -  [266X](#) Foreclosure by Action
    -  [266X\(F\)](#) Pleading
      -  [266k454](#) Plea, Answer, or Affidavit of Defense
        -  [266k454\(1\)](#) k. In General. [Most Cited Cases](#)

Land trust trustee's verified answer to foreclosure complaint was insufficient to preclude entry of final judgment of foreclosure because trustee swore that facts were "true to best of his knowledge and belief," rather than true. [West's F.S.A. §§ 92.525\(2\), \(4\)\(b, c\), 702.10\(1\)\(a-c\)](#).

[2]  [KeyCite Citing References for this Headnote](#)

-  [266](#) Mortgages
  -  [266X](#) Foreclosure by Action
    -  [266X\(F\)](#) Pleading
      -  [266k454](#) Plea, Answer, or Affidavit of Defense
        -  [266k454\(1\)](#) k. In General. [Most Cited Cases](#)


Foreclosure statute's authorization of filing of presumably unverified defenses by motion refers to only motions attacking matters appearing on face of complaint. [West's F.S.A. §§ 92.525, 702.10](#).

**\*85** Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Moses Baker, Judge. L.T. Case No. CL 92-7176 AD.  
Joshua A. Muss, West Palm Beach, pro se.

[James W. Beasley, Jr.](#) and [David Leacock](#) of Tew & Beasley, West Palm Beach, for appellee.


PER CURIAM.

We affirm an order granting final judgment of foreclosure under [section 702.10, Florida Statutes \(1993\)](#). Although several grounds have been asserted as a basis for affirming the lower court's order, we address only one, as it is dispositive of the issue on appeal. [Green v. First American Bank and Trust, 511 So.2d 569 \(Fla. 4th DCA 1987\)](#), *rev. denied*, [520 So.2d 584 \(Fla.1988\)](#).

[1]  In December 1993, Lennar Florida Partners I, as authorized by [section 702.10](#), sought a summary foreclosure of its interest in a parcel of land known as the "Smith Dairy Property." Pursuant to the procedure set forth in [section 702.10\(1\)\(a\)](#), an order to show cause was served on Appellant and a hearing on the order set. In response, as authorized by the statute, Appellant filed a "verified" answer, affirmative defenses, and a counterclaim. However, rather than stating under oath that the facts contained therein were true, Appellant swore only that the facts were "true to the best of his knowledge and belief."

[Section 92.525\(4\)\(c\), Florida Statutes \(1993\)](#) states that “[t]he requirement that a document be verified means that the document must be signed or executed by a person and that the person must state under oath or affirm that the facts or matters stated or recited in the document are true, or words of that import or effect.” Further, [section 92.525\(2\)](#) authorizes verification solely on information and belief only where “permitted by law.” See [State, Department of Highway Safety & Motor Vehicles v. Padilla, 629 So.2d 180 \(Fla. 3d DCA 1993\)](#) (verification on information or belief permissible under [section 322.2615\(2\), Florida Statutes \(1991\)](#), where statute authorized affidavit stating “officer’s grounds for belief” that person arrested had violated section 316.193), *rev. denied*, [639 So.2d 980 \(Fla.1994\)](#). The term document includes pleadings. [§ 92.525\(4\)\(b\) \(1993\)](#).

Reviewing [section 702.10](#) in light of the requirements in [section 92.525](#), we find no basis for permitting verification under [section 702.10](#) to be made solely on “information or belief.” As such, Appellant’s verified answer was insufficient to preclude entry of a final judgment of foreclosure as provided for in [sections 702.10\(1\)\(b\) and \(1\)\(c\)](#).

[2]  We have considered Appellant’s contention that we need not be concerned with [section 92.525](#) in light of [section 702.10](#)’s authorization of the filing of presumably unverified defenses by motion. However, we read this portion of the statute to reference only motions attacking matters appearing on the face of the complaint. We recognize that strict interpretation of this statute might lead to inequitable results in some conceivable circumstances such as those where information needed to prove allegations is exclusively within the knowledge or possession of a party’s opponent or a third party. Nevertheless, the statute is clear and we are bound by its provisions.

STONE, [POLEN](#) and [KLEIN](#), JJ., concur.

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