

Part XI

ACTIONS TO INTERPRET RIGHTS AND RESPONSIBILITIES

Chapter 49

Declaratory judgment

- § 49:1 Elements of the prima facie case of declaratory judgment
- § 49:2 Defenses to a claim of declaratory judgment
- § 49:3 Research assistance for declaratory judgment
- § 49:4 Jury verdicts involving declaratory judgment
- § 49:5 Sample jury instructions for a declaratory judgment case

KeyCite®: Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

§ 49:1 Elements of the prima facie case of declaratory judgment

Fla. Stat. § 86.021 creates a right to a declaratory judgment when the elements of such a claim are pled and proven. The purpose of a declaratory judgment is to afford the parties relief from their insecurity and uncertainty with respect to their rights, status, and other equitable or legal relations.¹

The necessary minimum elements of the cause of action of declaratory judgment read as follows:

(1) *there is a bona fide, actual, present practical need for the declaration;*

AND

(2) *the declaration deals with a present, ascertained or ascertainable state of facts or present controversy as to a state of*

[Section 49:1]

¹**Purpose of declaratory judgment.** Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles, 680 So. 2d 400 (Fla. 1996).

facts:

AND

(3) some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts;

AND

(4) there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law;

AND

(5) the antagonistic and adverse interests are all before the court by proper process or class representation;

AND

(6) relief sought is not merely giving of legal advice by the courts or the answer to questions propounded from curiosity.²

Regarding the first element, the plaintiff/petitioner must show need for the declaration that is bona fide, actual, present, and practical.³ For example, a tax collector's interest was sufficient to create a bona fide and a practical need for a declaration pursuant to Declaratory Judgment Act when the tax collector could not have performed her duties in compliance with state law if the school board attempted to levy taxes pursuant to its constitutional authority rather than seeking a declaration of the invalidity of the challenged statutes, and it was necessary for the trial court to order the tax collector to collect and remit certain amount based on the court's declaration in order to grant the relief requested by the school board.⁴

Regarding the second element, the petition or complaint for a declaratory judgment must deal with "a present, ascertained or ascertainable state of facts or present controversy as to a state of facts."⁵ A typical example is whether a policy of insurance provides coverage.⁶

Regarding the third element, the plaintiff/petitioner must show some immunity, power, privilege or right of his is dependent

²Elements of action for declaratory judgment. *Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles*, 680 So. 2d 400 (Fla. 1996); *City of Hollywood v. Florida Power & Light Co.*, 624 So. 2d 385 (Fla. 4th DCA 1993).

³Bona fide need. *Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles*, 680 So. 2d 400 (Fla. 1996).

⁴Bona fide — example. *State, Dept. of Educ. v. Glazier*, 624 So. 2d 1069 (Fla. 2d DCA 1992), reversed on other grounds, 624 So. 2d 304 (Fla. 1992).

⁵Elements of action for declaratory judgment. *Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles*, 680 So. 2d 400 (Fla. 1996); *City of Hollywood v. Florida Power & Light Co.*, 624 So. 2d 385 (Fla. 4th DCA 1993).

⁶Coverage. *Britannic Underwriters, Inc. v. Central Jersey Investments, Inc.*, 632 So.2d 138 (Fla. 4th DCA 1994).

facts;

AND

(3) *some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts;*

AND

(4) *there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law;*

AND

(5) *the antagonistic and adverse interests are all before the court by proper process or class representation;*

AND

(6) *relief sought is not merely giving of legal advice by the courts or the answer to questions propounded from curiosity.²*

Regarding the first element, the plaintiff/petitioner must show need for the declaration that is bona fide, actual, present, and practical.³ For example, a tax collector's interest was sufficient to create a bona fide and a practical need for a declaration pursuant to Declaratory Judgment Act when the tax collector could not have performed her duties in compliance with state law if the school board attempted to levy taxes pursuant to its constitutional authority rather than seeking a declaration of the invalidity of the challenged statutes, and it was necessary for the trial court to order the tax collector to collect and remit certain amount based on the court's declaration in order to grant the relief requested by the school board.⁴

Regarding the second element, the petition or complaint for a declaratory judgment must deal with "a present, ascertained or ascertainable state of facts or present controversy as to a state of facts."⁵ A typical example is whether a policy of insurance provides coverage.⁶

Regarding the third element, the plaintiff/petitioner must show some immunity, power, privilege or right of his is dependent

²**Elements of action for declaratory judgment.** Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles, 680 So. 2d 400 (Fla. 1996). City of Hollywood v. Florida Power & Light Co., 624 So. 2d 285 (Fla. 4th DCA 1993).

³**Bona fide need.** Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles, 680 So. 2d 400 (Fla. 1996).

⁴**Bona fide — example.** State, Dept. of Educ. v. Glasser, 622 So.2d 1003 (Fla. 2d DCA 1992), reversed on other grounds, 622 So.2d 944 (Fla. 1992).

⁵**Elements of action for declaratory judgment.** Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles, 680 So. 2d 400 (Fla. 1996). City of Hollywood v. Florida Power & Light Co., 624 So. 2d 285 (Fla. 4th DCA 1993).

⁶**Coverage.** Britamco Underwriters, Inc. v. Central Jersey Investments, Inc., 632 So.2d 138 (Fla. 4th DCA 1994).

upon the facts or the law applicable to the facts; or stated somewhat differently, that the plaintiff/petitioner has ascertainable rights.⁷ This is best achieved when a written instrument is shown to affect some immunity, power, privilege or right of the plaintiff/petitioner, such as questions arising out of either the construction of, or the validity of, a written statute, contract or instrument.⁸ In order for declaratory judgment action to lie, there must be some doubt as to existence or nonexistence of some right, status, immunity, power or privilege, which may be at stake under a statute, deed, will, contract, or other article, memorandum or instrument in writing.⁹ Florida's Declaratory Judgment Act is available also to determine the rights of parties under an oral contract.¹⁰ However, such an oral contract may not be the subject of a declaratory judgment when it cannot be shown that the plaintiff/petitioner has ascertainable rights under the oral agreement, such as when there was a material dispute as to terms, performance, breach, and general relief available pursuant to the alleged agreement.¹¹

Regarding the fourth element, the plaintiff/petitioner must show that he has standing to bring the suit, which means he must show that he is someone with an actual, present, adverse and antagonistic interest in the subject matter.¹²

Regarding the fifth element, the plaintiff/petitioner satisfies his burden of bringing the antagonistic and adverse interests before the court by proper process or class representation by bringing before the court a true adversary who will fight against the plaintiff/petitioner and against whom litigation is unavoidable.¹³

Regarding the sixth element, the plaintiff/petitioner satisfies this element by showing that the relief he seeks is not merely giving of legal advice by the courts or the answer to questions

⁷**Ascertainable rights.** Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles, 680 So. 2d 400 (Fla. 1996).

⁸**Writing requirement.** Johnson v. Atlantic Nat. Ins. Co., 155 So.2d 886 (Fla. 3d DCA 1963).

⁹**Writing required for declaratory judgment.** Columbia Cas. Co. v. Zimmerman, 62 So.2d 338 (1952). Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles, 680 So. 2d 400 (Fla. 1996).

¹⁰**Oral contract.** Sorrentino v. Barwick, 412 So.2d 55 (Fla. 4th DCA 1982).

¹¹**Oral contract is an action at law, not equity.** Coral Gates Properties v. Hodes, 59 So.2d 630 (Fla. 1952).

¹²**Elements of action for declaratory judgment.** Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles, 680 So. 2d 400 (Fla. 1996).

¹³**Elements of action for declaratory judgment.** Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles, 680 So. 2d 400 (Fla. 1996). X Corp. v. Y Person, 622 So.2d 1098 (Fla. 2d DCA 1993).

propounded from curiosity.¹⁴ The dispute must be actual, not theoretical.¹⁵

In Florida, the right to a declaratory judgment arises out Fla. Stat. ch. 86 which provides in relevant part:

Fla. Stat. sec. 86.011 Jurisdiction of trial court.—

The circuit and county courts have jurisdiction within their respective jurisdictional amounts to declare rights, status, and other equitable or legal relations whether or not further relief is or could be claimed. No action or procedure is open to objection on the ground that a declaratory judgment is demanded. The court's declaration may be either affirmative or negative in form and effect and such declaration has the force and effect of a final judgment. The court may render declaratory judgments on the existence, or nonexistence:

(1) *Of any immunity, power, privilege, or right; or*

(2) *Of any fact upon which the existence or nonexistence of such immunity, power, privilege, or right does or may depend, whether such immunity, power, privilege, or right now exists or will arise in the future. Any person seeking a declaratory judgment may also demand additional, alternative, coercive, subsequent, or supplemental relief in the same action.*

History.—s. 1, ch. 21820, 1943; s. 2, ch. 29737, 1955; s. 38, ch. 67-254; s. 3, ch. 90-269.

Note.—Former s. 87.01.

Fla. Stat. sec. 86.021 Power to construe.—

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.

History.—s. 2, ch. 21820, 1943; s. 38, ch. 67-254; s. 458, ch. 95-147.

Note.—Former s. 87.02.

Fla. Stat. sec. 86.031 Before breach.—

¹⁴**Elements of action for declaratory judgment.** Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles, 680 So. 2d 400 (Fla. 1996). City of Hollywood v. Florida Power & Light Co., 624 So. 2d 285 (Fla. 4th DCA 1993).

¹⁵**Actual dispute.** Florida Society of Ophthalmology v. State, Dept. of Professional Regulation, 532 So.2d 1278 (Fla. 1st DCA 1988).

A contract may be construed either before or after there has been a breach of it.

History.—s. 3, ch. 21820, 1943; s. 38, ch. 67-254.

Note.—Former s. 87.03.

Fla. Stat. sec. 86.041 *Actions by executors, administrators, trustees, etc.—*

Any person interested as or through an executor, administrator, trustee, guardian, or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust, a guardianship, or of the estate of a decedent, an infant, a mental incompetent, or insolvent may have a declaration of rights or equitable or legal relations in respect thereto:

(1) To ascertain any class of creditors, devisees, legatees, heirs, next of kin, or others; or

(2) To direct the executor, administrator, or trustee to refrain from doing any particular act in his or her fiduciary capacity; or

(3) To determine any question arising in the administration of the guardianship, estate, or trust, including questions of construction of wills and other writings.

For the purpose of this section, a "mental incompetent" is one who, because of mental illness, mental retardation, senility, excessive use of drugs or alcohol, or other mental incapacity, is incapable of either managing his or her property or caring for himself or herself, or both.

History.—s. 4, ch. 21820, 1943; s. 38, ch. 67-254; s. 1, ch. 88-33; s. 459, ch. 95-147.

Note.—Former s. 87.04.

Fla. Stat. sec. 86.051 *Enumeration not exclusive.—*

The enumeration in ss. 86.021, 86.031 and 86.041 does not limit or restrict the exercise of the general powers conferred in s. 86.011 in any action where declaratory relief is sought. Any declaratory judgment rendered pursuant to this chapter may be rendered by way of anticipation with respect to any act not yet done or any event which has not yet happened, and in such case the judgment shall have the same binding effect with respect to that future act or event, and the rights or liability to arise therefrom, as if that act or event had already been done or had already happened before the judgment was rendered.

History.—s. 5, ch. 21820, 1943; s. 38, ch. 67-254.

Note.—Former s. 87.05.

Fla. Stat. sec. 86.061 *Supplemental relief.—*

Further relief based on a declaratory judgment may be granted when necessary or proper. The application therefor shall be by motion to the court having jurisdiction to grant

adverse party whose rights have been adjudicated by the declaratory judgment to show cause on reasonable notice, why further relief should not be granted forthwith.

History.—s. 7, ch. 21820, 1943; s. 38, ch. 67-254.

Note.—Former s. 87.07.

Fla. Stat. sec. 86.071 Jury trials.—

When an action under this chapter concerns the determination of an issue of fact, the issue may be tried as issues of fact are tried in other civil actions in the court in which the proceeding is pending. To settle questions of fact necessary to be determined before judgment can be rendered, the court may direct their submission to a jury. When a declaration of right or the granting of further relief based thereon concerns the determination of issues of fact triable by a jury, the issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict is required or not. Neither this section nor any other section of this chapter shall be construed as requiring a jury to determine issues of fact in chancery actions.

History.—s. 8, ch. 21820, 1943; s. 38, ch. 67-254.

Note.—Former s. 87.08.

Fla. Stat. sec. 86.081 Costs.—

The court may award costs as are equitable.

History.—s. 9, ch. 21820, 1943; s. 38, ch. 67-254.

Note.—Former s. 87.09.

Fla. Stat. sec. 86.091 Parties.—

When declaratory relief is sought, all persons may be made parties who have or claim any interest which would be affected by the declaration. No declaration shall prejudice the rights of persons not parties to the proceedings. In any proceeding concerning the validity of a county or municipal charter, ordinance, or franchise, such county or municipality shall be made a party and shall be entitled to be heard. If the statute, charter, ordinance, or franchise is alleged to be unconstitutional, the Attorney General or the state attorney of the judicial circuit in which the action is pending shall be served with a copy of the complaint and be entitled to be heard.

History.—s. 10, ch. 21820, 1943; s. 1, ch. 59-440; s. 38, ch. 67-254.

Note.—Former s. 87.10.

Fla. Stat. sec. 86.101 Construction of law.—

This chapter is declared to be substantive and remedial. Its purpose is to settle and to afford relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations and is to be liberally administered and construed.

History.—s. 11, ch. 21820, 1943; s. 38, ch. 67-254.

Note.—Former s. 87.11.

Fla. Stat. sec. 86.111 *Existence of another adequate remedy; effect.*—

The existence of another adequate remedy does not preclude a judgment for declaratory relief. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar. The court has power to give as full and complete equitable relief as it would have had if such proceeding had been instituted as an action in chancery.

History.—s. 12, ch. 21820, 1943; s. 2, ch. 29737, 1955; s. 38, ch. 67-254.

Note.—Former s. 87.12.

§ 49:2 Defenses to a claim of declaratory judgment

A party may prevail on a cause of action only by pleading and proving all of the requisite elements of the civil action.¹ This is of course true for a claim of declaratory judgment, and therefore, one defense is the assertion that the plaintiff failed to properly plead and prove the elements of this cause of action as enumerated in the previous section.

The statute of limitations for a claim of declaratory judgment is four years.² The limitations period begins to run when the last element constituting the cause of action occurs.³ “A defense based upon the statute of limitations is also normally an affirmative defense which should be raised in an answer. This defense, however, may be asserted in a motion to dismiss under Florida Rule of Civil Procedure 1.140(b) if the defense appears on the face of a prior pleading.”⁴

GENERAL DEFENSES AVAILABLE UNDER THE FLORIDA RULES OF CIVIL PROCEDURE:

As with any cause of action, it is wise to consider whether any of the following affirmative defenses could be relevant to a defense against a declaratory judgment claim, because pursuant to Fla. R. Civ. P. 1.110, the following must be set forth affirmatively in the answer: accord and satisfaction; arbitration and award; assumption of risk; contributory negligence; discharge in bankruptcy; duress; estoppel; failure of consideration; fraud; illegality;

[Section 49:2]

¹**Omission of element is fatal to claim.** See, e.g., *Doyle v. Flex*, 210 So. 2d 493, 494–95 (Fla. 4th DCA 1968).

²**Limitations.** F.S.A. § 95.11(3)(p).

³**Commencement of limitations.** Fla. Stat. § 95.031(1).

⁴**Limitations — pleading requirements.** See *Pontier v. Wolfson*, 637 So. 2d 39 (Fla. 2d DCA 1994) (citing Fla. Rule of Civil Procedure 1.110(d) and *Hofer v. Ross*, 481 So. 2d 939 (Fla. 2d DCA 1985)).

injury by fellow servant; laches; license; payment; release; res judicata; statute of frauds; statute of limitations; waiver; and any other matter constituting an avoidance or affirmative defense.⁵ Of these 20 defenses, perhaps the following may be most likely to be applicable to a claim for declaratory judgment:

Accord and satisfaction.⁶ "While the rule permits a liberal construction of pleas of accord and satisfaction, the necessary legal elements requisite to such defense should be" pled and proven by the defendant.⁷ Florida law provides that an accord and satisfaction is a new agreement between two parties, a debtor and creditor, which results when the debtor tenders to the creditor and the creditor accepts and negotiates in full satisfaction and discharge of a prior disputed debt an amount owed to the creditor by the debtor.⁸ An elementary principle underlying this doctrine requires that there be a dispute as to the amount originally owed, and that the compromise or settlement be different from that amount.⁹ An accord and satisfaction results as a matter of law when the creditor accepts payment tendered only on the express condition that its receipt is to be considered a full or complete satisfaction of the amount originally in dispute.¹⁰ Merely pleading or proving a payment may not adequately plead or prove an accord and satisfaction, in part because "[t]here is a permissible inference against the pleader that the amount paid was less than the sum demanded . . ."¹¹ For example, a document stating that the parties had effected a complete settlement of all business transactions between them, but not disclosing the nature of the settlement nor that money or anything of value was

⁵Defenses required to appear in answer to complaint. See Fla. R. Civ. P. 1.110(d).

⁶Pleading accord and satisfaction as affirmative defense. See Fla. R. Civ. P. 1.110(d).

⁷Defendant's burden. *Sapp v. Atlantic National Bank of Jacksonville*, 105 Fla. 507, 141 So. 605 (Fla. 1932).

⁸Elements of accord and satisfaction defense. *Burke Co. v. Hilton Development Co.*, 802 F.Supp. 434 (N.D.Fla., 1992) (citing *Republic Funding Corp. of Florida v. Juarez*, 563 So. 2d 145, 146-47 (Fla. 5th DCA 1990) and *Jacksonville Electric Authority v. Draper's Egg and Poultry Co.*, 557 So. 2d 1357, 1358-59 (Fla. 1990)).

⁹Principle underlying accord and satisfaction. *Jacksonville Electric Authority v. Draper's Egg and Poultry Co.*, 557 So. 2d 1357, 1359 (Fla. 1990).

¹⁰How partial payment may create accord and satisfaction. *Republic Funding Corp. of Florida v. Juarez*, 563 So. 2d 145, 147 (Fla. 5th DCA 1990); *W.C. Murphy Architect v. W.P. Austin Construction Corp.*, 547 So. 2d 302, 303 (Fla. 3d DCA 1989); *Hannah v. James A. Ryder Corp.*, 380 So. 2d 507, 509-10 (Fla. 3d DCA 1980).

¹¹Presumption against partial payment creating accord and satisfaction. *Sapp v. Atlantic Nat. Bank of Jacksonville*, 105 Fla. 507, 141 So. 605 (Fla. 1932).

paid in satisfaction of claim, was held not to support a plea of accord and satisfaction.¹²

Arbitration and award.¹³ If the defendant fails to demand arbitration and instead answers the complaint, the defendant waives his or her right to arbitration, even if his or her answer asserts arbitration as an affirmative defense.¹⁴ "By agreeing to arbitrate, a party does not give up substantive rights afforded by statute or common law. The party only agrees to submit the dispute to 'resolution in an arbitral, rather than a judicial forum.'"¹⁵ If the parties execute an arbitration agreement in a transaction involving interstate commerce, the Federal Arbitration Act, 9 U.S.C.A. §§ 1 et seq., is implicated.¹⁶ Otherwise, the parties may specify the procedures of the Florida Arbitration Code as being applicable to their transaction.¹⁷

It is noteworthy that Florida's Declaratory Judgments Act does

¹²**Accord and satisfaction — example of failed attempt.** *Sapp v. Atlantic Nat. Bank of Jacksonville*, 105 Fla. 507, 141 So. 605 (Fla. 1932).

¹³**Pleading arbitration as affirmative defense.** See Fla. R. Civ. P. 1.110(d).

¹⁴**Arbitration is waived by active participation in a civil suit.** See *Bared and Co., Inc. v. Specialty Maintenance and Const., Inc.*, 610 So. 2d 1 (Fla. 2d DCA 1992) which reads:

'A party's contractual right to arbitration may be waived by active participation in a lawsuit or by taking action inconsistent with that right . . . A showing of prejudice [to the other party] is not required if waiver is based upon inconsistent acts.' *Finn v. Prudential-Bache Securities, Inc.*, 523 So. 2d 617, 618, 619-20 (Fla. 4th DCA 1988), as quoted in *State Farm Fire & Casualty Co. v. Kaplan*, 596 So. 2d 101 (Fla. 2d DCA 1992). *SMCI and National Fire* originally answered appellants' cross-claim without demanding arbitration and thus waived any right to arbitration. See *Hansen v. Dean Witter Reynolds, Inc.*, 408 So. 2d 658 (Fla. 3d DCA 1981); *King v. Thompson & McKinnon, Auchincloss Kohlmeyer, Inc.*, 352 So. 2d 1235 (Fla. 4th DCA 1977). Contrary to appellees' argument, the fact that *SMCI and National Fire* subsequently filed an amended answer raising their right to arbitration as an affirmative defense, coupled with a separate demand for arbitration, is not determinative. It was not the substance of the initial answer that resulted in the waiver but the fact that *SMCI and National Fire* answered rather than demanding arbitration. As in *Hansen*, 'by answering the complaint without demanding arbitration, [appellants] waived their rights . . . even though they asserted [appellees'] failure to arbitrate as an affirmative defense.' 408 So. 2d at 659.

¹⁵**Effect of agreement to arbitrate.** *Hialeah Automotive, LLC v. Basulto*, 22 So.3d 586 (Fla. 3d DCA 2009) (quoting from *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985)).

¹⁶**Federal Arbitration Act, 9 U.S.C. §§ 1 et seq., applies in Florida to transactions involving interstate commerce.** See *Volt Info. Scis., Inc. v. Bd. of Trs.*, 489 U.S. 468, 474-79, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989); *Preston v. Ferrer*, 552 U.S. 346, 128 S.Ct. 978, 169 L.Ed.2d 917 (2008); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006); and *Powertel, Inc. v. Bexley*, 743 So. 2d 570, 573 (Fla. 1st DCA 1999).

¹⁷**Florida Arbitration Code.** Fla. Stat. ch. 682.

not forbid its use to determine questions arising out of an arbitration clause.¹⁸

Estoppel.¹⁹ The “elements of estoppel must be proven by clear and convincing evidence.”²⁰ Collateral estoppel “is a judicial doctrine which in general terms prevents identical parties from relitigating issues that have previously been decided between them.”²¹ “By definition (and by usage throughout the centuries), equitable estoppel ‘estops’ or bars a party from asserting something (e.g., a fact, a rule of law, or a defense) that he or she otherwise would be entitled to assert.”²² To state a cause of action for promissory estoppel, a plaintiff must allege facts that, if taken as true, would show (1) that the plaintiff detrimentally relied on a promise made by the defendant, (2) that the defendant reasonably should have expected the promise to induce reliance in the form of action or forbearance on the part of the plaintiff or a third person, and (3) that injustice can be avoided only by enforcement of the promise against the defendant.²³

Failure of consideration.²⁴ It is a fundamental principle of contract law that a promise must be supported by consideration in order for the contract to be enforceable.²⁵ Likewise, a modification of a contract must be supported with consideration.²⁶ In a contract where the parties exchange promises of performance, “[i]f either of those promises is illusory or unenforceable then

¹⁸**Arbitration clause may be subject of declaratory judgment action.** *Bell v. Associated Independents, Inc.*, 143 So.2d 904 (Fla. 2d DCA 1962).

¹⁹**Pleading estoppel as affirmative defense.** See Fla. R. Civ. P. 1.110(d).

²⁰**Burden of proof of elements of estoppel.** *Castro v. East Pass Enterprises, Inc.*, 881 So. 2d 699 (Fla. 1st DCA 2004) (citing *Watson Clinic, LLP v. Verzosa*, 816 So. 2d 832, 834 (Fla. 2d DCA 2002)).

²¹**Defining collateral estoppel.** *Mobil Oil Corp. v. Shevin*, 354 So. 2d 372, 374 (Fla. 1977). See also *State, Agency for Health Care Admin. v. MIED, Inc.*, 869 So. 2d 13 (Fla. 1st DCA 2004).

²²**Defining equitable estoppel.** *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1077 (Fla. 2001).

²³**Elements of promissory estoppel.** *W.R. Townsend Contracting, Inc. v. Jensen Civil Const., Inc.*, 728 So. 2d 297 (Fla. 1st DCA 1999) (citing *W.R. Grace & Co. v. Geodata Services, Inc.*, 547 So. 2d 919, 924 (Fla. 1989)).

²⁴**Pleading failure of consideration as affirmative defense.** See Fla. R. Civ. P. 1.110(d).

²⁵**Enforceable contract requires valid consideration.** *Office Pavilion South Florida, Inc. v. ASAL Products, Inc.*, 849 So. 2d 367 (Fla. 4th DCA 2003) (citing Restatement (Second) of Contracts § 17 (1981) (“[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.”)).

²⁶**Enforceable change in contract terms requires valid consideration.** *Wilson v. Odom*, 215 So. 2d 37, 38 (Fla. 1st DCA 1968).

there is no consideration for the other promise."²⁷ If, however, "one of the promises appears on its face to be so insubstantial as to impose no obligation at all on the promisor — who says, in effect, 'I will if I want to' — then that promise may be characterized as an 'illusory' promise . . . An illusory promise does not constitute consideration for the other promise, and thus the contract is unenforceable against either party."²⁸

Illegality.²⁹ Florida courts indulge the presumption that all contracts are lawful and if illegality exists it must be alleged and proven.³⁰ In any action brought in which it is necessary, or attempted, to prove an illegal contract, in order to maintain the action, or to sustain the particular recovery sought, the courts will not enforce it, nor will they enforce the alleged rights directly springing from such a contract, even after the contract has been performed.³¹ Illegality will serve, therefore, as a good defense here if it can be shown that the claim arises out of an illegal contract, but will not be a useful defense if the claim is separate from the illegal contract. For example, a Florida appellate court once held:

if a contract is entered into for the sale of illegal drugs and the buyer takes the drugs without paying for them, courts will not enforce the contract by requiring the buyer to return the drugs or pay for them. If, however, during the transaction the buyer absconds with the car used by the seller to transport the drugs and refuses to return it, an action for conversion should not be barred.³²

Laches.³³ The defense of laches is appropriate when the plaintiff's undue delay causes the defendant undue prejudice.³⁴ The elements of a claim of laches are: (a) conduct on the part of

²⁷**An illusory or unenforceable promise is not valid consideration.** Allington Towers N., Inc. v. Rubin, 400 So. 2d 86, 87 (Fla. 4th DCA 1981).

²⁸**Effect of illusory promise upon enforceability of a contract.** Johnson Enter. of Jacksonville, Inc. v. FPL Group, Inc., 162 F.3d 1290, 1311 (11th Cir. 1998). It is noteworthy that, in this decision, the 11th Circuit court of appeals was applying Florida law. This quote from this 11th circuit decision was cited with approval in Office Pavilion South Florida, Inc. v. ASAL Products, Inc., 849 So. 2d 367 (Fla. 4th DCA 2003).

²⁹**Pleading illegality as an affirmative defense.** See Fla. R. Civ. P. 1.110(d).

³⁰**Contracts are presumed legal unless alleged and proven otherwise.** Janet Realty Corp. v. Hoffman's, Inc., 17 So. 2d 114 (Fla. 1943).

³¹**Effect of illegality of contract.** Finley Method Co. v. Standard Asphalt Co. of Florida, 104 Fla. 126, 139 So. 795 (Fla. 1932).

³²**Example of defense of illegal contract being insufficient to bar an action that was not sufficiently a part of the illegal contract.** Duncan v. Kasim, Inc., 810 So. 2d 968 (Fla. 5th DCA 2002).

³³**Pleading laches as an affirmative defense.** See Fla. R. Civ. P. 1.110(d).

³⁴**Laches lies when unreasonable delay causes unfair prejudice.**

the defendant giving rise to the situation for which the plaintiff's complaint is made; (b) failure of the plaintiff, having had knowledge or notice of the defendant's conduct, to assert his or her rights by filing suit; (c) lack of knowledge on the part of the defendant that the plaintiff will assert the right on which he or she bases the suit; and (d) injury or prejudice to the defendant would result in the event that relief is accorded to the plaintiff.³⁵ "It has generally been held that laches does not come into play until the period prescribed by the applicable statute of limitations has expired."³⁶ An exception to this rule applies when the equities of the situation demand it, such as when an unreasonable delay results in prejudice to the rights of the party against whom enforcement of a debt or other obligation is sought.³⁷

License.³⁸ This defense applies when the defendant was licensed to do something by some legal authority "and the acts complained of in the complaint herein were done by and in pursuance of that license."³⁹

Release.⁴⁰ A release or a waiver can result in the plaintiff's relinquishment of the right to bring the claim against the defendant.⁴¹ Such a defense must be raised in the answer to the complaint.⁴² If the circumstances permit, one might argue for a

Edwards v. Edwards, 730 So. 2d 711 (Fla. 4th DCA 1999).

³⁵**Elements of action of laches.** Van Meter v. Kelsey, 91 So. 2d 327 (Fla. 1956).

³⁶**General rule: laches not available as a defense prior to the expiration of the statute of limitations.** Jefferies v. Corwin, 363 So. 2d 600 (Fla. 4th DCA 1978).

³⁷**Exceptions to general rule: laches not available as a defense prior to the expiration of the statute of limitations.** Jefferies v. Corwin, 363 So. 2d 600 (Fla. 4th DCA 1978). Briggs v. Estate of Geelhoed By and Through Johnson, 543 So. 2d 332 (Fla. 4th DCA 1989).

³⁸**Pleading license as an affirmative defense.** See Fla. R. Civ. P. 1.110(d).

³⁹**Nature of the defense of license.** See generally, LaCoe's Pleadings Under the Florida Rules of Civil Procedure with Forms (2007 ed.).

⁴⁰**Pleading release as an affirmative defense.** See Fla. R. Civ. P. 1.110(d).

⁴¹**Effect of release or waiver.** See Fla. R. Civ. P. 1.110(d); Pontier v. Wolfson, 637 So. 2d 39 (Fla. 2d DCA 1994).

⁴²**Defense of release must appear in the answer to the complaint.** See Fla. R. Civ. P. 1.110(d); W.T. Rawleigh Co. v. Langford, 112 Fla. 487, 150 So. 592 (Fla. 1933) (holding that "Attention is called to the fact that the pleadings of defendant should be recast in advance of another trial, if the nucleus of any such defense as is implied in the charge of the court above held bad is to be relied on. The charge suggests the idea of waiver, release, or estoppel as applied to the provisions of the written contract sued on, a defense that must be specially pleaded to be availed of.").

waiver due to an express "assumption of the risk."⁴³ "It is hornbook law that the execution of a valid release results in the termination of all rights covered by the agreement."⁴⁴ A release "conclusively resolves all claims" covered by the release.⁴⁵ A "general release" encompasses all claims which have matured at time of its execution.⁴⁶ In determining what rights are covered by a release, courts must look to the intent of the parties as expressed in the document itself.⁴⁷ As is the case with contracts generally, "the language used in [a] release is the best evidence of the parties' intent."⁴⁸ Where the parties' intent can be determined from the language of the instrument, such intent is conclusive as to the nature of the instrument, and construction of the release is a question of law to be resolved by the court, and not by a jury.⁴⁹

Res judicata.⁵⁰ Res judicata would bar this claim if this same cause of action has already been litigated between this plaintiff and defendant in such a way that the first judgment is conclusive as to all matters that were or could have been adjudicated in the first action.⁵¹

Statute of frauds.⁵² Florida's statute of frauds is codified at Fla. Stat. § 725.01 and requires the following agreements, among others, to be in writing in order to be enforceable: any agreement that is not to be performed within 1 year; conveyances of real property; promises to pay another's debt; prenuptial agreements. If we deem any statute requiring a contract to be in writing to be

⁴³**Waiver by express assumption of risk.** Kuehner v. Green, 436 So. 2d 78 (Fla. 1983).

⁴⁴**Hornbook law on releases.** Hall v. Burger King Corp., 912 F.Supp. 1509 (S.D.Fla.,1995).

⁴⁵**Release is conclusive as to its stated claims.** Pettinelli v. Danzig, 722 F.2d 706, 708 (11th Cir.1984).

⁴⁶**General release.** Sottile v. Gaines Constr. Co., 281 So. 2d 558, 561 (Fla. 3d DCA 1973), cert. denied, 289 So. 2d 737 (Fla.1974). See also Mulhern v. Rogers, 636 F.Supp. 323, 325 (S.D.Fla.1986).

⁴⁷**Express intent.** Hurt v. Leatherby Ins. Co., 380 So. 2d 432, 433 (Fla. 1980); Solitron Devices, Inc. v. Honeywell, Inc., 842 F.2d 274, 277 (11th Cir. 1988); Weingart v. Allen & O'Hara, Inc., 654 F.2d 1096, 1103 (5th Cir.1981).

⁴⁸**Best evidence.** Hurt v. Leatherby Ins. Co., 380 So. 2d 432, 433 (Fla. 1980). See also Hall v. Burger King Corp., 912 F.Supp. 1509 (S.D.Fla.,1995).

⁴⁹**Whether the intent of release is a jury question.** Atlantic Coast Line R.R. Co. v. Boone, 85 So. 2d 834, 842 (Fla. 1956). See also Hall v. Burger King Corp., 912 F.Supp. 1509 (S.D.Fla.,1995).

⁵⁰**Pleading res judicata as an affirmative defense.** See Fla. R. Civ. P. 1.110(d).

⁵¹**Elements of res judicata.** See Fla. R. Civ. P. 1.110(d); Acadia Partners, L.P. v. Tompkins, 759 So. 2d 732 (Fla. 5th DCA 2000).

⁵²**Pleading statute of frauds as affirmative defense.** See Fla. R. Civ. P. 1.110(d).

a statute of frauds, then it may be said that Florida's statute of frauds is further codified at Fla. Stat. §§ 61.079, 73.015, 95.04, 180.24, 207.021, 213.21, 287.058, 364.07, 402.7305, 520.07, 520.34, 520.86, 548.05, 559.3904, 559.803, 559.811, 627.404, 628.801, 672.201, 675.104, 678.319, 680.201, 686.201, 689.01, 689.05, 718.3026, 718.503, 719.3026, 719.503, 720.3055, 725.03, and 732.701. In Florida, a quantity term is essential to a contract for the sale of goods, as illustrated by Florida's statute of frauds provisions adopted from the Uniform Commercial Code and codified at Fla. Stat. § 672.201(1).⁵³ That statute of frauds requires that a contract for the sale of goods in excess of \$500 must be in writing to be enforceable.⁵⁴ Under this statute of frauds, "the only term that must appear in a writing to support an enforceable contract for the sale of goods is the quantity term."⁵⁵ Therefore, "a writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under [the Statute of Frauds] beyond the quantity of goods shown in such writing."⁵⁶ Despite a failure to comply with the statute of frauds, a contract for goods is enforceable "[i]f the party against whom enforcement is sought admits in his or her pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable . . . beyond the quantity of goods admitted."⁵⁷ There are two other specific instances excusing a failure to comply with the UCC statute of frauds applicable to a contract for goods, and those instances appear in subsection 3 of Fla. Stat. § 672.201. Of course, "before it becomes proper or necessary to determine whether the facts permit the enforcement of . . . a contract, as an exception under the Statute of Frauds, it must first be determined that the existence of the contract and the terms thereof have been established with both the quantum and the quality of evidence required under the applicable rules of law."⁵⁸

⁵³**Quantity term is essential to a contract for the sale of goods.** Office Pavilion South Florida, Inc. v. ASAL Products, Inc., 849 So. 2d 367 (Fla. 4th DCA 2003).

⁵⁴**Contracts for the sale of goods to which the statute of frauds applies.** Fla. Stat. § 672.201(1).

⁵⁵**Quantity is the only term in a contract for goods required by the statute of frauds to be in writing.** Merritt-Campbell, Inc. v. RxP Products, Inc., 164 F.3d 957, 962 (5th Cir.1999), cited with approval by Office Pavilion South Florida, Inc. v. ASAL Products, Inc., 849 So. 2d 367 (Fla. 4th DCA 2003).

⁵⁶**Effect of omission of quantity term upon contracts for the sale of goods to which the statute of frauds applies.** Fla. Stat. § 672.201(1).

⁵⁷**Statute of frauds may be overcome if party admits a contract for the sale of goods was made.** Fla. Stat. § 672.201(3)(b).

⁵⁸**Examination of applicability of statute of frauds unnecessary**

Statute of limitations.⁵⁹ As discussed above, the law sets a deadline for the filing of this claim.

Waiver.⁶⁰ A waiver is ordinarily an intentional relinquishment of a known right or privilege.⁶¹ When a waiver is implied from conduct, “the acts, conduct, or circumstances relied upon to show waiver must make out a clear case.”⁶² For example, “waiver does not arise from forbearance for a reasonable time.”⁶³ “In order to establish a valid waiver, the following elements must be satisfied: (1) the existence at the time of the waiver of a right, privilege, advantage, or benefit that may be waived; (2) the actual or constructive knowledge thereof; and (3) an intention to relinquish that right, privilege, advantage or benefit.”⁶⁴

Any other matter constituting an avoidance or affirmative defense.⁶⁵ The Florida Rules of Civil Procedure require the defendant to raise all such defenses in his answer to the plaintiff’s complaint.

DEFENSES SPECIFIC TO THIS CAUSE OF ACTION FOR A DECLARATORY JUDGMENT:

In addition to these defenses listed in the Florida Rules of Civil Procedure, the following general defenses may be applicable depending upon the facts of a given declaratory judgment case:

Factual dispute is basis of claim. A declaratory action is not available when the object of the action is to try disputed questions of fact as the determinative issue, rather than to seek a construction of definite stated rights, status, or other relations.⁶⁶

until existence of valid and binding contract is first proven. *Gable v. Miller*, 104 So. 2d 358, 360 (Fla. 1958).

⁵⁹**Pleading statute of limitations as an affirmative defense.** See Fla. R. Civ. P. 1.110(d).

⁶⁰**Pleading waiver as affirmative defense.** See Fla. R. Civ. P. 1.110(d).

⁶¹**Definition of waiver.** *Mason v. State*, 176 So. 2d 76 (Fla. 1965).

⁶²**Requirements of a waiver that is implied from one’s conduct.** *Fireman’s Fund Ins. Co. v. Vogel*, 195 So. 2d 20 (Fla. 2d DCA 1976) (citing *Gilman v. Butzloff*, 155 Fla. 888, 22 So. 2d 263 (1945) and *Masser v. London Operating Co.*, 106 Fla. 474, 145 So. 72 (1932)).

⁶³**A reasonable delay does not constitute a waiver by conduct.** *Fireman’s Fund Ins. Co. v. Vogel*, 195 So. 2d 20 (Fla. 2d DCA 1976) (citing *Gilman v. Butzloff*, 155 Fla. 888, 22 So. 2d 263 (1945)).

⁶⁴**Elements of a claim of a waiver.** *Destin Sav. Bank v. Summerhouse of FWB, Inc.*, 579 So. 2d 232 (Fla. 1st DCA 1991).

⁶⁵**Pleading a matter constituting avoidance or an affirmative defense.** See Fla. R. Civ. P. 1.110(d).

⁶⁶**Factual dispute.** *X Corp. v. Y Person*, 622 So. 2d 1098, 2 A.D. Cas. (BNA) 1201, 63 Empl. Prac. Dec. (CCH) P 42697 (Fla. 2d DCA 1993). *Smith v. Milwaukee Ins. Co. of Milwaukee, Wis.*, 197 So.2d 548 (Fla. 4th DCA 1967), certiorari dismissed, 204 So.2d 332 (Fla. 1968).

However, questions of fact may be determined in a declaratory proceeding if necessary to construe the legal rights.⁶⁷

Need not urgent. To bring a declaratory judgment action, there must be bona fide dispute between the parties and an actual, present need for the declaration.⁶⁸

Petitioner lacks standing. For example, a public official generally does not have standing to sue for the purpose of determining whether the law that sets forth his duties is valid, but there is an apparent exception to this rule when the law requires the expenditure of public funds.⁶⁹

Dispute is academic or theoretical. The dispute must be actual, not theoretical.⁷⁰

Contract clearly establishes rights. Florida's declaratory judgment statute is not available to settle factual issues bearing on the liability under a contract which is clear and unambiguous and which presents no need for its construction.⁷¹

Act inapplicable to judgments. Florida's declaratory decree statute is not a device that may be used for a collateral attack on final judgments or decrees.⁷² For example, a civic association's declaratory judgment action, which was challenging the court judgments that realigned city property and transferred property from the city to a development corporation, was an impermissible collateral attack on prior judgments.⁷³

Workers' compensation exclusive remedy. Workers' compensation "immunity" makes the Florida Workers' Compensation Act (Fla. Stat. ch. 440) an employee's exclusive remedy against his employer in most circumstances.⁷⁴ Fla. Stat. ch. 440 provides that workers' compensation coverage "shall be exclusive

⁶⁷**Factual dispute — exception.** X Corp. v. Y Person, 622 So. 2d 1098, 2 A.D. Cas. (BNA) 1201, 63 Empl. Prac. Dec. (CCH) P 42697 (Fla. 2d DCA 1993).

⁶⁸**Need not urgent.** Britamco Underwriters, Inc. v. Central Jersey Investments, Inc., 632 So.2d 138 (Fla. 4th DCA 1994).

⁶⁹**Standing of public officials.** Branca v. City of Miramar, 634 So. 2d 604 (Fla. 1994).

⁷⁰**Actual dispute.** Florida Society of Ophthalmology v. State, Dept. of Professional Regulation, 532 So.2d 1278 (Fla. 1st DCA 1988).

⁷¹**Contract clear.** Burns v. Hartford Acc. & Indem. Co., 157 So.2d 84 (Fla. 3d DCA 1963).

⁷²**Judgment.** Hollywood Lakes Section Civic Ass'n, Inc. v. City of Hollywood, 676 So. 2d 500 (Fla. 4th DCA 1996).

⁷³**Judgment-example.** Hollywood Lakes Section Civic Ass'n, Inc. v. City of Hollywood, 676 So. 2d 500 (Fla. 4th DCA 1996).

⁷⁴**Workers' compensation — exclusive remedy.** Fla. Stat. § 440.11; See also McGinley, Florida Workers' Compensation with Forms, 9 Fla. Prac. § 6A:2 (West's Florida Practice Series) (available on Westlaw in the FLPRAC database).

and in place of all other liability of such employer . . .”⁷⁵ This exclusivity usually extends to the employer’s managers, supervisors, and others with policy making capacity.⁷⁶ In a proper circumstance, the employer’s exclusive remedy also protects its subcontractors.⁷⁷ It extends to co-employees “when such employee is acting in furtherance of the employer’s business . . .”⁷⁸ This includes co-employees who are employed via the use of an employee leasing company, a temporary labor company, or a help supply services company.⁷⁹ This also includes employees of joint employers or the company in a joint venture.⁸⁰ However, co-employees lose their immunity if they were involved solely in “unrelated works.”⁸¹ All could possibly lose their “immunity” by committing an egregious tort, but the required degree of culpable conduct differs.⁸² Co-employees must act “with willful and wanton disregard or unprovoked physical aggression or with gross

⁷⁵**Workers’ compensation statutory exclusivity.** Fla. Stat. § 440.11; See also McGinley, Florida Workers’ Compensation with Forms, 9 Fla. Prac. § 6A:5 (West’s Florida Practice Series) (available on Westlaw in the FLPRAC database).

⁷⁶**Workers’ compensation exclusivity makes managers and supervisors immune from most tort suits.** McGinley, Florida Workers’ Compensation with Forms, 9 Fla. Prac. § 6A:2 (West’s Florida Practice Series) (available on Westlaw in the FLPRAC database).

⁷⁷**An employer’s workers’ compensation exclusive remedy “immunity” can extend to subcontractors in a proper circumstance.** The circumstances where such “immunity” flows or fails to flow is shown with case law citations and flowcharts in McGinley, Florida Workers’ Compensation with Forms, 9 Fla. Prac. § 6A:4 (West’s Florida Practice Series) (available on Westlaw in the FLPRAC database).

⁷⁸**Workers’ compensation exclusivity makes co-workers immune from most tort suits.** McGinley, Florida Workers’ Compensation with Forms, 9 Fla. Prac. § 6A:11 (West’s Florida Practice Series) (available on Westlaw in the FLPRAC database).

⁷⁹**Workers’ compensation exclusivity makes co-workers immune despite their employment by a professional employer’s organization.** McGinley, Florida Workers’ Compensation with Forms, 9 Fla. Prac. § 6A:5A (West’s Florida Practice Series) (available on Westlaw in the FLPRAC database).

⁸⁰**Workers’ compensation exclusivity makes co-workers immune despite their employment by a joint venturer or joint employer.** McGinley, Florida Workers’ Compensation with Forms, 9 Fla. Prac. § 6A:12 (West’s Florida Practice Series) and see also, McGinley, Florida Workers’ Compensation with Forms, 9 Fla. Prac. § 6:22 (both available on Westlaw in the FLPRAC database).

⁸¹**Workers’ compensation exclusivity makes co-workers immune despite their employment by a professional employer’s organization.** McGinley, Florida Workers’ Compensation with Forms, 9 Fla. Prac. § 6A:11 (West’s Florida Practice Series) (available on Westlaw in the FLPRAC database).

⁸²**Loss of “immunity” under workers’ compensation exclusivity.** McGinley, Florida Workers’ Compensation with Forms, 9 Fla. Prac. § 6A:2 (West’s Florida Practice Series) (available on Westlaw in the FLPRAC database).

negligence.”⁸³ The employer or its managers must engage in tortious conduct that was:

deliberately intended to injure the employee; or . . . that the employer knew, based on prior similar accidents or on explicit warnings specifically identifying a known danger, was virtually certain to result in injury or death to the employee, and the employee was not aware of the risk because the danger was not apparent and the employer deliberately concealed or misrepresented the danger so as to prevent the employee from exercising informed judgment about whether to perform the work.⁸⁴ The fullness and limits of the workers’ compensation exclusive remedy is detailed in Ch. 6A, “Exclusive Remedy: Workers’ Compensation with Forms Immunity from Civil Liability” in McGinley, Florida Workers’ Compensation with Forms, 9 Fla. Prac. §§ 6A:1 et seq.

Original writing, from which declaratory judgment is sought, might need to be filed with the court, depending on the facts of a given case. Even in those instances when a declaratory judgment issue turns on the words of a document or other writing, the original writing might not need to be filed with the court.⁸⁵ This may depend upon what issues and other defenses arise from the facts of a given declaratory judgment case.

The Evidence Code provides the rationale for this conclusion. Section 90.952, Florida Statutes . . . indicates that original documents are required to prove the contents of a writing, unless otherwise provided by statute. Section 90.953, Florida Statutes . . ., however, indicates that duplicates are admissible unless a genuine question is raised about the authenticity of the original, or it is unfair to admit the duplicate, or “The document or writing is a negotiable instrument as defined in Florida Statutes sec. 673.1041, a security instrument as defined in Florida Statutes sec. 678.1021, or any other writing that evidences a right to the payment of money, is not itself a security agreement or lease, and is of a type that is transferred by delivery in the ordinary course of business with any

⁸³**Degree of tortious conduct required to avoid co-employee’s “immunity” arising out of the exclusive remedy of workers’ compensation.** Fla. Stat. § 440.11(1)(b). See also McGinley, Florida Workers’ Compensation with Forms, 9 Fla. Prac. § 6A:11 (West’s Florida Practice Series) (available on Westlaw in the FLPRAC database).

⁸⁴**Degree of tortious conduct required to avoid an employer’s “immunity” arising out of the exclusive remedy of workers’ compensation.** Fla. Stat. § 440.11(1)(b). See also McGinley, Florida Workers’ Compensation with Forms, 9 Fla. Prac. § 6A:11 (West’s Florida Practice Series) (available on Westlaw in the FLPRAC database).

⁸⁵**Need for original as evidence.** See generally 1 Florida Practice Series: Ehrhardt’s Florida Evidence, § 953.1, The best evidence rule—Admissibility of duplicates; 5 Florida Practice Series: Florida Civil Practice, § 20:6, The original document rule.

necessary endorsement or assignment.⁸⁶

§ 49:3 Research assistance for declaratory judgment

In the preceding two sections, we discussed the elements of the statutory claim for a declaratory judgment, and the likely defenses to such a claim. For further research, the author recommends:

Schwinghammer, Jr., Insurance Litigation in Florida: Declaratory Judgments and the Duty to Defend, 50 U.Miami L.Rev. 945 (1996).

Dickson, Declaratory judgments in Florida jurisdiction and judicial discretion, 27 U.Miami L.Rev. 47 (1973).

Interest Necessary to Maintenance of Declaratory Determination of Validity of Statute or Ordinance, 174 A.L.R. 549

Release as Proper Subject of Action for Declaratory Judgment. 167 A.L.R 433

Application of Declaratory Judgment Acts to Questions in Respect of Contracts or Alleged Contracts. 162 A.L.R 756

Application of Declaratory Judgment Acts to Questions in Respect of Insurance Policies, 142 A.L.R. 8.

Questions Regarding Rights of Inheritance or Other Rights in Respect of Another's Estate After Death as Proper Subject of Declaratory Action Before Latter's Death, 139 A.L.R. 1239

Determination of Constitutionality of Statute or Ordinance, or Proposed Statute or Ordinance, as Proper Subject of Judicial Decision Under Declaratory Judgment Acts, 114 A.L.R. 1361

Florida Pleading and Practice Forms § 11:35, Complaint—For Declaratory Judgment—To Declare Residential Restrictions Invalid—Restrictions Applicable Only Between Original Grantor and Immediate Grantee.

Florida Pleading and Practice Forms § 47:14, Complaint—For Declaratory Judgment Regarding Joint and Mutual Wills

Florida Pleading and Practice Forms § 73:31, Complaint—For Declaratory Judgment as to Franchise Agreement Requirements

Florida Pleading and Practice Forms § 51:23.10, Complaint for Declaratory Judgment to Construe Will—For Constructive Trust

§ 49:4 Jury verdicts involving declaratory judgment

Jury verdicts are possible in declaratory judgment actions, despite the fact that the action is essentially one in equity. The act itself provides the following permission for jury trials:

Fla. Stat. sec. 86.071 Jury trials.—

When an action under this chapter concerns the determination of an issue of fact, the issue may be tried as issues of fact are tried in other civil actions in the court in which the proceeding is pending. To settle questions of fact necessary to be

⁸⁶Original. Perry v. Fairbanks Capital Corp., 888 So. 2d 725 (Fla. 5th DCA 2004).

§ 49:4

determined before judgment can be rendered, the court may direct their submission to a jury. When a declaration of right or the granting of further relief based thereon concerns the determination of issues of fact triable by a jury, the issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict is required or not. Neither this section nor any other section of this chapter shall be construed as requiring a jury to determine issues of fact in chancery actions.

At the time of publication of this text, no universally noteworthy jury verdict reports could be located by this author in a search of the Westlaw databases for the following reporters: ALM Properties, Inc.'s *Verdict Search Weekly*; Florida Legal Periodicals, Inc.; and LRP Publications' *Florida Jury Verdict Reporter*.

To conduct your own search for such a verdict that may be relevant to your own issue, these verdict reporters and others can be found on Westlaw.com in the following databases: FL-JV-PLUS, FL-JV-ALL and ALMVS-FL-JV.

§ 49:5 Sample jury instructions for a declaratory judgment case

Although the facts of each declaratory judgment case are different, the following sample jury instructions can be modified to fit most any facts.¹ The following jury instructions are drafted by using appropriate parts of the 2010 version of the Florida Standard Jury Instructions for Civil Cases² with additions required by this particular cause of action. Footnotes are provided by this

[Section 49:5]

¹**Trial court has authority to modify standard jury instructions when appropriate.** Fla. R. of Civil Proc. 1.985 provides that the Florida Standard Jury Instructions may be used to the extent that the forms are applicable, unless the trial judge determines that an applicable form of instruction is erroneous or inadequate. In that event the trial judge shall modify the form or give such other instruction as the judge determines necessary to accurately instruct the jury, and shall state on the record or in a separate order the manner in which the judge finds the standard form erroneous or inadequate. Similarly, if the notes accompanying the Standard Instructions recommend that a certain type of instruction not be given, the trial judge may follow the recommendation unless the judge determines that giving such an instruction is necessary to accurately instruct the jury, in which event the judge shall give an appropriate instruction and state on the record or on a separate order the legal basis for doing so. *See also* Fla. R. of Civil Proc. 1.470 (addressing when and how to present proposed jury instructions and object to instructions.)

²**Source of these jury instructions.** In re Standard Jury Instructions In Civil Cases-Report No. 09-01 (Reorganization of the Civil Jury Instructions), 35 So.3d 666 (Fla. 2010).