FLORIDA'S THIRD SPECIES OF JURISDICTION

Vol. 82, No. 3 March 2008 Pg 10

Judge Scott Stephens Featured Article

The most common[1] use of the word "jurisdiction" in Florida practice is curiously lacking in definition. Trial courts "lack jurisdiction" until proper pleadings are filed.[2] They exceed "jurisdictional" limits if they order relief outside the scope of the pleadings.[3] They lose ("are divested of") jurisdiction if a voluntary dismissal is taken or when a judgment is entered, unless "jurisdiction" is specifically reserved.[4] These notions of "jurisdiction" depend on a case's procedural posture, and thus cannot be subject matter jurisdiction (SMJ) or jurisdiction in personam. Subject matter jurisdiction is the power allocated to a court by constitution or statute,[5] a fixture of the legal landscape that procedural events in a specific case are unlikely to change. Personal jurisdiction depends on a person's contacts with the forum state, typically not on the pleadings.[6] The concept of "jurisdiction" that *is* dependent on pleadings or other procedural events, therefore, must constitute a distinct third species of jurisdiction, which could be called procedural jurisdiction, or more colorfully, "greenlight jurisdiction."

Despite its importance as a principle of procedural law, its actual meaning and legal significance have yet to be confronted conclusively. Understanding the different types of jurisdiction is crucial to the practitioner because each has "its own legal significance."[7]

This article finds a logical consistency in the law of "jurisdiction" in the cases despite significant confusion over the years. It observes that the bare word "jurisdiction" has been used to mean a court's *exclusive authority to enter orders in a particular case at a particular time*. It is a legal conclusion dependent on the presence of three elements — the familiar requirements of subject matter and personal jurisdiction must, of course, be present in every case, but in addition the court's legal authority must be activated according to procedural requirements of pleading and process. The contention that a trial court lacks "jurisdiction" can be made if any one of the three elements is missing, but in practice "jurisdictional" attacks rarely implicate subject matter jurisdiction or personal jurisdiction. When they do, they say so explicitly. When "jurisdiction" is used without identifying the specific jurisdictional concept being employed, it almost always refers to the third, procedural element of jurisdiction.

Attaining consistency is an accomplishment, because the forces for confusion have been remarkably tenacious. Because a failure of subject matter jurisdiction trumps res judicata and all other timeliness requirements, litigants with unpreserved arguments naturally seek to cast them as "jurisdictional," either by expanding the concept of subject matter jurisdiction explicitly, or by confusing it with other concepts of

jurisdiction. The venerable case of *Lovett v. Lovett*, 112 So. 768, 776
(Fla. 1927), offered hope of rescue to the untimely for many years.

Lovett stated that "jurisdiction" in Florida was a legal conclusion dependent on three elements, not just two. It intimated that "jurisdiction" derives from — indeed would appear to be shorthand for — the traditional recitation that the court "has jurisdiction of the subject-matter and the parties." Under *Lovett*, even when a court undoubtedly had subject matter jurisdiction and jurisdiction over the persons involved, it did not have "jurisdiction of the subject-matter and the parties" unless the pleadings had properly "invoked" the court's power. For those propositions, *Lovett* remains good law today (indeed they constitute the thesis of this article), but the court went further. It permitted the appellants to challenge the trial court judgment based on a pleading defect not raised below on the theory that the pleading defect was "jurisdictional." How a pleading defect could change the type of case before the court, thus defeating its subject matter jurisdiction, the court did not say.

It has taken 80 years, and the process remains incomplete, but the confusion wrought by *Lovett* is waning. The Florida Supreme Court has restored the original meaning of subject matter jurisdiction, and the district courts for the most part decline to extend subject matter jurisdiction treatment to unpreserved "jurisdictional" defects arising from procedural events. In the process, the cases have implicitly fleshed out a law of jurisdiction which requires three elements, and separately identifies the legal significance of each one.

The practitioner needs to be aware that the legal consequence of a jurisdictional error depends on which element is involved and when the error was first raised. Arguing that a court lacks "jurisdiction" is meaningless if one is not prepared to identify the specific class of jurisdictional defect and the applicable legal result. Expecting all errors of "jurisdiction" to be treated the same is a recipe for failure.

The legally significant difference between three jurisdictional elements is the degree of waivability. The requirement of subject matter jurisdiction is never waivable; judgments rendered without SMJ are void ab initio, and can be successfully attacked at any time. Judgments unsupported by in personam jurisdiction, by contrast, are not inherently void. Instead, they are voidable by the specific persons affected, and the objection is waived if not asserted at the first opportunity.[8] The waivability of defects of procedural jurisdiction is more controversial, with some ancient cases and a few modern ones holding them unwaivable, with the bulk of more recent authority holding them waived if not timely raised. Even though the word "jurisdiction" has traditionally been attached to them, they remain principles of procedural law, and should be treated accordingly.

The primary thesis of this article is that there are three elements to the legal conclusion that a Florida court has "jurisdiction" and the legal consequence of a defect of jurisdiction depends on which element is defective and when it was raised. An important corollary is that subject matter jurisdiction generally cannot be created, suspended, or terminated by procedural events in a case, and any "jurisdiction" that can be so intermittent

must be procedural and hence waivable. Whether a court has power to hear and decide a given *type* of case is a different question from whether the case itself is in a procedural posture that authorizes the court to proceed. The following sections explain and support this conclusion in greater depth, first defining procedural jurisdiction, and then articulating its logical separation from subject matter jurisdiction. The concluding sections show how recent cases have acknowledged the existence of a third element of jurisdictional analysis in Florida.

Three Species of Jurisdiction

Each of the three concepts of jurisdiction has its distinct legal source, functional definition, and set of legal consequences. The first two are well-defined; the third is familiar, but so far lacking in systematic definition.

The first and most fundamental requirement is subject matter jurisdiction (SMJ). A court's power derives from either constitutional or statutory provisions specifying the class of cases the court is granted authority to hear.[9] It has SMJ only over those types of cases, and may not proceed in any fashion in any other type of case.[10] A court proceeding in absence of SMJ is subject to writ of prohibition, and an order rendered without SMJ is unwaivably void. As a practical matter, this means the order has no res judicata effect, and is not entitled to full faith and credit. The error can successfully be raised for the first time on appeal or on collateral attack years later. The requirement of subject matter jurisdiction is so fundamental that it prevails over the otherwise essential[11] principle of finality of judgments.

The second jurisdictional requirement is a reasonable connection between the court and the parties (or properties) involved. A court may not enter orders affecting individuals unless they have some legally meaningful contact with the territorial extent of the court's authority, known as jurisdiction over the person (JOP).[12] While a defect of JOP does not stop a court from proceeding altogether, it has no power to bind a party over whom it lacks personal jurisdiction.[13] An order lacking JOP is not inherently void, but rather voidable, and the error can be waived if not asserted at the first opportunity.

Procedural jurisdiction has nothing to do with the scope of the court's constitutional or statutory power, or the status of the parties. Instead, it is a matter of compliance with applicable procedural principles, some codified in rules, but more often products of case law. These principles can correctly be characterized as "jurisdictional," in that they address a particular court's authority to proceed in a specific direction at a defined time. Even when a court has subject matter jurisdiction and personal jurisdiction — hence the *power* to proceed — the procedural equivalents of traffic signals regulate when it is *permissible* to proceed. For example, a case must be commenced by pleadings before a court can enter an order. Until that occurs, the court is like a motorist facing a red light: Proceeding is physically possible but is deterred by the prospect of undesirable consequences. The light turns green once proper pleadings are filed, but directional signals (rules confining actions to the scope of the pleadings) still limit where the court may permissibly go. When a final judgment is entered, the court faces another red signal.

Whether these procedural rules *should* be called "jurisdictional" is questionable, but that use of the term is firmly entrenched in the tradition of Florida law and it is semantically defensible. The term "jurisdiction" means a court's authority to hear and decide a dispute, and procedural regulations that determine whether the authority is currently activated can fit within that definition. Accordingly, the third species of jurisdiction being posited here is any argument or ruling directed to a court's authority to hear and decide a dispute and *predicated on the specific case's procedural posture*.

The following list illustrates some procedural rules that have been characterized as "jurisdictional" in the case law:

1) A court may not enter an order until the case is opened by filing of a pleading;[14]

2) A court may not enter an order outside the scope of the pleadings;[15]

3) A court may not enter an order in a case that is closed by voluntary dismissal[16] or by entry of a final judgment[17] unless jurisdiction is "reserved."[18]

4) A court may not enter an order on an issue that is under review by the appellate court.[19]

All of these rules of procedural jurisdiction, if violated, render an order subject to correction upon a timely appeal. But except for the last one (addressed below), there is no reason any of them should supersede the force of res judicata to allow relitigation of orders that have become final. None of them change the nature of the power the state has assigned to the court or the relationship between the state and the parties. As with

any other form of procedural error, a timely objection affords the trial court an opportunity to cure the error before proceeding further.

Accordingly, errors of procedural jurisdiction should always be raised before the trial court or the appellate court is justified in refusing to consider them. There are issues of procedural jurisdiction that can be raised initially on appeal, but that is not *because* they are procedurally "jurisdictional." Instead, it is because they qualify independently as fundamental errors.

Procedural jurisdiction thus encompasses several procedural questions — whether a court's jurisdiction is properly "invoked," whether it has acted within the scope of the pleadings, and generally whether it has authority to proceed given the case's procedural posture. Procedural jurisdiction is fundamentally different than subject matter jurisdiction and personal jurisdiction. And as will be explained below, uses of the word "jurisdiction" that do not fit into one of the three categories are spurious, not "jurisdictional" in any legally meaningful sense. As a practical matter, counsel should be careful to raise all forms of jurisdictional objection at the first opportunity, since most jurisdictional objections are procedural, and waived if not timely asserted. Only a true deficiency of subject matter jurisdiction can be raised at any time, and valid objections to a court's subject matter jurisdiction are rare, for the reasons that appear in the next section.

Subject Matter Jurisdiction Is Constitutionally Granted and Statutorily Allocated

Under the Florida Constitution, art.V, §5(b), every original action is within the subject matter jurisdiction of either the county court or the circuit court.[20] The circuit court

holds “general jurisdiction”[21] power to hear any original actions not legislatively allocated to the county court. Any state legislative act purporting to limit the subject matter jurisdiction of the circuit courts in any other way would be unconstitutional.[22]

Unlike the complicated and expensive controversies over the power of courts of limited jurisdiction, extensive litigation over the subject matter jurisdiction of the circuit courts of Florida is rarely warranted. In most cases, the determination of subject matter jurisdiction is complete upon identifying the type of case, *i.e.*, the body of law under which the case will be decided, and ascertaining whether the legislature has committed that type of case to the county court.

Expecting a subject matter jurisdiction defense to conclusively thwart a claim is usually unrealistic. In keeping with the principle of access to courts, the constitutional structure all but assures that there will be some tribunal[23] empowered to hear every type of case. Subject matter jurisdiction is an allocation rule that prescribes *which* court has authority to hear a dispute. As a practical matter, this means that an actual subject matter jurisdiction argument is nearly always equivalent to a claim that the case is pending in the wrong court. Only in the rarest of circumstances could it operate to bar a claim altogether.

Only a state constitutional rule or pre-emptive federal law[24] could actually *deny* the Florida trial judiciary authority over all original actions of any particular subject matter. Arguing that no Florida court has subject matter jurisdiction over a given case requires citation of an authority higher than (or at least equal to) the state constitution.

Constitutional rules depriving the state courts of all subject matter jurisdiction do exist, but they are usually highly specific. The state's sovereign immunity, Fla. Const. art. X, §13, is implemented by denial of subject matter jurisdiction over proceedings against the state, except to the extent waived by general law.[25] In addition, several federal laws deny state courts subject matter jurisdiction by assigning specific classes of cases to federal courts or agencies. For example, tort or contract cases that would otherwise be within state court jurisdiction are allocated exclusively to federal courts if they are encompassed by federal flood insurance or disaster relief operations.[26] Federal law prevents state courts from proceeding in cases otherwise within their subject matter jurisdiction if the parties have contracted for arbitration, or if the defendant is an Indian tribe, or in some cases involving municipalities.[27] In general, any federal rule that prohibits a state court from proceeding in a particular way, even if it based on procedural considerations, has the same legal effect as a deprivation of state court subject matter jurisdiction: Proceeding in violation of an applicable federal rule can render an order void. For example, failure to follow federal due process requirements can render an order subject to collateral attack.[28] Counsel should be alert to the possibility that a federal or state constitutional rule could extinguish the circuit court's subject matter jurisdiction altogether, but in the absence of such a rule, a challenge to subject matter jurisdiction is unlikely to succeed without identifying the court in which the case *does* belong.

To be sure, there are substantial numbers of cases in the intermediate appellate courts that appear to contemplate the proposition that a state statute or rule

can extinguish circuit court subject matter jurisdiction without allocating it to another trial court, or appear to require a statutory basis for the circuit court to exercise jurisdiction. The interstate child custody cases uniformly, and entirely incorrectly, frame the issue of custody over a particular child (*i.e.*, person) as one of subject matter jurisdiction.[29] Cases frequently cite statutory bases for the circuit courts' exercise of jurisdiction,[30] which is certainly not wrong, but it is unnecessary unless there is some contention the legislature has allocated that class of cases to county court. Ultimately, the district courts are not to be faulted for the ad hoc introduction of extraneous concepts into the meaning of "subject matter jurisdiction." As the next section shows, the intermingling of subject matter jurisdiction and issues of procedural jurisdiction was long ago authorized by one of two competing lines of cases.

Procedural Jurisdiction Is Not Subject Matter Jurisdiction

Subject matter jurisdiction is power granted by the sovereign to a court and as such can neither be created nor destroyed by the parties.[31] It is a feature of the legal landscape itself and generally should be unaffected by procedural events in a particular case. Nevertheless, there are instances in which the constitutional and statutory provisions allocating subject matter jurisdiction depend in some sense on case-specific facts or events. Two examples merit discussion.

First, by taking an appeal, a party shifts subject matter jurisdiction from the trial court to the appellate court because it changes the type of case. The constitution separately allocates original proceedings, art. V §5(b), and appellate proceedings, art. V §4(b)(1). The notice of

appeal, therefore, changes the type of case from an original action to an appeal, transferring subject matter jurisdiction to the appellate court. Cases that hold a trial court order "void" for lack of jurisdiction because the matter was pending on appeal are thus correctly applying the concept of subject matter jurisdiction.

Second, the traditional use of an "amount in controversy"[32] to divide cases between county and circuit courts injects a potential factual issue into the determination of subject matter jurisdiction.[33] If a case is brought in circuit court, and it is later conceded or determined that the amount in controversy is beneath the threshold, the court may transfer the case.[34]

It is, therefore, not impossible for procedural events to affect the existence of subject matter jurisdiction. But only those facts made material by the jurisdictional statutes could conceivably have that effect. It is difficult to conceive how any other procedural event can change the general type of case. It would follow logically that pleading defects could not defeat subject matter jurisdiction, but that has not always been understood.

The definitive case separating subject matter jurisdiction from procedural questions is *Malone v. Meres,* 109 So. 677 (Fla. 1926). The court had on several prior occasions[35] rejected attempts to "jurisdictionalize" simple procedural or substantive error, but the *Malone* appellant nevertheless claimed that the trial court's failure to sua sponte enforce a procedural requirement had somehow retrospectively extinguished its subject matter jurisdiction. He was seeking to collaterally attack a decree some four months after it had been entered.

The court summarily rejected the attempt to elevate procedural error to the level of subject matter jurisdiction: "[T]he subject-matter of the suit was the assertion of a lien predicated upon a contract of sale. . . that was within the jurisdiction of the court."[36]With citation to dozens of authorities from Florida and elsewhere, the court laid out the basic principle that "jurisdiction of the subject-matter does not mean jurisdiction of the particular case but of the class of cases to which the particular case belongs, and does not depend upon the sufficiency of the pleadings nor the rightfulness of the decision."[37]Neither procedural irregularities nor substantive legal error would deprive a court of subject matter jurisdiction so as to make its order void; either kind of error could be corrected only through timely appeal.

Malone specifically holds that if a procedural event brings a case to the point where substantive law requires the court to deny the relief being requested, the court does not lose jurisdiction, but to the contrary, has jurisdiction and should enter an order denying the relief.[38] Importantly, subject matter jurisdiction includes "the power to decide wrongly as well as correctly."[39] After *Malone*, collaterally attacking a judgment on the basis of a defect in the underlying pleadings would appear to be frivolous.

Those who would jurisdictionalize procedure were undeterred. The following year, the Florida Supreme Court decided *Lovett*, intimating in dictum that acting outside the scope of the pleadings could retrospectively deprive a court of subject matter jurisdiction:

The jurisdiction and power of a [c]ourt remain at rest until called into action by some suitor; it cannot by its own action institute a proceeding sua sponte. The action of a [c]ourt must be called into exercise by pleading and process, prescribed or recognized by law, procured or obtained by some suitor by filing a declaration, complaint, petition, cross-bill, or in some form requesting the exercise of the power of the [c]ourt. If a [c]ourt should render a judgment in a case where it had jurisdiction of the parties, upon a matter entirely outside of the issues made, it would of necessity be arbitrary and unjust as being outside the jurisdiction of the subject-matter of the particular case, and such judgment would be void and would not withstand a collateral attack...when it is said that a [c]ourt has jurisdiction of the subject-matter of any given cause, if these words are to be given their full meaning, they imply, generally speaking, 1) that the [c]ourt has jurisdictional power to adjudicate the class of cases to which such case belongs; and 2) that its jurisdiction has been invoked in the particular case by lawfully bringing before it the necessary parties to the controversy, and 3) the controversy itself by pleading of some sort sufficient to that end.... [40]

In *Lovett*, the parties litigated the partition of four parcels of real estate. On appeal, the appellants contended the trial court exceeded its jurisdiction by ruling on the fourth parcel, which had not been mentioned in the complaint, only in one of the answers. Although the appellants had actively participated in litigating the fourth parcel before the trial court without objecting to the ostensible pleading defect, they raised the issue for the first time in the Supreme Court, claiming it was “jurisdictional.” With the above-quoted

language, the court excused the appellants' failure to raise the issue below, expressly relying on the rule that defects of subject matter jurisdiction cannot be waived by the parties.[41] The court went on to determine there was, in fact, no pleading defect, as the answer raising the fourth parcel was sufficient to place it before the court. But since the order purported to bind certain minor parties not properly before the court, the Supreme Court made the order voidable by those minor parties. That result implies the court based its decision on personal jurisdiction, since obviously it would be incorrect to make an order voidable rather than void if it were unsupported by subject matter jurisdiction.

It is not the actual holding of *Lovett*, but rather the above-quoted dictum for which it has since been cited,[42] that resulted in the law of jurisdiction branching into different, and ultimately inconsistent, directions. Both *Malone* and *Lovett* had recognized that some procedural rules had been called "jurisdictional" but *Malone* unequivocally held that kind of jurisdiction was not subject matter jurisdiction. The *Lovett* dictum stated a pleading defect could be "jurisdictional" and permitted it to be raised for the first time on appeal after the litigants had proceeded through trial without mentioning it. While it did not explicitly hold the pleading defect resulted in a failure of subject matter jurisdiction, it treated the procedural jurisdictional issue *as if* it were subject matter jurisdiction. The same result could have been reached (and probably would have) by declaring the error "fundamental," but the opinion went out of its way to characterize the error as "jurisdictional" in excusing its untimely assertion. *Lovett* was thus read

by subsequent courts to mean that a court lacked subject matter jurisdiction if its jurisdiction had not been properly "invoked."

Lovett's merging of the notion of subject matter jurisdiction with the sufficiency of the pleadings is clearly inconsistent with *Malone,* which *Lovett* curiously does not cite. It is also inconsistent with the definition of subject matter jurisdiction (the power to hear and decide cases of a particular type) that the opinion itself contains. Logically, the existence of a court's power to hear cases of a particular type exists regardless of whether such a case ever arises. The act of evaluating the pleadings and staying within their scope cannot occur unless the court has the power to entertain that type of case in the first place. If the power to hear the case exists, it cannot be split into numerous pieces depending on what was pled.

After *Malone* and *Lovett*, separate lines of Florida Supreme Court decisions emerged. Cases following *Lovett* permitted procedural arguments to enjoy the immunity from timeliness requirements that follows from a lack of subject matter jurisdiction.[43] Several cases recited the proposition that pleadings are jurisdictional without using it to excuse any untimely action,[44] but in at least four Supreme Court cases, orders that were otherwise final were denied res judicata effect due to procedural errors.[45] These culminated with *Gay v. McCaughan*, 105 So. 2d 771, 773 (Fla. 1958), which relied on *Lovett* to cast a procedural consideration as a matter of subject matter jurisdiction, permitting a collateral attack.[46]

Over the same period, cases following *Malone* would refuse to jurisdictionalize procedural error, focusing instead on the finality of judgments not timely appealed. For example, in *Goodrich v. Thompson*, 118 So. 60, 62 (Fla. 1928), the court refused to reopen an 11-year-old decree alleged to be tainted by procedural error. *Garner v. Slack,* 136 So. 444, 445 (Fla. 1931), cited *Malone* for the proposition that "the question as to whether or not either pleadings or proof will support a deficiency decree is not jurisdictional but is a question which may be presented to an appellate court in proper proceedings for review."[47] In *State ex rel. Fulton Bag & Cotton Mills v. Burnside,* 153 Fla. 599, 602 (Fla. 1943), the court followed *Malone*, holding

where it appears that a court is legally organized and has jurisdiction of the subject matter and the adverse parties are given an opportunity to be heard as required by law, errors or irregularities, or even wrong doing in the proceedings, short of an illegal deprivation of an opportunity to be heard, will not render the judgment void.

Awareness of the logical inconsistency between the *Lovett* dictum and the universally accepted definition of subject matter jurisdiction seemed to grow toward the end of the 20th century. At least one case called the failure to procedurally perfect a court's jurisdiction a "jurisdictional" defect, but by characterizing the decree as voidable on appeal rather than void *ab intitio*, analytically distanced the ruling from one of subject matter jurisdiction.[48] Since the 1958 case of *Gay*, the Supreme Court continued to cite the jurisdictional

principles of *Malone*,[49] but has not relied on *Lovett's* dictum to excuse untimely appeals or collateral attacks.[50]

the time the Supreme Court decided *Cunningham v. Std. Guar. Ins. Co.,* 630 So. 2d 179, 181 (Fla. 1994), there were several cases[51] in the district courts of appeal following *Malone,* rejecting the notion that procedural events could defeat subject matter jurisdiction and hence res judicata, but there were also cases to the contrary citing *Lovett*.[52] In general, these cases did not acknowledge the conflict between *Lovett* and *Malone*, with the notable exception of Judge Cowart's opinion in *Florida Power and Light Co. v. Canal Authority,* 423 So. 2d 421, 424 (Fla. 5th DCA 1982), *rev. den.*, 434 So. 2d 887 (Fla. 1983). After extensive consideration of both precedents, the *Florida Power and Light* court held pleading defects were not issues of subject matter jurisdiction and did not strip the res judicata effect from final orders.

The issue came to a head in 1994, when the First District held the circuit court lacked subject matter jurisdiction over an insurer bad faith action when the underlying negligence claim had not been tried to completion. In *Standard Guaranty Insurance Co. v. Cunningham*, 610 So. 2d 458 (Fla. 1st DCA 1992), the insurer had stipulated to try the bad faith claim before a jury even though the underlying action was unresolved and, upon receiving an adverse ruling, attacked the result on "jurisdictional" grounds. Its argument was that the plaintiff had failed to plead the completion of the underlying action, which had not yet occurred, so the pleadings had failed to "invoke" the court's subject matter jurisdiction and the result of the trial process to which it had stipulated

should be disregarded. Citing *Gay*, which in turn was based on *Lovett,* the district court held the procedural defect operated to deny the court of subject matter jurisdiction. The concurring opinion of Judge Wolf stated succinctly: "[W]hile a prior judgment which exceeds the policy limits is an essential element of a bad-faith action [citation omitted], I do not believe that the failure to allege and prove this element rises to the level of a jurisdictional defect which cannot be waived." [53]

The Supreme Court agreed with Judge Wolf, and expressly recognized the distinction between the existence of subject matter jurisdiction and its procedural invocation.[54] Directly repudiating the implication several courts had discerned in the *Lovett* language, the court held the parties could cure these procedural defects by waiver or agreement — something obviously impossible if subject matter jurisdiction were at stake. The defendant had argued its own stipulation to proceed in a bad faith action could not "convey" subject matter jurisdiction on the trial court, which is true but immaterial: It is the constitution, not the parties' stipulation, which conveys subject matter jurisdiction on the circuit court. Nevertheless, two districts had held the trial courts lacked subject matter jurisdiction in those circumstances.[55]

The Supreme Court perceived that the district courts had strayed from the actual meaning of subject matter jurisdiction and approvingly cited *Florida Power and Light* for the proposition that "deficiencies in the pleading invoking the jurisdiction of the trial court did not deprive the court of jurisdiction. Clearly the trial

court in the instant cases, being the circuit court, had subject-matter jurisdiction over the class of cases known as condemnation suits."

Cunningham should therefore have put an end to the notion that a party seeking to belatedly overturn a judgment could scour the underlying pleadings for some defect that would render the otherwise final judgment "void" for lack of subject matter jurisdiction. It would still be appropriate to call the pleading defect an error of "jurisdiction," but not to treat it as one of "subject matter jurisdiction." This variety of "jurisdictional" error would be subject to correction on timely appeal if the error was preserved, but a late-raised objection or collateral attack would fail.

While *Cunningham* appeared to finally resolve the question of whether a pleading defect could retroactively defeat the inception of subject matter jurisdiction over a case, yet another line of cases had, in the spirit of *Lovett* though not citing it directly, developed the notion that procedural events could terminate subject matter jurisdiction after it had been acquired. In *Randle-Eastern Ambulance Serv. v. Vasta*, 360 So. 2d 68, 69 (Fla. 1978), the court held that it was as if the trial court "lacked jurisdiction" once a voluntary dismissal had been filed. The *Randle-Eastern* case cited only the rules of procedure and saw no need to identify what kind of jurisdiction was lacking.

Most of the 80 district court cases citing *Randle-Eastern* had no occasion to consider the type of jurisdictional concept being applied, because the issue was timely raised.[56] After all, it is only when a litigant seeks to use a "jurisdictional" argument to pierce theres judicata effect of a final judgment or to raise a specific

argument for the first time in the appellate court that the court need determine whether the jurisdictional argument being advanced is truly one of subject matter jurisdiction. When a timely objection has been made to a proceeding after a voluntary dismissal, the court can simply reverse the procedural error, and calling it a "nullity"[57] is dictum. Nevertheless, cases such as *Colucci v. Greenfield*, 547 So. 2d 224, 225 (Fla. 3d DCA 1989), suggest that prior to *Cunningham*, the district courts widely considered it self-evident that *Randle-Eastern* jurisdiction was equivalent to subject matter jurisdiction.

After *Cunningham* re-established the fundamental definition of subject matter jurisdiction, it is hard to see how courts continued to commingle it with *Randle-Eastern* jurisdiction. The latter cannot implicate subject matter jurisdiction or in personam jurisdiction, since neither the type of case nor the identity of the parties is changed by the filing of a voluntary dismissal. This was tacitly recognized in *Miller v. Fortune Ins. Co.*,484 So. 2d 1221 (Fla.1986), in which the court essentially receded from the "jurisdictional" basis of *Randle-Eastern*.[58]

Nevertheless, there are cases since *Cunningham* that treat *Randle-Eastern* jurisdiction as if it is subject matter jurisdiction. In *84 Lumber Co. v. Cooper*, 656 So. 2d 1297, 1299 (Fla. 2d DCA 1994), the court held a procedural defect tantamount to a lack of subject matter jurisdiction, excusing the appellant's failure to timely raise the issue. In *Hoechst Celanese Corp v. Fry*,693 So. 2d 1003 (Fla. 3d DCA 1997), *rev. den.*, 700 So. 2d 685 (Fla. 1997), the Third District raised the "jurisdiction" question sua sponte on the ground that subject matter jurisdiction was at issue. The Fifth

District held *Randle-Eastern* jurisdiction was unwaivable subject matter jurisdiction in *Durie v. Hanson*, 691 So. 2d 485, 486 (Fla. 5th DCA 1997).

The Fourth District in *T.D. v. K.D.,* 747 So. 2d 456, 458 n.1 (Fla. 4th DCA 1999), took a different approach, holding instead that *Randle-Eastern* jurisdiction was not subject matter jurisdiction, but rather "case" jurisdiction, a procedural concept addressing whether it was proper for the court to act at a given procedural posture.[59] *T.D.* thus represents the first explicit recognition in the cases of the third species of jurisdiction that is the subject of this article.

The high water mark of the cases equating *Randle-Eastern* with subject matter jurisdiction was the Fifth District's decision in *General Dynamics Corp. v. Paulucci,* 797 So. 2d 18, 20 (Fla. 5th DCA 2001). The Fifth District held the trial court had lost subject matter jurisdiction when it entered a judgment approving a settlement agreement, citing *Wallace v. Townsell,* 471 So. 2d 662 (Fla. 5th DCA 1985).[60] The Supreme Court reversed, with Justice Pariente writing for a unanimous court:

Jurisdiction is a broad term that includes several concepts, each with its own legal significance. In *Paulucci*, the Fifth District characterized the issue before it as one of the trial court's "subject matter jurisdiction." *See* 797 So. 2d at 21. We conclude that framing the issue as one of subject matter jurisdiction is inaccurate. Subject matter jurisdiction "means no more than the power lawfully existing to hear and determine a cause." *Cunningham v. Standard Guar. Ins. Co.*, 630 So. 2d 179, 181 (Fla. 1994) (quoting *Malone v. Meres*, 91 Fla. 709, 109 So. 677, 683 (Fla. 1926)). It "concerns the power

of the trial court to deal with a class of cases to which a particular case belongs." *Id.* Rather, the issue presented by the certified question is more aptly described as one of the trial court's "continuing jurisdiction...."[61]

After *Paulucci*, there should be no occasion to confuse procedural jurisdiction with subject matter jurisdiction. *Cunningham* held that pleading defects do not defeat creation of subject matter jurisdiction, and *Paulucci* held that procedural events do not terminate it.

Since *Paulucci,* the district courts for the most part adhere to the notion that a third species of jurisdiction exists, and whether it is called "case" jurisdiction or "continuing" jurisdiction, it is a set of procedural rules and not a rule of subject matter jurisdiction.[62] But *Lovett* has still been cited by some courts for the notion that procedural defects can render a decree void. One dissenting opinion[63] and two panel holdings since *Paulucci* cling to the notion that procedural defects can deprive courts, retrospectively, of subject matter jurisdiction.

In *Garcia v. Stewart*, 906 So. 2d 1117, 1123 (Fla. 4th DCA 2005), the Fourth District apparently revived the *Lovett* notion that the pleadings constituted an essential "aspect" of subject matter jurisdiction. The trial court had granted a motion to disburse certain funds that were in the court registry as proceeds from a foreclosure sale. That order was more than six months old when it was challenged. The Fourth District noted that the error was untimely raised, acknowledging it would need to cast the error as "jurisdictional" in order to consider it.[64] For the sole reason that there had been "no *pleading* concerning [the] claim,"[65] the court held "the trial court was without subject matter jurisdiction

when it entered the order distributing funds." Mr. Garcia, who had been the defendant in the original mortgage action and participated in proceedings when the order was entered, who apparently raised no objection to the status of the pleadings before the trial court, and who allowed the time for appealing the order to expire, was permitted to set aside an apparently final order six months later, on the theory that pleading defects could strip a court of subject matter jurisdiction. There is no indication that counsel in that case raised *Cunningham* or *Paulucci* or *Florida Power and Light* before the district court.

Subsequently, the Fifth District cited *Garcia* with apparent approval for the proposition that pleading defects could deprive a court of subject matter jurisdiction in *Phenion Development Group Inc. v. Love*, 940 So. 2d 1179, 1182 (Fla. 5th DCA 2006). The court held the pleadings in that case were sufficient and rejected the appellant's argument, first raised seven months after the final judgment, that the trial court had lacked jurisdiction.

Garcia thus stands as the only case post-*Paulucci* to declare a court's order void from its inception for lack of subject matter jurisdiction on account of a pleading defect. While the analysis of this article implies that *Garcia* and the *Phenion* dictum are inconsistent with *Paulucci* and *Cunningham* and the fundamental definition of subject matter jurisdiction, practitioners must remain attentive to the fact that *Garcia* is arguably the law in the Fourth District at the present time, and the Fifth District has apparently adopted it as well. But neither case acknowledged *Cunningham*, which speaks directly to the question of whether

pleading defects can defeat subject matter jurisdiction. Whether the district courts would adhere to *Garcia* in a case where it was expressly challenged under *Cunningham* remains to be seen.

The *Cunningham-Paulucci* rule that procedural defects cannot strip a court of subject matter jurisdiction is not only correct under art. V, §5(b) of the Florida Constitution and the universal definition of subject matter jurisdiction, it is also better public policy than *Garcia* or any other unwarranted extension of the concept of subject matter jurisdiction at the expense of res judicata. People need to be able to rely on finality of judgments. Pleading defects should be waivable, because they could be cured if promptly brought to the lower court's attention. If a party had a meaningful opportunity to object to a pleading defect, or to appeal an adverse decision, there is no reason why they should be later be able to sweep aside the result of the process. Doing otherwise affords parties an incentive to remain silent about such pleading defects, litigate the case to conclusion, and exert a veto over the result if it turns out to be unfavorable. Fundamental error doctrine affords the appellate courts a basis for correcting imperfectly preserved errors when necessary, without characterizing them as "jurisdictional."

The recent case of *Cuartas v. Cuartas,* 951 So. 2d 980 (Fla. 3d DCA 2007), illustrates the potential pitfalls of the *Lovett-Garcia* rule. In family law cases, modification actions by rule must be commenced with a petition, not just a motion.[66] Mr. Cuartas had filed a motion for change of custody, and the parties litigated the matter through hearing without raising the pleading deficiency. Only after sustaining an adverse ruling did

the former wife raise the pleading defect, seeking to invalidate the results of the hearing by claiming the defect was jurisdictional. The Third District rejected the argument, on the ground that pleading defects are waivable by conduct. If *Garcia* prevailed in the Third District, the "gotcha" tactic emphatically rebuffed by the *Cuartas* court would have succeeded.

Although the practice of treating pleadings as "aspects" of subject matter jurisdiction has been soundly repudiated by *Cunningham*, *Garcia* instructs that it is not dead yet. Long-standing traditions die hard. There always will be parties seeking to make untimely arguments — parties who desperately desire to undo judgments after the time for appealing has expired or who tactically declined to raise certain arguments before the trial court, but want to argue them on appeal. It is understandable that parties would try to circumvent the rules of finality and timeliness by claiming their issue implicates the court's subject matter jurisdiction, the one recognized way to get around the timeliness requirements. Confusing pleading defects with failures of subject matter jurisdiction is incorrect, but by tracing the history of *Lovett* and its progeny, at least one can understand how the curious proposition arose and propagated, and why it persists to some extent today. And while this article is adamant about erasing the confusion between subject matter jurisdiction and jurisdictional concepts arising from a case's procedural posture, these both constitute legitimate uses of the word "jurisdiction." The next section briefly touches upon some indefensible misuses of the word "jurisdiction."

Three Categories of Legitimately "Jurisdictional" Analysis

A court's "authority to render the judgment" was identified as one of "three jurisdictional elements" as long ago as *Arcadia Citrus Growers Ass'n v. Hollingsworth*, 185 So. 431, 433 (Fla. 1938). The other two elements, of course, were subject matter jurisdiction and personal jurisdiction. Numerous cases after *Arcadia Citrus* implicitly recognized the existence of a third species of jurisdiction by distinguishing a procedural jurisdictional concept from subject matter jurisdiction, but the next explicit recognition of a distinct third category of jurisdiction was not made until the Fourth District decided *T.D. v. K.D.,* 747 So. 2d 456 (Fla. 4th DCA 1999):

We use the word "jurisdiction" advisedly even though it has different meanings, each with different implications. Ordinarily we use this word to refer to "subject matter" or "personal" jurisdiction. There is a third meaning — more logically designated as "case" jurisdiction — which involves the power of the court over a particular case that is within its subject matter jurisdiction.[67]

The "continuing jurisdiction" of *Paulucci* also involves the authority of the court to enter orders in a particular case that is within its subject matter jurisdiction.[68] The determination of subject matter jurisdiction is complete when it is concluded that a specific case is within the general type of case allocated to the court. Once acquired, subject matter jurisdiction can only be lost by the taking of an appeal. Procedural jurisdiction, by contrast, can appear and disappear depending on various events, and indeed it can be split into pieces when a court retains "jurisdiction" over some issues but

not others when rendering judgment. As noted above, there is an argument that compliance with procedural rules governing the onset and termination of a court's authority to enter orders in a particular case need not be called "jurisdiction." Nevertheless, it appears that reserving, continuing, and divesting procedural jurisdiction is here to stay. This is not objectionable, so long as this form of jurisdiction "of the subject matter and parties" is not confused with jurisdiction of the subject matter.

The *Lovett* rule that a court's jurisdiction must be properly invoked before it can be exercised is still good law. Courts should follow it scrupulously, but as a waivable rule of procedure and not a rule of subject matter jurisdiction. Obviously the SMJ must exist before it can be "invoked." The same is true of the rule that requires courts to stay within the confines of the pleadings. All of these rules govern *when* a court may enter an order. Being dependent on the procedural posture of the case, they are not rules of subject matter jurisdiction.

As a practical matter, rules of procedural jurisdiction have more in common with routine procedural law than with subject matter jurisdiction. If a procedural error is timely brought to the court's attention, the trial court can remedy the error before proceeding further. Unless a procedural error qualifies as fundamental error, it is waived if not timely asserted, as required by the principles of finality and reliability of judgments. Procedural jurisdiction is not subject matter jurisdiction, but it remains a legitimately jurisdictional concept in that it directly addresses the court's authority to hear and decide a dispute.[69]

There are numerous other appearances of the word "jurisdiction" which are not in any meaningful sense "jurisdictional," although citing specific examples is deliberately avoided here. In particular, it is a semantically indefensible misuse of the word "jurisdiction" to say a court "lacks jurisdiction to" take a certain action when the requisites of subject matter,in personam, and procedural jurisdiction are all in place. A trial court may reach a result that is substantively incorrect, but that does not serve to deprive that court, retrospectively, of "jurisdiction."

Jurisdiction is the authority to make a decision. It is logically impossible for a court's authority to make a decision to be dependent on the correctness of the decision. As noted by the *Malone* court, a court with subject matter jurisdiction has "the power to decide wrongly as well as correctly."[70] The logical inconsistency in supposing subject matter jurisdiction could be extinguished by reaching a legally incorrect result was expressly acknowledged in *Calhoun v. New Hampshire Ins. Co.*, 354 So. 2d 882, 883 (Fla. 1978). A court that has subject matter jurisdiction does not lose it by deciding wrongly, and it is respectfully submitted that practitioners and courts should avoid gratuitous uses of "lacked jurisdiction to..." to describe simple substantive legal error. In too many cases, "the term 'jurisdiction' was employed, possibly unfortunately instead of 'authority,' a word of slightly gentler connotation."[71]

In conclusion, Florida's jurisprudence of "jurisdiction" has not been seamless, but neither has it been chaotic, as some might claim. There is an underlying order to the seemingly casual, undefined use of the word. Admittedly, it sounds odd that "jurisdiction of the

subject matter and parties" means something different than "subject matter jurisdiction and personal jurisdiction." When a Florida court has (or retains) "jurisdiction of the subject matter" that actually means something quite different than subject matter jurisdiction, which depends only on the general type of case involved.

"Jurisdiction of the subject matter" means that the court's authority over a particular incident, transaction, or circumstances that constitutes the "subject matter" of the case has been activated, as required by procedural law. Similarly, jurisdiction "of the parties" means more than personal jurisdiction — it means the court's existing legal authority over the parties has been activated in a procedurally proper way, usually service of process.[72] Thus if one expects the "big two" categories of jurisdiction from law school to be the only categories, there are thousands of references to jurisdiction in the Florida cases that would not make any sense at all. But when one perceives that those references pertain to the question of whether the applicable procedural law affords the court a green light to proceed under the circumstances, it becomes evident that an entirely distinct category exists, and although some inconsistency marked its development, in recent decades, the body of procedural law of jurisdiction in Florida has become increasingly coherent. All that remains is to formally recognize the existence of procedural jurisdiction as a distinct species, and to eradicate the vestiges of its confusion with subject matter jurisdiction.

The three classifications of potential jurisdictional error and their legal consequences

[1] A sample of 7,490 district court of appeal cases using the term "jurisdiction" was taken through Lexis-Nexis on August 10, 2007. Cases using the term "subject matter jurisdiction" were counted separately, as were cases using one of several variants of personal or in personam jurisdiction. Those two categories each accounted for approximately six percent of the uses of the word "jurisdiction" in Florida D.C.A. cases. The various subspecies of subject matter and personal jurisdiction collectively add up to less than one percent of the appearances of "jurisdiction" in the district court of appeal cases: pendent jurisdiction, three cases; ancillary, one; in rem, 43; quasi-in-rem, six. Thus 87 percent of the appearances of "jurisdiction" are not specifically identified as subject matter jurisdiction or personal jurisdiction.

[2] *Lovett v. Lovett*, 112 So. 768, 776 (Fla. 1927).

[3] *See* notes 13 and 14.

[4] *See* notes 15 through 17.

[5] *Florida Star v. B.J.F.*, 530 So. 2d 286, 288 (Fla. 1988). *See also Cunningham v. Std. Guar. Ins. Co.*, 630 So. 2d 179, 181 (Fla. 1994).

[6] An excellent general discussion of the current law of personal jurisdiction is contained in

Garris v. Thomasville-Thomas County Humane Soc'y,

941 So. 2d 540, 541 (Fla. 1st D.C.A. 2006). The court distinguishes personal jurisdiction from service of process in *Borden v. East-European Ins. Co.*, 921 So. 2d 587, 592 (Fla. 2006).

[7] *Paulucci v. Gen. Dynamics Corp.*, 842 So. 2d 797, 801, n.3 (Fla. 2003).

[8] *Babcock v. Whatmore*, 707 So. 2d 702, 704 (Fla. 1998).

[9] *Florida Star v. B.J.F.*, 530 So. 2d 286, 288 (Fla. 1988). *See also Cunningham v. Std. Guar. Ins. Co.*, 630 So. 2d 179, 181 (Fla. 1994).

[10] *See Naples v. Naples,* 967 So. 2d 944 (Fla 2d D.C.A. 2007) (trial court could not have reached case on merits since it held itself without SMJ). A logical purist might argue that a court lacking SMJ would not even have the power to enter an order dismissing the case for lack of SMJ, but that is countered by the principle that every court has SMJ to determine whether it has jurisdiction. *Sun Insurance Company v. Boyd*, 105 So. 2d 574, 575 (Fla.1958).

[11] *Hughes v. State,* 901 So. 2d 837 (Fla. 2005)("the importance of finality in any justice system. . . cannot be understated.") One of the goals of the current constitutional structure is to attain finality in a reasonably prompt manner. *See Bunkley v. State*, 882 So. 2d 890, 902 (Fla. 2004)(Wells, J. concurring).

[12] *Venetian Salami Co. v. Parthenais,* 554 So. 2d 499 (Fla. 1989). Jurisdiction in rem, founded on the presence of property within the court's territorial bounds, can to some extent substitute for personal jurisdiction. *See generally, Publix Super Markets, Inc. v. Cheesbro Roofing, Inc.*, 502 So. 2d 484, 486 (Fla. 5th D.C.A. 1987).

[13] *See Synchron, Inc. v. Kogan* 757 So. 2d 564, 567 (Fla. 2d D.C.A. 2000)("not contempt to disobey an order entered without personal jurisdiction over the accused"); *Joannou v. Corsini*

543 So. 2d 308 (Fla. 4th D.C.A. 1989) ("lack of personal jurisdiction makes such order voidable only, not void").

[14] *Lovett v. Lovett*, 112 So. 768 (Fla. 1927), is still good law on this point.

[15] *Cortina v. Cortina*, 98 So. 2d 334, 337 (Fla. 1957); *Aldridge v. Peak Prop. & Cas. Ins. Corp.,* 873 So. 2d 499, 501 (Fla. 2d D.C.A. 2004); *Carroll & Assocs., P.A. v. Galindo*, 864 So. 2d 24, 28 (Fla. 3d D.C.A. 2003); *Instituto Patriotico Y Docente San Carlos v. Cuban Am. Nat'l Found.*, 667 So. 2d 490, 492 (Fla. 3d D.C.A. 1996).

[16] *Randle-Eastern Ambulance Service, Inc. v. Vasta*, 360 So. 2d 68 (Fla. 1978); *Miller v. Fortune Ins. Co.*, 484 So. 2d 1221, 1223 (Fla. 1986); *Piper Aircraft Corp. v. Prescott*, 445 So. 2d 591, 594 (Fla. 1st D.C.A. 1984); *Levine v. Gonzalez,* 901 So. 2d 969, 973 (Fla. 4th D.C.A. 2005); *MCR Funding v. CMG Funding Corp.*, 771 So. 2d 32, 35 (Fla. 4th D.C.A. 2000).

[17] The origin of this rule is *Davidson v. Stringer*, 147 So. 228, 229 (Fla. 1933) ("When a judgment or decree has once been rendered, the [c]ourt loses jurisdiction over the subject matter of the suit, other than to see that proper entry of the judgment or decree is made and that the rights determined and fixed by it are properly enforced"). *See also Finkelstein v. North Broward Hospital Dist.*, 484 So. 2d 1241, 1243 (Fla. 1986); *Buckley Towers Condominium, Inc. v. Buchwald*, 321 So. 2d 628, 629 (Fla. 3d D.C.A. 1975); *Kinser v. Crum*, 823 So. 2d 826, 827 (Fla. 1st D.C.A. 2002).

[18] *See Damian v. Damian*, 955 So. 2d 1178, 1180 (Fla. 2d D.C.A. 2007), and cases therein cited. The origin of the notion of "reserving jurisdiction" is not clear, but the concept was so well established as to require no citation to authority by the time of *Gulliver Academy v. Bodek*, 694 So. 2d 675, 677 (Fla. 1997) ("a reservation of jurisdiction in a final judgment is procedurally an

enlargement of time.... Any other interpretation would make the trial court's reservation in the final judgment not only a nullity but a procedural trap.") *Gulliver Academy* is no longer viable for the quoted proposition after the 2000 adoption of Fla. R. Civ. P. 1.525. *Saia Motor Freight Line, Inc. v. Reid*, 930 So. 2d 598, 600 (Fla. 2006). *Saia* also disapproved *Gilbert v. K-Mart Corp.,* 664 So. 2d 335, 339 (Fla. 1st D.C.A. 1995).

[19] *Peltz v. Dist. Court of Appeal*, 605 So. 2d 865, 866 (Fla. 1992).

[20] *See Johnson v. Plantation Gen. Hosp. P'ship*, 641 So. 2d 58, 60 (Fla. 1994).

[21] *Mandico v. Taos Constr.*, 605 So. 2d 850, 854 (Fla. 1992); *State ex rel. Sheiner v. Giblin*, 73 So. 2d 851, 852 (Fla. 1954); *Curtis v. Albritton,* 132 So. 677, 681 (Fla. 1931). *See also Condon v. Office Depot, Inc.*, 855 So. 2d 644, 648 (Fla. 2d D.C.A. 2003).

[22] "The circuit courts of the State of Florida are courts of general jurisdiction — similar to the Court of King's Bench in England — clothed with most generous powers under the Constitution, which are beyond the competency of the legislature to curtail. *Ex Parte Henderson*, 6 Fla. 279; *Lamb v. State,* 91 Fla. 396, 107 So. 535." *English v. McCrary,* 348 So. 2d 293, 297 (Fla. 1977), *quoting State ex rel. B. F. Goodrich Co. et al. v. Trammell et al.*, 192 So. 175 (1939). *See also State v. Jefferson*, 758 So. 2d 661, 664 (Fla. 2000); *Leonard v. State*, 760 So. 2d 114, 118 (Fla. 2000).

[23] When the legislature allocates a class of cases for administrative adjudication under Fla. Const., art. V, §1, that does not deprive the circuit court of jurisdiction over those cases, but rather erects a "prudential limitation" on the court's authority to act before administrative remedies have been exhausted. *Dep't of Business Regulation v. Provende, Inc.*, 399 So. 2d 1038,

1040 (Fla. 3d D.C.A. 1981).

[24] Federal law preempts state constitutional rules, including state court subject matter jurisdiction when there is a conflict. *See Boca Burger, Inc. v. Forum*, 912 So. 2d 561, 568 (Fla. 2005).

[25] *Dep't of Educ. v. Roe*, 679 So. 2d 756, 758 (Fla. 1996); *Reddish v. Smith*, 468 So. 2d 929 (Fla. 1985); *Circuit Court of Twelfth Judicial Circuit v. Department of Natural Resources*, 339 So. 2d 1113, 1114 (Fla. 1976); *Klonis v. Department of Revenue,* 766 So. 2d 1186, 1189 (Fla. 1st D.C.A. 2000).

[26] *See Seibels Bruce Ins. Cos. v. Deville Condo. Ass'n*, 786 So. 2d 616, 619 (Fla. 1st D.C.A. 2001).

[27] *See Houghtaling v. Seminole Tribe of Fla.*, 611 So. 2d 1235, 1239 (Fla. 1993); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006); *Lake Clarke Shores v. Page*, 569 So. 2d 1256, 1257 (Fla. 1990). These rules appear to be more in the nature of substantive immunity rules than limits on state court subject matter jurisdiction, but that is an interesting academic question left for another day.

[28] *See Fuentes v. Shevin*, 407 U.S. 67 (1972).

[29] The constitutional nature of subject matter jurisdiction in Florida has gone unnoticed in family law custody cases. *See Strommen v. Strommen*, 927 So. 2d 176, 183 (Fla. 2d D.C.A. 2006).

[30] *See, e.g., Dep't of Revenue ex rel. Vickers v. Pelsey*, 779 So. 2d 629, 631 (Fla. 1st D.C.A. 2001).

[31] *Brautigam v. MacVicar*, 73 So. 2d 863, 866 (Fla. 1954).

[32] Fla. Stat. §34.01(1)(c) (2006).

[33] *See Condon*, 855 So. 2d 644 (Fla. 2d D.C.A. 2003)*; Becker v. Re/Max Horizons Realty, Inc.*, 819 So. 2d 887, 889 (Fla. 1st D.C.A. 2002).

[34] Before the adoption of Fla. R. Civ. P.1.060, an action

brought in the wrong court would be dismissed. *Caudell v. Leventis*, 43 So. 2d 853, 855 (Fla. 1950). Apparently, it is still possible to litigate a case to judgment without mentioning that the complaint's demand was below the jurisdictional minimum, then raise the pleading defect as "jurisdictional." *Fedan Corp. v. Reina*, 695 So. 2d 1282, 1283 (Fla. 3d D.C.A. 1997). Despite the structure of power allocation under the constitution, the Supreme Court has held it possible for circuit and county courts to have "concurrent" jurisdiction over some matters. *Alexdex Corp. v. Nachon Enters.*, 641 So. 2d 858, 861 (Fla. 1994).

[35] *See*, *e.g.*, *Hillsborough Grocery Co. v. Ingalls*, 53 So. 930.

[36] *Malone,* 109 So. at 682.

[37] *Id* at 685.

[38] *Id.* at 685-86. ("Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and, whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court.").

[39] *Id.* at 687.

[40] *Lovett v. Lovett*, 112 So. 768, 776 (Fla. 1927).

[41] *Id.* at 775.

[42] The *Lovett* dictum had attained the status of precedent by the time the Supreme Court relied upon it for the holding in *Coffrin v. Sayles*, 128 Fla. 622, 630 (Fla. 1937). *See also Krivitsky v. Nye*, 19 So. 2d 563, 568 (Fla. 1944).

[43] *See Sawyer v. State*, 113 So. 736 (Fla. 1927); *Fla. Power and Light Co. v. Canal Auth.*, 423 So. 2d 421, 425 (Fla. 5th D.C.A. 1982); *Smith v. Milwaukee Ins. Co.,* 197 So. 2d 548, 551 (Fla. 4th D.C.A. 1967) (concurring opinion); *Roberts v. Seaboard Surety Co.*, 158 Fla. 686, 699 (Fla. 1947); *State*

ex rel. Campbell v. Chapman, 145 Fla. 647, 666 (Fla. 1941) (trial court had "jurisdiction" only because the pleadings were sufficient to invoke it).

[44] *See*, *e.g.*, *Cone v. Benjamin*, 27 So. 2d 90, 97 (Fla. 1946) (apparently equating); *Roberts v. Seaboard Surety Co.*, 158 Fla. 686, 699 (Fla. 1947); *State ex rel. Campbell v. Chapman*, 145 Fla. 647, 666 (Fla. 1941); *State ex rel. Associated Utilities Corp. v. Chillingworth*, 181 So. 346, 348 (Fla. 1938); *Hollywood, Inc. v. Clark*, 153 Fla. 501, 512 (Fla. 1943); *Cumberland Software, Inc. v. Great American Mortg. Corp.*, 507 So. 2d 794 (Fla. 4th D.C.A. 1987) ("subject matter jurisdiction, which we find the trial court exceeded in acting beyond its inherent jurisdiction in this case, cannot be waived.").

[45] *Cravero v. Florida State Turnpike Authority*, 91 So. 2d 312 (Fla 1956); *Krivitsky v. Nye*, 19 So. 2d 563 (Fla 1944); *State ex rel. Landis v. Simmons*, 140 So. 187 (Fla. 1932).

[46] *Id.* at 774-75. To date, 81 cases have cited *Lovett*, but only 14 of those also cited *Malone,* and none of them expressly noted the conflict. *Roberts* and *State ex rel Campbell* were able to harmonize *Lovett* and *Malone* on their respective facts.

[47] To similar effect, *see Paul v. Tampa*, 198 So. 583 (Fla. 1940); *In Re Estate of Begg*, 12 So. 2d 115, 116 (Fla. 1943); *De Marigny v. De Marigny*, 43 So. 2d 442, 445 (Fla. 1949) (divorce allegedly granted without residency requirement voidable, not void).

[48] *Cortina v. Cortina*, 98 So. 2d 334, 337 (Fla. 1957) ("[W]here, as here, an issue was not presented by the pleadings nor litigated by the parties during the hearing on the pleadings as made, a decree adjudicating such issue is, at least, voidable on appeal."); *Lockwood v. Pierce,* 730 So. 2d 1281, 1283 (Fla. 4th D.C.A. 1999)("[T]he clerk waived the court's lack of jurisdiction by appearing at the hearing without contesting that

point.").

[49] *See, e.g., Calhoun v. New Hampshire Ins. Co.*, 354 So. 2d 882, 883 (Fla. 1978).

[50] To date, *Lovett* continues to be cited, but mostly for the basic definition of subject matter jurisdiction or the procedural rule that courts may not act outside the scope of the pleadings. As if to underscore the insularity between cases following *Lovett* and those following *Malone*, in *Chase Bank of Tex. Nat'l Ass'n v. Dep't of Ins.*, 860 So. 2d 472, 475 (Fla. 1st D.C.A. 2003), *Lovett* was cited as the original source of the standard definition of subject matter jurisdiction, although the identical definition was contained in *Malone*, which was decided a year earlier.

[51] *Florida Power and Light Co. v. Canal Authority,* 423 So. 2d 421, 424 (Fla. 5th D.C.A. 1982); *Lusker v. Guardianship of Lusker*, 434 So. 2d 951, 953-54 (Fla. 2d D.C.A. 1983); *Sullivan v. Musella* 564 So. 2d 150 (Fla. 2d D.C.A. 1990). Cases after 1994 to similar effect are *Chase Bank of Tex. Nat'l Ass'n v. Dep't of Ins.*, 860 So. 2d 472, 476 (Fla. 1st D.C.A. 2003*); Dep't of Revenue ex rel. Vickers v. Pelsey*, 779 So. 2d 629, 631 (Fla. 1st D.C.A. 2001).

[52] *Lockwood v. Pierce,* 730 So. 2d 1281, 1283 (Fla. 4th D.C.A. 1999); *In re Estate of Hatcher,* 439 So. 2d 977, 980 (Fla. 3d D.C.A. 1983); *Bartolucci v. McKay,* 428 So. 2d 378 (Fla. 5th D.C.A. 1983); *Fine v. Fine,* 400 So. 2d 1254 (Fla. 5th D.C.A. 1981); *Defreitas v. Defreitas,* 398 So. 2d 991 (Fla. 4th D.C.A. 1981). In addition, at least one case after 1994 held pleading defects could strip a court of subject matter jurisdiction without specifically citing *Lovett*. *Decubellis v. Ritchotte,* 730 So. 2d 723 (Fla. 5th D.C.A. 1999).

[53] *Standard Guaranty Insurance Co. v. Cunningham*, 610 So. 2d 458, 460 (Fla. 1st D.C.A. 1992).

[54] *Cunningham v. Std. Guar. Ins. Co.,* 630 So. 2d 179, 181

(Fla. 1994).

[55] *Dixie Insurance Co. v. Gaffney*, 582 So. 2d 64 (Fla. 1st D.C.A. 1991); *State Farm Mut. Auto. Ins. Co. v. Marshall*, 618 So. 2d 1377 (Fla. 5th D.C.A. 1993).

[56] *See, e.g., Levine v. Gonzalez,* 901 So. 2d 969, 973 (Fla. 4th D.C.A. 2005); *Rabello v. Alonso,* 927 So. 2d 45, 46 (Fla. 3rd D.C.A. 2006) (basis for writ of prohibition); *Brown v. Ameri Star, Inc.,* 884 So. 2d 1065, 1067 (Fla. 2d D.C.A. 2004).

[57] *Goldberg v. Howard*, 646 So. 2d 856, 856 (Fla. 4th D.C.A. 1995).

[58] As candidly acknowledged in Justice Ehrlich's concurrence, the *reason* why a litigant took a voluntary dismissal could hardly be relevant to a trial court's decision to vacate a dismissal if the trial court had no "jurisdiction" to consider a motion to vacate a dismissal.

[59] *See also Tobkin v. State*, 777 So. 2d 1160 (Fla. 4th D.C.A. 2001).

[60] Interestingly, *Wallace* contains not a single reference to case or statute, suggesting the court considered its equation of subject matter jurisdiction with procedural requisites too well established to require citation.

[61] *Paulucci*, 842 So. 2d at 801n.3.

[62] *See, e.g.*, *Mueller v. Kamenesh*, 864 So. 2d 38, 40n.2 (Fla. 3d D.C.A. 2003); *ATM Ltd. v. Caporicci Footwear, Ltd.*, 867 So. 2d 413 (Fla. 3d D.C.A. 2003); *Levine v. Gonzalez,* 901 So. 2d 969 (Fla. 4th D.C.A. 2005).

[63] *Goldfarb v. Daitch*, 696 So. 2d 1199, 1205 (Fla. 3d D.C.A. 1997).

[64] *Garcia v. Stewart*, 906 So. 2d 1117, 1121-22 (Fla. 4th D.C.A. 2005).

[65] *Id.* at 1122 (emphasis in original).

[66] *Cuartas v. Cuartas,* 951 So. 2d 980, 982 (Fla. 3d D.C.A. 2007).

[67] *T.D. v. K.D.*, 747 So. 2d 456, 458 (Fla. 4th D.C.A. 1999).
[68] *See also Whitby v. Infinity Radio, Inc*., 961 So. 2d 349, 353 (Fla. 4th D.C.A. 2007); T*obkin v. State*, 777 So. 2d 1160, 1163 (Fla. 4th D.C.A. 2001).
[69] For example, a writ of prohibition may be entered to prevent a court from exceeding the limits of procedural jurisdiction. *Capital Bank v. Knuck*, 537 So. 2d 697, 698 (Fla. 3d D.C.A. 1989).
[70] *Malone,* 109 So. at 687.
[71] *Butler v. Allied Dairy Products, Inc.*, 151 So. 2d 279, 282 (Fla. 1963).

72

Borden v. East-European Ins. Co.

, 921 So. 2d 587, 592 (Fla. 2006).

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