

**IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR  
LEE COUNTY, FLORIDA** **CIVIL ACTION**

**D. De.,  
Petitioner & wife,**

**vs.  
R. De.,  
Respondent & husband,**

**Case No. XX DR YYYY N**

**ORDER**

This matter having come before the court on:

- (1) husband's "Motion to Compel";
- (2) husband's Motion to Adopt filed 8/17/2012;
- (3) husband's "Cross Exceptions" filed 8/17/2012;
- (4) wife's exception filed 8/8/2012 to the magistrate's report filed 7/31/2012,

it is ordered:

1. Findings

Regarding (4), the wife's exception to the magistrate's report, on 5/4/2012 the wife filed a motion to amend and she also filed her proposed amended petition at that time. This case began on 8/1/2011 when the wife filed the initial petition.

The husband opposed the wife's motion to amend and the court referred the wife's motion to amend to the magistrate. The magistrate recommended an order denying the wife's motion to amend.

This case is not set for trial and a notice for trial has not been filed. There is no showing of actual prejudice to the husband in granting the motion to amend or a showing of any abuse of the amendment process by the wife.

Regarding (1), the husband's "Motion to Compel," the husband's "Amended Notice of Hearing" filed 8/23/2012 does not identify which of the husband's two "Motions to Compel" the husband is noticing for hearing today. He filed one "Motion to Compel" on 4/5/2012 and another on 7/26/2012. The court assumes the latter motion is the one heard today because the argument was concerned with that motion.

The husband's argument, not stated in his motion, is that wife failed to provide "complete" copies of certain credit card statements in her response to his third request to produce. Upon inquiry the court learned that in an earlier response to any earlier request to produce, the wife's counsel delivered to the husband's counsel copies of credit card statements that included an

itemized list in the statement of the places she had charged the card during the month and the amounts of each purchase, e.g., her statement of 9/2011. In her response to his third request her counsel delivered to his counsel only copies of the statements showing the total of each month's purchases, e.g., her statement of 11/2012, and he did not provide a copy of the statement of the credit card company that itemized that month's purchases. Likely there are other examples of "incomplete" responses.

However, the husband's motion and argument do not demonstrate that he or his counsel ever explained to the wife or her counsel - in the motion, by email, by letter, by telephone call, etc. - exactly what was missing from the copies of credit card statements that she sent in response to his third request to produce. It took the court one short paragraph to explain what was missing, but husband and his counsel never did that.

As for the wife and her lawyer, they also did nothing to avoid a hearing on the husband's motion to compel. There is nothing shown today that they inquired: "What is missing?" No email, letter, phone call, etc., was made by them to clarify why the husband filed his motion to compel.

This entire episode is an example of unnecessary litigation on the part of both parties.

Regarding (2), there is no authority for this motion in the rules of procedure.

Regarding (3), there is no authority for a "Cross Exception" in the rules of procedure that is actually a request to deny the other party's exception and adopt the recommended order of the magistrate.

## 2. Ruling

### 2.1 Wife's exception and motion to amend are granted

The magistrate's report and recommended order filed 7/31/2012 is not approved. It is not adopted as the order of the court. This is more unnecessary litigation. Her motion to amend must be granted.

It is an abuse of discretion for a trial court to deny a motion to amend in these circumstances. This case has not been noticed for trial; discovery is still outstanding, as illustrated by the husband's motion to compel heard today; there is no trial order entered. There is no actual prejudice to the husband from granting the wife's motion to amend.

"Prejudice" means an inability to prove his case on the merits if the motion to amend is granted, say because evidence the husband needs to meet the wife's new allegations is now not available to him because of the passage of time or because of something the wife has done. Delay or a complication of the issues or the addition of new issues by the amendment or a need for further discovery is not actual prejudice to the husband. A need for further discovery into the new allegations will not prevent the husband from meeting the wife's amended allegations and her amended requests for relief. It may mean he and his lawyer have more work to do and that this case may take more time to conclude but that is not actual prejudice to the husband. Preparing for trial is not "actual prejudice." That is what lawsuits are about.

As for abuse of the amendment process, this is the first motion to amend the wife has filed,

the motion is not filed on the eve of trial, there is no showing that evidence of the new allegations is now unavailable to the husband or that he cannot defend himself on the merits because of the passage of time or due to some action of the wife, so there is *per se* no abuse of the process for amending.

The magistrate's report does not make any finding of actual prejudice to the husband that results from the amendment of the wife's petition. The passage of time from 8/2011 to 5/2012 and a possible complication of the litigation by new facts and new issues is not "actual prejudice" that would permit a denial of the motion to amend.

The allegation of facts in a petition does not mean the facts are proven. A pleader has the burden to prove the facts alleged. Likewise, a request for relief does not mean the pleader is entitled to the relief sought and the pleader must demonstrate that the law allows the relief sought on the facts that are proven at trial. A pleading, that is, a petition or complaint, says what the pleader believes he or she can prove and the relief he or she believes the law allows; it puts the other party on notice of the proof and issues that will be heard at trial.

The point of an amendment to a pleading is to allege different facts or to ask for different relief from that sought originally. That the wife knew or should have known all of the matters alleged in the amended petition is not actual prejudice to the husband.

Beyond all question, the case law and the rules of procedure require a trial court to grant an amendment of the pleadings in this situation.

**The magistrate's report and recommended order are not adopted or approved. The wife's exception is granted.**

**The wife's motion to amend filed 5/4/2012 is granted and she is granted leave to file her amended petition that she filed on 5/4/2012. She filed her original amended petition on that day so there is no need to file it again.**

**The husband is hereby granted 20 days leave to file a motion or responsive pleading to the wife's amended petition filed 5/4/2012, pursuant to Rules 1.110 and 1.140.**

## 2.2 Husband's motion to compel is denied

This motion is denied. There is no showing that by any means - email, letter, telephone call to counsel, in the motion itself, etc. - did the husband or his counsel tell the wife or her counsel exactly what was missing in her response to his third request to produce.

This was an unnecessary motion and an unnecessary hearing, due to the absence of cooperation and communication between both counsel. The husband's motion to compel and his request for fees for this motion is denied. Equity is as equity does. A bit of communication and cooperation with co-counsel would have made this motion and hearing unnecessary.

In passing the court notes that Rule 1.350 and its counter part 12.350 are widely abused and misused discovery rules.

There is no rule or case law requiring a party receiving a request under those rules to make

copies of requested documents and send them to the requester, even if that is a local custom for the convenience of the lawyers and their experts. Rule 1.350(a)(1) allows a party “*to inspect and copy any designated documents...*” (*Emphasis supplied.*) The rule does not require the recipient of the request to make copies of the documents. *See, e.g., Grinnell Corp. v. Palms 2100 Ocean Blvd., Ltd.*, 924 So.2d 887 (Fla. 4<sup>th</sup> DCA 2006), in which the court said: “Florida Rule of Civil Procedure 1.350(b) requires that a response under the rule only produce items ‘as they are kept in the usual course of business or ... identify them to correspond with the categories in the request.’ ” *Id.* at 895. *Compare* Rule 1.410(e)(1): “... the person to whom the subpoena is directed may serve written objection to inspection or copying of any of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court...” So, inspection and copying by the requester is what these rules allow. And, the requester has to pay for any copies, at reasonable cost, if the recipient provides the copier at the place designated. If the recipient chooses to send copies in order to avoid an inspection, that is an effort that is not required by the rules.

Here, the wife and her counsel took the trouble to copy and send over to the husband’s counsel copies of the statements requested, a step that is not required by law. Some slight return of courtesy from the husband or his counsel would have solved the problem he now complains of. A letter or phone call or email to opposing counsel could have cleared up the problem, and a letter or phone call or email could have come from the wife’s counsel as well.

Instead, the lawyers did nothing, preferring instead to come to court, which was an unnecessary effort. This is an example of unnecessary litigation. **The husband’s motion to compel is denied.** His request for fees for his motion is denied.

### 2.3 Husband’s other two matters noticed

The court makes no rulings on these matters because neither is allowed by Rule 12.490. The husband’s “cross-exception” is in fact a request for the court to adopt the magistrate’s report filed 7/31/2012, it is not an exception to anything in that report. His “motion to adopt” is not allowed by Rule 12.490. This is just more unnecessary litigation.

In general, both counsel have a habit of filing “objections” to motions and other responses like this “cross-exception” and “motion to adopt,” none of which are permitted by the rules of procedure.

Done and ordered in Fort Myers, Lee County, Florida, this \_\_\_\_\_

R. Thomas Corbin, Circuit Judge

Copies provided to:  
 , Esq.

, Esq.  
Magistrate's office