

KASHI LAW LETTER

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INSURANCE: COMMERCIAL PROPERTY INSURANCE: SINKHOLE LOSS: APPRAISAL: INSURER'S RETENTION OF RIGHT TO DENY COVERAGE DOES NOT NEGATE ITS RIGHT TO APPRAISAL: DISAGREEMENT OVER WHAT REPAIRS ARE NECESSARY IS A VALUATION ISSUE RATHER THAN A COVERAGE ISSUE AND IS SUBJECT TO APPRAISAL

**The Cincinnati Insurance Company v. Cannon Ranch Partners, Inc., ___ So. 3d ___,
40 Fla. L. Weekly D78 (Fla. 2d DCA December 31, 2014)**

When the insurer and the insured disagreed whether underpinning was necessary to restore the property after a sinkhole loss, the trial court denied the insurer's motion to compel appraisal, but the appellate court reversed. (1) The insurer's retention "of the right to deny the claim following a proper appraisal" "[did] not render the appraisal clause unenforceable." (2) "[T]he question of what repairs are needed to restore a piece of covered property is a question related to the amount of 'loss' and not coverage. . . . The method of repair required to return the covered property to its original state is thus an integral part of the appraisal, separate and apart from any coverage question."

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REAL ESTATE: MORTGAGE FORECLOSURE: CIVIL PROCEDURE: APPEALS: INVOLUNTARY DISMISSAL WITHOUT PREJUDICE, WITHOUT GRANTING LEAVE TO AMEND, IS A FINAL APPEALABLE ORDER: TRIAL COURT LACKS JURISDICTION TO GRANT UNTIMELY MOTION FOR REHEARING: APPELLATE COURT REFUSES TO TREAT UNTIMELY MOTION FOR REHEARING AS MOTION FOR RELIEF FROM JUDGMENT BECAUSE MOTION DID NOT INVOKe FLA. R. CIV. P. 1.540 OR COMPLY WITH ITS REQUIREMENTS: EVEN IF MOTION HAD BEEN TIMELY, IT WOULD NOT HAVE SUSPENDED RENDITION AS TO BANK BECAUSE MOTION WAS FILED BY HOMEOWNERS ASSOCIATION: APPELLATE COURT'S HOLDING DOES NOT PREVENT BANK OR ASSOCIATION FROM FILING TIMELY AND ADEQUATE MOTION FOR RELIEF FROM JUDGMENT

**Patel v. U.S. Bank National Association, ___ So. 3d ___, 40 Fla. L. Weekly D80
(Fla. 2d DCA December 31, 2014)**

The trial court involuntarily dismissed a foreclosure action without prejudice and without leave

to amend based upon the mistaken belief that the note was not attached to the complaint. When the trial court discovered its error, it instructed the parties to file a motion for rehearing. The bank did not file a motion, but the homeowners association filed an untimely one. The trial court granted the association's motion, but the appellate court reversed. "An order dismissing an action without prejudice and without granting leave to amend is a final appealable order." As a result, the trial court lacked jurisdiction to grant the association's untimely motion for rehearing. Furthermore, even if the motion had been timely, it would not have suspended rendition as to the bank because the bank did not file the motion. The appellate court declined to treat the untimely motion for rehearing as a motion for relief from judgment because the motion did not invoke *Fla. R. Civ. P.* 1.540 or comply with its requirements. This holding did not bar any of the "appellees [on remand] from seeking relief by way of a timely and procedurally adequate motion for relief from the judgment"

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TORTS: MOTOR VEHICLE NEGLIGENCE: DAMAGES: FUTURE NON-ECONOMIC DAMAGES: A VERDICT IS NOT INADEQUATE AS A MATTER OF LAW IF THE JURY FINDS THAT THE PLAINTIFF SUSTAINED A PERMANENT INJURY BUT FAILS TO AWARD FUTURE NONECONOMIC DAMAGES: THE PROPER INQUIRY IS WHETHER THE VERDICT IS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE; APPEALS: TRIAL COURT ABUSED ITS DISCRETION BY GRANTING NEW TRIAL BASED UPON AN ERRONEOUS VIEW OF THE LAW: APPELLATE COURT REMANDS FOR RECONSIDERATION UNDER CORRECT LEGAL PRINCIPLES

Buitrago v. Feaster, ___ So. 3d ___, 40 Fla. L. Weekly D81 (Fla. 2d DCA December 31, 2014)

The jury in a motor vehicle negligence case awarded damages to the plaintiff for past and future medical expenses, lost wages, and past noneconomic damages but awarded nothing for future noneconomic damages. The plaintiff moved for a new trial on future noneconomic damages, contending that an award of future noneconomic damages was compulsory based upon the finding that the plaintiff sustained a permanent injury. The trial court granted the motion without explanation. As a result, the appellate felt compelled to conclude that the trial court's ruling was based upon the plaintiff's argument, which was rejected by the Florida Supreme Court in *Allstate Insurance Company v. Manasse*, 707 So. 2d 1110 (Fla. 1998). The trial court should have determined whether the verdict was contrary to the manifest weight of the evidence, but the plaintiff did not base its motion upon this standard, and the trial court failed to consider it. As a result, the appellate court remanded for reconsideration based upon the correct legal standard.

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BUSINESS ORGANIZATIONS: LIMITED LIABILITY COMPANIES: BREACH OF FIDUCIARY DUTY: CONFLICT OF INTERESTS

**McCoy v. Durden, ___ So. 3d ___, 40 Fla. L. Weekly D81
(Fla. 1st DCA December 31, 2014)**

When an LLC borrowed \$65 million to buy two radio stations in California, its operating agreement was amended to give the lender control over the board of directors and to modify the rules governing conflicts of interest. After the LLC defaulted on the loan, the non-lender members of the board of directors brought a derivative action for breach of fiduciary duty against the lender group. The trial court entered summary judgment for the defendants, but the appellate court reversed because an issue of fact existed whether the defendants engaged in willful misconduct under the operating agreement.

The fiduciary duty is an equitable concept. A fiduciary duty arises when one party reposes its trust in another party, who accepts the trust, or when “confidence has been acquired and abused.” A fiduciary has the duty to act in the utmost good faith and to subordinate its interests if they conflict with the duty. “[C]orporate officers and directors owe both a duty of loyalty and a duty of care to the corporation that they serve.”

Section 608.4225(1), Florida Statutes, provides that “each manager and managing member [of a limited liability company] shall owe a duty of loyalty and a duty of care to the limited liability company and all of the members of the limited liability company,” but the statute limits the duty of loyalty to three specific areas. “Section 608.4225(1)(b) also limits the duty of care to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.” Section 608.4225(1)(c), Florida Statutes, requires the managers and managing members of a limited liability company to exercise good faith and fair dealing in the discharge of their duties to the limited liability company and its members. Section 608.4226(1), Florida Statutes, defines a conflict of interests transaction as one involving a limited liability company in which a manager, managing member, director, or officer has a financial interest, but a conflict of interests transaction may not be void or voidable if the conflict is disclosed or known or the transaction is fair and reasonable. Under Section 608.423, Florida Statutes, the operating agreement may, within specific bounds, modify the duties of members and managers. In this case, the operating agreement sought to limit fiduciary duties and liability for a breach.

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REAL ESTATE: MORTGAGE FORECLOSURE: ERRONEOUS LEGAL DESCRIPTION OF PROPERTY IN MORTGAGE; CIVIL PROCEDURE: MOTION TO VACATE FINAL JUDGMENT, JUDICIAL SALE, AND CERTIFICATES OF SALE AND TITLE TO ENABLE BANK TO REFORM MORTGAGE TO CORRECT LEGAL DESCRIPTION: TRIAL COURT ERRED BY SUA SPONTE DISMISSING ACTION WITHOUT PREJUDICE IN ADDITION TO GRANTING MOTION

**Wells Fargo Bank, N.A. v. Giesel, ___ So. 3d ___, 40 Fla. L. Weekly D88
(Fla. 1st DCA December 31, 2014)**

When the bank discovered that description of the property in its mortgage was erroneous, it filed a motion to vacate the final judgment of foreclosure, the judicial sale, and the certificates of sale and title so that it could seek reformation of the mortgage to correct the description. The trial court, without conducting a hearing, not only granted the bank's motion but went on to dismiss the action without prejudice. The appellate court reversed. The sua sponte dismissal deprived the bank of due process. A request for further appropriate relief in the ad damnum clause of the bank's motion did not authorize the trial court to dismiss the action without notice and an opportunity to be heard. Dismissal was not required and did not constitute "further appropriate relief." Judge Makar concurred in Judge Wetherell's majority opinion, but Judge Van Nortwick dissented.

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**CIVIL PROCEDURE: LITIGATION MISCONDUCT:
SANCTIONS: STRIKING PLEADINGS: THREATENING
LITIGANT'S PROFESSIONAL ADVISOR WITH BODILY HARM;
EVIDENCE: AUTHENTICATION: SILENT WITNESS THEORY:
STILL PHOTOGRAPHS OF FRAMES FROM VIDEO
SURVEILLANCE TAPES WERE ERRONEOUSLY ADMITTED IN
EVIDENCE BECAUSE OF THE ABSENCE OF TESTIMONY
FROM A WITNESS RESPONSIBLE FOR THE VIDEO SYSTEM
CONFIRMING THE ACCURACY OF THE TIME AND DATE ON
WHICH THE TAPE WAS MADE AND THE ABSENCE OF
EDITING OR TAMPERING**

**Lerner v. Halegua, ___ So. 3d ___, 40 Fla. L. Weekly D93
(Fla. 3d DCA December 31, 2014)**

The trial judge, in a civil case, declared a mistrial because a party's professional advisor had been threatened with bodily harm. After an evidentiary hearing, the trial court struck the alleged perpetrator's pleadings for litigation misconduct. The threats were made in notes left in the front door to the victim's condominium unit. "[The victim] took several still photographs of frames from [his condominium association's] surveillance tape, purporting to show [the perpetrator] and the date and time shown by the video camera." The appellate court reversed because the videotape from which the still photographs were taken was not authenticated. "A witness responsible for the videotape system, able to confirm the accuracy of the time and date on which the tape was made, and able to confirm that the tape was not edited or tampered with, should be presented if there is no stipulation on these points, to 'provide the indicia of reliability required to authenticate a videotape for purposes of the 'silent witness theory.'" The silent witness theory applies "when there is no individual videographer available to testify regarding the videotape taken by a remotely-controlled surveillance camera." "In the present case, [the victim] did not personally observe the events depicted on the surveillance videos or the photos. . . . [The victim] had no responsibility for the operation, placement, or maintenance of the video camera in question, and he had no direct knowledge regarding the procedure for retrieving or copying those portions of a video record that might be pertinent to the investigation at issue here."

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**ATTORNEY'S FEES: CHARGING LIEN; APPEALS:
ORDER DENYING MOTION TO CANCEL CHARGING
LIEN WAS A NON-FINAL ORDER BECAUSE IT DID NOT
DETERMINE THE AMOUNT OF THE LIEN: NON-FINAL ORDER
WAS NOT APPEALABLE AS AN ORDER DETERMINING RIGHT
TO IMMEDIATE POSSESSION
OF PROPERTY: NON-FINAL ORDER WAS NOT REVIEWABLE
BY CERTIORARI BECAUSE OF THE ABSENCE OF
IRREPARABLE HARM**

**Bloomgarden v. Mandel, ___ So. 3d ___, 40 Fla. L. Weekly D95
(Fla. 3d DCA December 31, 2014)**

The plaintiffs in a legal malpractice case appealed from an order denying their motion to cancel their original lawyer's charging lien after the malpractice case was settled by successor counsel. The appellate court dismissed the appeal for lack of jurisdiction. The order was not appealable as a final order because it did not end the judicial labor inasmuch as the trial court did not determine the amount of the lien. The order was not appealable as a non-final order determining the right to immediate possession of property: The order "adjudicated the validity of a charging lien; it did not adjudicate the immediate possession of anything." The order was not reviewable by certiorari because "[i]rreparable harm [was] neither alleged nor established," and the plaintiffs did not show why any error "could not be remedied on plenary appeal."

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**INSURANCE: PIP: ASSIGNMENT: APPEALS:
SECOND TIER CERTIORARI: CIRCUIT COURT DENIED
PETITION FOR FIRST TIER CERTIORARI BECAUSE
ORDER OF COUNTY COURT, REQUIRING ASSIGNEE
TO ADD ASSIGNOR AS AN INDISPENSABLE PARTY,
DID NOT RESULT IN IRREPARABLE HARM: DISTRICT COURT
OF APPEAL DENIED PETITION FOR SECOND TIER
CERTIORARI, ALTHOUGH ASSIGNOR WAS NOT
AN INDISPENSABLE PARTY, BECAUSE CIRCUIT COURT
DID NOT FAIL TO PROVIDE PROCEDURAL DUE
PROCESS OR APPLY THE INCORRECT LAW**

**Gables Insurance Recovery, Inc. v. Progressive Express Insurance Company, ___
So. 3d ___, 40 Fla. L. Weekly D96 (Fla. 3d DCA December 31, 2014)**

The insured under a PIP policy gave an assignment to her radiologist, which gave an assignment to a debt collector, which sued the PIP carrier for non-payment. The carrier alleged that it paid the radiologist, who was an indispensable party, and the county court ordered the debt collector to add the radiologist as a defendant. The circuit court denied the debt collector's petition for first tier certiorari because of the absence of irreparable harm. The district court of appeal denied the debt collector's petition for second tier certiorari, although the radiologist was not an indispensable party, because the circuit court did not fail to provide the debt collector with due process or apply the incorrect law.

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GUARDIANSHIP: ORDER AUTHORIZING GUARDIAN FOR INCAPACITATED PERSON TO AMEND TRUST TO APPOINT GUARDIAN AS TRUSTEE AFFIRMED

Rene v. Sykes-Kennedy, ___ So. 3d ___, 40 Fla. L. Weekly D101 (Fla. 5th DCA January 2, 2015)

The trial court appointed a limited guardian for the ward because she was afflicted with senile dementia. The ward's trust provided that her granddaughter would serve as trustee if the ward became incapacitated, but the trial court granted the guardian's motion to amend the trust to appoint the guardian as trustee. The granddaughter appealed, but the appellate court affirmed. Section 744.441, Florida Statutes, provides that a guardian, with court approval, may "exercise any power as trustee that the ward might have lawfully exercised if not incapacitated, if the best interest of the ward requires such action." "Here, if not incapacitated, [the ward] had the power to amend her trust and appoint [her guardian] as the new trustee. Furthermore, given the evidence regarding [the guardian's] education, business experience, and relationship with the ward, [the appellate court had] no difficulty concluding that there was substantial, competent evidence to support the trial court's determination that it was in the ward's best interest to have [the guardian] replace [the granddaughter] as trustee."

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FAMILY LAW: DISSOLUTION OF MARRIAGE; CIVIL PROCEDURE: SANCTIONS: STRIKING PLEADINGS: ORDER STRIKING HUSBAND'S PLEADINGS BASED UPON FAILURE TO ATTEND PRETRIAL CONFERENCE AND TO COMPLY WITH PRIOR COURT ORDERS LACKED REQUIRED FINDINGS THAT HUSBAND'S CONDUCT WAS WILLFUL OR DELIBERATE; VENUE: CHOICE OF LAW PROVISION: TRIAL COURT ERRED BY PLACING BURDEN ON PROPONENT TO SHOW THAT CHOICE OF LAW PROVISION APPLIED

Lamb v. Lamb, ___ So. 3d ___, 40 Fla. L. Weekly D102 (Fla. 5th DCA January 2, 2015)

An order, in an action for dissolution of marriage, striking the husband's pleadings based upon his "fail[ure] to attend a pretrial conference and to comply with other pretrial orders" "was clearly deficient because it did not contain the required findings that the [husband's] conduct was willful or deliberate." In addition, "[a]lthough the judge attempted to make amends in the final judgment by reinstating [the husband's] pleadings, that was an insufficient cure" because "changing the rules after trial deprived [the husband] of any real opportunity to be heard. This lack of due process compelled [the court] to remand the case for a new trial."

The parties entered into a prenuptial agreement with a choice of law provision designating Scottish law. The trial court ruled that the husband failed to satisfy his burden to show that Scottish law applied, but the appellate court reversed. "The party seeking to avoid

enforcement of the choice-of-law provision has the burden of demonstrating that the foreign law contravenes public policy.” As a result, “the trial court improperly shifted the burden of proof.”

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**TORTS: NEGLIGENCE: PREMISES LIABILITY:
INDEPENDENT CONTRACTOR DEFENSE:
LATENT DEFECTS: FAILURE TO WARN:
CIVIL PROCEDURE: SUMMARY JUDGMENT:
TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT
FOR PROPERTY OWNER IN ACTION
BY INDEPENDENT CONTRACTOR WHO FELL
THROUGH SKYLIGHT THAT HAD BEEN PAINTED
TO MATCH COLOR OF ROOF: WHETHER CONDITION
WAS LATENT OR COULD HAVE BEEN DISCOVERED
THROUGH REASONABLE INSPECTION WERE ISSUES
OF FACT: LESSEE’S CONSULTANTS AND ITS PARTIAL
OWNER WERE ENTITLED TO SUMMARY JUDGMENT
BECAUSE THEY DID NOT EXERCISE CONTROL
OVER PROPERTY**

**Phillips v. Republic Financial Corporation, ___ So. 3d ___, 40 Fla. L. Weekly D103
(Fla. 5th DCA January 2, 2014)**

The lessee of a warehouse hired a company to clean and paint the roof and to clean and caulk the skylights on the roof, and the company hired the plaintiff to perform the work. While doing so, the plaintiff fell through a skylight that had been painted to match the color of the roof. The plaintiff entered into a settlement with lessee and sued the owner of the warehouse, a company that held a 33% interest in the lessee, the lessee’s consultant under a financial services agreement, and a director and employee of the consultant who actually performed financial consulting services for the lessee. The trial court entered summary judgment for all of the defendants, but the appellate court reversed in part. The owner was not entitled to summary judgment. As a general rule, someone who hires an independent contractor is not liable for the injuries the contractor sustains while performing the work for which he was hired unless (1) the customer actively participates in the project to the extent of directly influencing the manner in which the work is performed, or (2) the customer fails to warn of a latent defect of which it knew or reasonably should have known and of which the contractor did not know nor reasonably should have known. In this case, the plaintiff did not know that the skylight through which he fell was present, the skylight was not obvious, and “falling through a painted-over skylight [was not] a ‘usual hazard’ of cleaning and painting a roof or repairing and caulking skylights.” Although the skylight was visible from the interior of the warehouse, it was difficult to see on the roof. The roof was made of corrugated metal, and the skylight was made of corrugated fiberglass that fit over the metal. Whether the skylight constituted a latent danger and the plaintiff reasonably should have discovered its existence were questions of fact for the jury. Therefore, the trial court erred by entering summary judgment for the owner. On the other hand, the consultant, the director and employee of the consultant, and the partial owner of the lessee were entitled to summary judgment because they did exercise control over the property when the accident occurred. Judge Berger concurred in Judge Murphy’s majority opinion, and Judge Lawson wrote a specially concurring opinion to elaborate on the issue of control. “The duty to protect others from injury resulting from a dangerous condition on a premises rests on the party who has the

right to *control access* by third parties to the premises, be it the owner, an agent, or a lessee of the property.” “In affirming the judgment in favor of [the consultant and the director and employee of the consultant], . . . the majority necessarily and properly recognize[d] that the term ‘control’ for premises liability purposes is governed by the lease giving [the lessee] exclusive possession of the premises, along with its concomitant control over access to the property.”

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**ATTORNEYS: DISQUALIFICATION: APPEALS:
CERTIORARI: TRIAL COURT DEPARTED FROM
ESSENTIAL REQUIREMENTS OF LAW AND INFLECTED
IRREPARABLE HARM ON THE PETITIONER BY DENYING
HIS MOTION FOR DISQUALIFICATION, WITHOUT RECEIVING
ANY OTHER EVIDENCE, AFTER A PRIMA FACIE CASE FOR
DISQUALIFICATION HAD BEEN ESTABLISHED:
REMAND FOR FULL EVIDENTIARY HEARING**

Flaig v. Coquina Palms Homeowner’s Association, Inc., ___ So. 3d ___, 40 Fla. L. Weekly D108 (Fla. 5th DCA January 2, 2015)

The trial court conducted an evidentiary hearing on the petitioner’s motion to disqualify opposing counsel. Although the petitioner established a prima facie case, the trial court denied the motion without receiving additional evidence. The appellate court granted certiorari, quashed the order, and remanded for a full evidentiary hearing. The trial court departed from the essential requirements of law and inflicted irreparable harm on the petitioner by denying his motion without conducting a full evidentiary hearing.

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**CIVIL PROCEDURE: PERSONAL JURISDICTION:
SERVICE OF PROCESS: INSUFFICIENCY OF SERVICE:
TRIAL COURT ERRED BY DENYING DEFENDANT’S
MOTION TO QUASH SERVICE BECAUSE DEFENDANT
ALLEGED THAT THE SUMMONS WAS UNSEALED AND
THE PLAINTIFF DID NOT FILE THE ORIGINAL SUMMONS**

Vaughn v. Wells Fargo Bank, N.A., ___ So. 3d ___, 40 Fla. L. Weekly D109 (Fla. 5th DCA January 2, 2015)

The defendant moved to quash service of process based upon the premise that the summons did not bear the seal of the clerk of the court. *Fla. R. Civ. P.* 1.070(a) and Section 28.071, Florida Statutes, both require a summons to contain the seal of the clerk of the court. Once the defendant raised this objection, the plaintiff had the burden “to produce the original summons to prove it was issued under seal pursuant to the statute and rule.” In this case, only a copy of the summons appeared in the record, but the copy “[did] not indicate that the required seal [was] affixed to the original document.”

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**REAL ESTATE: MORTGAGE FORECLOSURE:
AFFIRMATIVE DEFENSES: NOTICE OF DEFAULT;
CIVIL PROCEDURE: SUMMARY JUDGMENT:
SUMMARY JUDGMENT FOR DEFENDANT REVERSED
BECAUSE RECORD ESTABLISHED THAT PLAINTIFF
DID PROVIDE ADEQUATE NOTICE OF DEFAULT**

Astoria Federal Savings and Loan Association v. Kaufman, ___ So. 3d ___, 40 Fla. L. Weekly D109 (Fla. 5th DCA January 2, 2015)

The trial court entered summary judgment for the defendant in a mortgage foreclosure based upon the plaintiff's failure to provide notice of default and the actions required for cure. The appellate court reversed because the record established that adequate notice had been provided.

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