KASHI LAW LETTER
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INSURANCE: LIABILITY INSURANCE: ESTOPPEL TO DENY COVERAGE: INSURED'S ALLEGATION THAT INSURER MADE STATEMENTS AND PERFORMED ACTIVITIES THAT LED INSURED TO BELIEVE THAT COVERAGE EXISTED FOR THIRD PARTY LIABILITY CLAIM, DESPITE INSURER'S KNOWLEDGE OF FACTS THAT WOULD HAVE PERMITTED IT TO DENY COVERAGE, STATED CAUSE OF ACTION FOR COVERAGE BY ESTOPPEL; APPEALS: BRIEFS: COURT CRITICIZES, BUT DOES NOT SANCTION, APPELLANT FOR MIS-CERTIFYING THAT INITIAL AND REPLY BRIEFS COMPLIED WITH FONT REQUIREMENTS OF FLA. R. APP. P. 9.210(2)

Bishop v. Progressive Express Insurance Company, ___ So. 3d ___, 40 Fla. L. Weekly D119 (Fla. 1st DCA January 6, 2015)

The appellate court reversed summary judgment for the insurer on a claim for coverage by estoppel. The insured alleged that the insurer made statement and performed activities that led her to believe that she had coverage for a third party liability claim "despite the insurer's knowledge of facts [that] would have permitted it to deny coverage." The court observed, "Undertaking communication, conduct, and steps in defense of an underlying action, heavily dependent upon the circumstances, may give rise to a coverage by estoppel claim." "'When an insurance company assumes the defense of an action with knowledge, actual or presumed, of facts which would have permitted it to deny coverage, it may be estopped from subsequently raising the defense of non-coverage.' . . . Prejudice and whether the promisee's reliance was reasonable are generally questions for the trier of fact." The court did not pass upon the merits of the insured's claim and "wr[o]te only to confirm [a] cause of action [for coverage by estoppel] exists, such a claim does not sound in bad faith, and here it was for the trier of fact to determine the ultimate weight to give the insurer's conduct versus the reasonableness of the [insured's] reliance."

The court criticized counsel for appellant for mis-certifying that the initial and reply briefs complied with the font requirements of *Fla. R. App. P.* 2.210(2) but did not impose sanctions for his dereliction.

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TORTS: NEGLIGENCE: PREMISES LIABILITY: FAILURE TO PROVIDE SECURITY: RESORT WAS NOT LIABLE TO THIRD PARTY FOR INJURIES SUSTAINED OFF THE PROPERTY AS A RESULT OF NEGLIGENCE OF INTOXICATED PATRON WHO WAS TOLD TO LEAVE THE PREMISES: LIABILITY PRECLUDED BY SECTION 768.125, FLORIDA STATUTES

Hall v. West, ___ So. 3d ___, 40 Fla. L. Weekly D122
(Fla. 2d DCA January 7, 2015)

The appellate court affirmed summary judgment for a resort in an action for negligent failure to provide security. The plaintiff was injured thirteen miles from the resort by an intoxicated patron who had been asked by security to leave the resort two hours earlier. The court held that liability was precluded by Section 768.125, Florida Statutes, which negates liability on the part of a person who sells or furnishes alcoholic beverages to a person of lawful drinking age in the absence of knowledge that the person was "habitually addicted to the use of any or all alcoholic beverages." The plaintiff could not circumvent the statute by predicating liability upon requiring the intoxicated patron to depart from the premises rather than serving alcoholic beverages to the intoxicated patron. The court declined to follow *Bardy v. Walt Disney World Co.,* 643 So. 2d 46 (Fla. 5th DCA 1994), which held that "Disney had a duty to refrain from ordering its [intoxicated] employee to leave the premises unless it reasonably believed that the employee could drive away safely." First, *Bardy* failed to adhere to Section 768.125. Second, *Bardy* was distinguishable. (1) Bardy was alone, and Disney's security guard threatened to have him arrested if he did not leave. The patron in the present case was accompanied by friends, and the resort did not force him to drive. "Unfortunately, even if [the patron] should not have driven, [the resort] could not [have] restrain[ed] him, take[n] away his keys, or impound[ed] his car." A [business has no legal duty to control the conduct of a third person to prevent that person from harming others." (2) The accident in *Bardy* occurred "almost immediately upon Bardy's departure and within five hundred feet from where he had parked. The accident in the present case occurred two hours after the patron's departure and thirteen miles from the resort. The court was unable to "ignore the spatial and temporal differences between [the two cases]."

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INSURANCE: HOMEOWNERS INSURANCE: FLORIDA INSURANCE GUARANTY ASSOCIATION (FIGA): SINKHOLE LOSS: COVERED LOSS: APPRAISAL: DEFINITION OF COVERED LOSS WHEN INSURER IS ADJUDICATED INSOLVENT GOVERNS FIGA'S OBLIGATIONS: EFFECTIVE MAY 17, 2011, THE DEFINITION OF COVERED CLAIM IN SECTION 631.54(3), FLORIDA STATUTES, WAS AMENDED TO PROHIBIT FIGA FROM PAYING AN INSURED DIRECTLY FOR A SINKHOLE LOSS, AND TO REQUIRE PAYMENT TO BE MADE ONLY FOR THE ACTUAL COST OF REPAIRS UP TO THE LESSER OF THE POLICY LIMITS OR THE STATUTORY LIMITS ON FIGA'S OBLIGATION TO PAY: BECAUSE OF THESE LIMITATIONS, FIGA MAY NOT BE REQUIRED TO SUBMIT TO APPRAISAL OF SINKHOLE CLAIMS; APPEALS: QUESTIONS OF GREAT PUBLIC IMPORTANCE CERTIFIED TO FLORIDA

SUPREME COURT

Florida Insurance Guaranty Association v. de la Fuente, ___ So. 3d ___, 40 Fla. L. Weekly D123 (Fla. 2d DCA January 7, 2015)

The trial court erred by requiring the Florida Insurance Guaranty Association (FIGA) to submit to the appraisal of a sinkhole claim and to pay the award directly to the insureds. The trial court erred by applying the definition of "covered claim" under the Florida Insurance Guaranty Act in effect when the policy was issued, rather than the subsequent definition in effect when the insurer was adjudicated insolvent. In between those dates, the Act was amended "to prohibit FIGA from paying an insured directly for a sinkhole loss. Instead, FIGA may only pay a contractor for the 'actual repairs to the property' for a loss up to the amount of the policy limits [or] the statutory limits on FIGA's obligations to pay, whichever is less." In addition, FIGA may not be required to submit to appraisal of sinkhole losses because the actual cost of repairs cannot be determined until the repairs are made, and contractors from multiple disciplines, performing work at different points in time, are required to remediate sinkhole losses. The Second District Court of Appeal certified to the Florida Supreme Court as questions of great public importance whether (1) the definition of covered claim in effect when the insurer is adjudicated insolvent applies if the definition is changed after the policy is issued, and (2) the amended statute precludes appraisal of sinkhole losses against FIGA.

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CIVIL PROCEDURE: DEFAULT JUDGMENT: UNLIQUIDATED DAMAGES: EVIDENTIARY HEARING: TRIAL COURT ERRED BY ENTERING DEFAULT JUDGMENT FOR UNLIQUIDATED DAMAGES WITHOUT CONDUCTING EVIDENTIARY HEARING: DAMAGES ARE NOT LIQUIDATED MERELY BECAUSE THE AMOUNT OF DAMAGES IS ALLEGED IN THE COMPLAINT

Paramo v. Floyd, ___ So. 3d ___, 40 Fla. L. Weekly D127 (Fla. 2d DCA January 7, 2015)

The homeowners obtained a default judgment for civil theft against the contractor they hired to expand and remodel their home. The appellate court reversed because the trial court entered judgment for unliquidated damages without conducting an evidentiary hearing. A default does not admit the amount of the plaintiff's unliquidated damages, and damages are unliquidated if testimony is necessary to determine their amount. Moreover, damages are not liquidated merely because the amount of the plaintiff's damages is alleged in the complaint. In this case, "the [plaintiffs] included in their damage calculations amounts paid" to complete work already completed by the defendant and amounts that were not liquidated because they were based upon the plaintiffs' estimates.

To read more briefs in the Civil Procedure: Judgment category of the Kashi Law Letter, please click here, http://www.kashilawletter.com/category/civil-procedure/judgment/.

TORTS: WRONGFUL DEATH: PRODUCT LIABILITY: TOBACCO: ENGLE PROGENY CASE: STATUTE OF LIMITATIONS: RESIDENCY REQUIREMENT FOR ENGLE CLASS MEMBERSHIP IS SATISFIED BY RESIDENCE

IN THE STATE OF FLORIDA ON NOVEMBER 21, 1996, THE CUTOFF DATE FOR FILING AN ENGLE PROGENY SUIT

Damianakis v. Philip Morris USA, Inc., ___ So. 3d ___, 40 Fla. L. Weekly D130 (Fla. 2d DCA January 7, 2015)

The trial court entered summary judgment against the plaintiff in an *Engle* progeny wrongful death case based upon the statute of limitations because the decedent was diagnosed with a smoking related illnesses before he moved to Florida. The Second District Court of Appeal reversed, "conclud[ing] that as long as an individual was a citizen or resident of Florida as of the cut-off date of November 21, 1996 [for filing an *Engle* progeny case], and his or her smoking-related illness 'manifested' on or before that date, then he or she satisfies the residency and citizenship requirement of Engle class membership. The first manifestation of a smoking-related illness in a state or country other than Florida is not relevant to this determination."

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NEGOTIABLE INSTRUMENTS: WORTHLESS CHECKS: PAYEE WAS NOT ENTITLED TO TREBLE DAMAGES AND PROCESSING FEES UNDER SECTION 68.065, FLORIDA STATUTES, BECAUSE HE DID NOT ATTEMPT TO CASH CHECK AFTER DRAWEE BANK INFORMED HIM THAT DRAWER'S ACCOUNT LACKED SUFFICIENT FUNDS TO COVER CHECK

Infrax Systems, Inc. v. Wood, ___ So. 3d ___, 40 Fla. L. Weekly D144 (Fla. 2d DCA January 7, 2015)

The appellate court reversed an award of treble damages and processing fees under Section 68.065, Florida Statutes, because of the absence of presentment and dishonor of worthless checks. "Where, as in this case, the payee merely inquires of the drawee bank concerning whether there are sufficient funds in the drawer's account to cover a check, there is no presentment," which is a prerequisite to the award of treble damages and processing fees under the worthless check statute.

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CONTRACTS: UNIFORM COMMERCIAL CODE: SALES-SERVICE DICHOTOMY: SALE AND INSTALLATION OF PALLET RACK SYSTEM WAS A HYBRID CONTRACT INVOLVING ELEMENTS OF A SALE AND ELEMENTS OF A SERVICE: WHETHER THE SALE OR SERVICE ELEMENT OF THE CONTRACT PREDOMINATED WAS A QUESTION OF FACT; APPEALS: RECORD ON APPEAL: TRANSCRIPT: APPELLATE COURT AFFIRMED TRIAL COURT'S FINDING THAT CONTRACT WAS PREDOMINANTLY FOR FURNISHING OF SERVICES BECAUSE THIS IS A QUESTION OF FACT, AND

THE APPELLANT FAILED TO PROVIDE THE APPELLATE COURT WITH A TRANSCRIPT OF TRIAL

Allied Shelving & Equipment, Inc. v. National Deli, LLC, ___ So. 3d ___, 40 Fla. L. Weekly D145 (Fla. 3d DCA January 7, 2015)

The plaintiff prevailed at trial on its claim for the defendant's breach of a contract to provide and install a pallet rack system in the plaintiff's warehouse. On appeal, the defendant contended that the trial court erred by applying the common law of contracts, rather than Article II of the Uniform Commercial Code, to the dispute. The common law of contracts applies to contracts for the provision of services. Article II of the Uniform Commercial Code applies to the sale of goods. The contract in this case was a hybrid, involving both elements of a sale and elements of a service. Therefore, the trial court was required to determine which element predominated. This is a question of fact, and the defendant/appellant failed to provide the appellate court with a transcript of the trial. As a result, the appellate court affirmed the trial court's implicit finding that the contract was primarily for the provision of services.

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REAL ESTATE: MORTGAGE FORECLOSURE: STANDING; LOST NOTE: NOTICE OF DEFAULT; APPEALS: RECORD ON APPEAL: AFFIRMANCE OF AMENDED FINAL JUDGMENT OF MORTGAGE FORECLOSURE REQUIRED BECAUSE OF ABSENCE OF TRIAL TRANSCRIPT

Emaminejad v. Ocwen Loan Servicing, LLC, ___ So. 3d ___, 40 Fla. L. Weekly D146 (Fla. 3d DCA January 7, 2015)

The lender prevailed at trial on a claim to reestablish a lost note and foreclose on a mortgage. The borrower appealed based upon lack of standing, the failure to satisfy the requirements for reestablishment of a lost note, failure to provide notice of default, and evidentiary rulings. The appellate court affirmed because the judgment was supported by the trial court's written findings, and the borrower failed to provide a transcript of the trial. The trial court found that the lender proved the allegations of the complaint and the equities of the case were on its side; the lender was in possession of the note and was entitled to enforce it when the note was misplaced during mailing to counsel for the loan servicer; loss of possession did not result from transfer or lawful seizure; and the lender proved the terms, and ownership, of the lost note. The borrower was incapable of proving the trial court's findings were clearly erroneous because of the absence of a trial transcript. The copy of the note attached to the original and amended verified complaints contained an allonge that made the note payable to the lender, and the lender's amended answers to interrogatories attached a copy of an assignment from the original mortgagee to the lender. Without a transcript, the borrower could not show that the lender failed to provide notice of default or that the trial court abused its discretion in ruling upon the admissibility of evidence. Essentially, the borrower's appeal was based upon evidence introduced, and arguments made, at trial that the appellate court was unable to review because of the absence of a transcript.

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CIVIL PROCEDURE: DISCOVERY: FINANCIAL INFORMATION; APPEALS: CERTIORARI: DEFENDANT'S FINANCIAL INFORMATION WAS NOT DISCOVERABLE BECAUSE PLAINTIFF DID NOT MAKE AND DEMONSTRATE VIABILITY OF CLAIM FOR PUNITIVE DAMAGES

United Automobile Insurance Company v. Davis, ___ So. 3d ___, 40 Fla. L. Weekly D147 (Fla. 3d DCA January 7, 2015)

The trial court overruled an insurance company's objection to the production of financial records, but the appellate court granted certiorari because the plaintiff did not make and establish the viability of a claim for punitive damages, and the financial records were not relevant to any other issue in the case.

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TORTS: NEGLIGENCE: SLIP AND FALL: INSURANCE: MEDICAL PAYMENTS COVERAGE: NONJOINDER STATUTE; APPEALS: CERTIORARI: APPELLATE COURT QUASHES ORDER DENYING MOTION TO SEVER ACTION FOR PERSONAL INJURIES FROM ACTION FOR BREACH OF CONTRACT AGAINST TORTFEASOR'S LIABILITY CARRIER FOR FAILING TO EXTEND MEDPAY COVERAGE TO PLAINTIFF BECAUSE COMBINING THE TWO ACTION VIOLATED THE SPIRIT OF THE NONJOINDER STATUTE BY ALLOWING THE JURY TO DISCOVER THAT THE TORTFEASOR WAS INSURED

Starr Indemnity & Liability Company v. Morris, ___ So. 3d ___, 40 Fla. L. Weekly D147 (Fla. 3d DCA January 7, 2015)

After the plaintiff slipped and fell on a sport fishing boat, she sued the owner and the captain of the vessel for negligence, and she sued the owner's liability insurer for breach of contract based upon the failure to pay the plaintiff under the medical payment coverage of the policy. The trial court denied the insurance company's motion to dismiss or sever the breach of contract claim, but the appellate court granted the insurance company's petition for certiorari. The motion to dismiss was not well taken, but the motion to sever should have been granted. Although the nonjoinder statute, Section 627.4136, Florida Statutes, did not technically apply because the plaintiff was suing for first party benefits as an insured under the policy, combining the plaintiff's claims for her personal injuries with her claim for breach of contract violated the spirit of the nonjoinder statute by allowing the jury to discover that the tortfeasors were insured.

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TORTS: MOTOR VEHICLE NEGLIGENCE; CIVIL PROCEDURE: DISCOVERY: SURVEILLANCE; APPEALS: CERTIORARI: APPELLATE COURT QUASHES ORDER PERMITTING PLAINTIFF TO VIEW SURVEILLANCE VIDEO BEFORE THE DEFENDANT DEPOSED HER: COURT ADOPTS BRIGHT-LINE RULE

Hankerson v. Wiley, ___ So. 3d ___, 40 Fla. L. Weekly D195 (Fla. 4th DCA January 7, 2015)

The trial court, in a motor vehicle negligence case, entered an order "permit[ting] the plaintiff to view a post-accident surveillance video before [her] deposition," but the appellate court granted the defendant's petition for certiorari. "[A] trial court abuses its discretion where it permits a plaintiff to view a post-accident surveillance video before allowing a defendant to depose the plaintiff. A bright line rule is preferable in this area because it will impose uniformity and avoid disparate rulings based primarily on the identity of the trial judge."

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JURISDICTION: SUBJECT MATTER JURISDICTION: CIRCUIT COURT LACKS SUBJECT MATTER JURISDICTION OVER DECLARATORY JUDGMENT ACTIONS IN WHICH AMOUNT IN CONTROVERSY DOES NOT EXCEED $15,000; APPEALS: PROHIBITION

Federated National Insurance Company v. Restoration 1 of South Florida, LLC, ___ So. 3d ___, 40 Fla. L. Weekly D152 (Fla. 4th DCA January 7, 2015)

The appellate court granted the defendant's petition for writ of prohibition because the trial court failed to transfer a declaratory judgment action for a claim in the amount $1,196.66 from circuit court to county court. Circuit courts have jurisdiction over declaratory judgment actions in which the amount in controversy exceeds $15,000, and county courts have jurisdiction over declaratory judgment actions in which the amount in controversy does not exceed $15,000.

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CREDITOR'S REMEDIES: GARNISHMENT: EXEMPTIONS: HEAD OF HOUSEHOLD EXEMPTION FROM GARNISHMENT APPLIES TO NON-FLORIDA RESIDENTS

Ulisano v. Ulisano, ___ So. 3d ___, 40 Fla. L. Weekly D153

(Fla. 4th DCA January 7, 2015)

The head of household exemption from garnishment applies both to Florida and non-Florida residents. Prior to 1993, Section 222.11, Florida Statutes, limited the exemption to Florida residents, but the statute was amended in that year to remove this limitation.

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CIVIL PROCEDURE: DISCOVERY: DEPOSITIONS: NONRESIDENTS: NONRESIDENT EMPLOYEE OF CORPORATION THAT WAS CLOSELY RELATED TO, BUT SEPARATE FROM, CORPORATE PLAINTIFF COULD NOT BE REQUIRED TO APPEAR FOR DEPOSITION IN FLORIDA; APPEALS: CERTIORARI

Philadelphia Indemnity Insurance Company v. Carlton, ___ So. 3d ___, 40 Fla. L. Weekly D153 (Fla. 4th DCA January 7, 2015)

An insurance company filed a declaratory judgment action against the insured of one of its subsidiaries. The trial court denied the plaintiff's motion for protective order when the defendant sought to depose a nonresident employee of a corporation that was closely related to, but separate from, the plaintiff, but the appellate court granted the plaintiff's petition for certiorari. "Here, [the party seeking to take the deposition] failed to demonstrate that [the witness] was an officer, director, or managing agent of the petitioning corporation . . . . Accordingly, [*Fla. R. Civ. P.*] 1.410(e)(2) applie[d] and [the witness could not] be required to attend a deposition in Broward County, Florida, but [was] entitled to be subpoenaed for deposition where he reside[d], [was] employed, or transact[ed] business."

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REAL ESTATE: MORTGAGE FORECLOSURE: STANDING: PROOF THAT PLAINTIFF ACQUIRED THE NOTE AT SOME TIME DID NOT ESTABLISH STANDING WHEN FORECLOSURE COMPLAINT WAS FILED

Fischer v. U.S. Bank National Association, ___ So. 3d ___, 40 Fla. L. Weekly D154 (Fla. 4th DCA January 7, 2015)

At the trial of a foreclosure action, the bank's witness was unable to testify that the bank owned or held the note when the foreclosure action was filed. "Although the Bank proved that it acquired the note at some time, it did not prove at trial that it had standing at the time the complaint was filed." As a result, the appellate court reversed judgment for the bank, and remanded for the entry of judgment in favor of the borrower.

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CIVIL PROCEDURE: INTERVENTION: TRIAL COURT ERRED BY DENYING INTERVENTION BECAUSE MOVANT'S INTEREST WAS NOT INDISPENSABLE: REMAND FOR CORRECT LEGAL ANALYSIS

Southern Comfort Grill, Inc. v. Hanks Construction, LLC, ___ So. 3d ___, 40 Fla. L. Weekly D155 (Fla. 4th DCA January 7, 2015)

A contractor filed an action for breach of contract and foreclosure of a mechanics lien based upon the defendants' failure to pay for leasehold improvements. The lessee moved to intervene in the action, contending that the defendants were acting as its agents when they entered into the contract with the plaintiff. The trial court denied the motion based upon the premise that the lessee's interest was not indispensable, but the appellate court reversed. The proper inquiry was whether the movant's interest was "of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment." If the movant possesses a sufficient interest, the trial court must exercise its "discretion to determine whether to permit intervention," considering such factors as "the derivation of the interest, any pertinent contractual language, the size of the interest, the potential for conflicts or new issues, and any other relevant circumstance." Because "the trial court [in this case] did not engage in the complete analysis required for intervention," the appellate court reversed and remanded for a proper analysis.

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TORTS: NEGLIGENCE: PREMISES LIABILITY: FAILURE TO PROVIDE SECURITY: THE PLAINTIFF'S STATUS AS A TRESPASSER IS RELEVANT IN AN ACTION FOR NEGLIGENT FAILURE TO PROVIDE SECURITY BECAUSE IT IS A PREMISES LIABILITY CASE

Nicholson v. Stonybrook Apartments, LLC, ___ So. 3d ___, 40 Fla. L. Weekly D159 (Fla. 4th DCA January 7, 2014)

"[The plaintiff] was shot in the leg by a third-party while attending a party at the . . . common area" of the defendant's apartment complex. The trial court affirmed judgment based upon a jury verdict for the defendant in the plaintiff's action for negligent failure to provide security. The trial court did not err by "allow[ing] the Apartment Complex to introduce evidence regarding [the plaintiff's] status as a trespasser and . . . includ[ing] the question of whether [the plaintiff] was a trespasser on the verdict form." The court clarified that an action for negligent failure to provide security is a premises liability case rather than an ordinary negligence case, and the plaintiff's status in relationship to the land is relevant in a premises liability case. Ordinary negligence cases involve active wrongdoing, but premises liability cases involve passive negligence; namely, the failure to do something to the property that results in harm. "As negligent security actions concern the landowner's *failure* to keep the premises safe and secure from foreseeable criminal activity, it follows that they fall under the umbrella of premises liability as opposed to ordinary negligence." In an active negligence case, the landowner would be liable even if the accident occurred off the premises but, in this case, the defendant's liability was predicated upon the plaintiff's injury on the property. As a result, her case was based upon premises liability, rather than ordinary negligence, and her status in relation to the defendant's property was a relevant factor for the jury to consider.

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TORTS: NEGLIGENCE: NEGLIGENT DESIGN OF TRAFFIC SIGNAL: DOCTRINE OF SLAVIN v. KAY: BECAUSE EVIDENCE SUPPORTED THE JURY'S FINDINGS THAT DEFECT IN DESIGN OF TRAFFIC SIGNAL WAS PATENT AND THAT THE FLORIDA DEPARTMENT OF TRANSPORTATION (FDOT), WHICH CONTROLLED ACCEPTANCE OF THE DESIGN DID SO, JUDGMENT FOR DESIGNER WAS AFFIRMED

McIntosh v. Progressive Design and Engineering, Inc., ___ So. 3d ___, 40 Fla. L. Weekly D160 (Fla. 4th DCA January 7, 2015)

The plaintiff's father died of the injuries that he sustained in an intersectional collision caused by the negligent design of a traffic signal. The trial court entered judgment for the designer, under the doctrine of *Slavin v. Kay,* 108 So. 2d 462 (Fla. 1959), because the jury found that the defect was patent and that the Florida Department of Transportation (FDOT) accepted the design. The appellate court affirmed because these issues were properly submitted to the jury, and the evidence supported its findings. "As between the parties to this construction project, FDOT was the entity to whom the design company owed its duty, because it controlled 'acceptance' of the design company's work. In turn, Broward County controlled acceptance of FDOT's work. At each step along the timeline, the party in control bore the burden of correcting patent defects because its control prevented anyone else from doing so." The doctrine of "*Slavin* [*v. Kaye*] is necessary to place the burden of responsibility upon the entity that controls the environment."

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CONTRACTS: ILLEGAL CONTRACTS: GAMBLING: ACTION FOR FAILING TO RETURN DEPOSIT MADE ON GAMBLING WEBSITE WAS NOT BARRED BY SECTION 849.26, FLORIDA STATUTES, BECAUSE OF THE ABSENCE OF ALLEGATIONS AS TO THE TERMS ON WHICH THE DEPOSIT WAS BEING HELD; CIVIL PROCEDURE: PLEADING: MOTION TO DISMISS: AFFIRMATIVE DEFENSES: ERROR TO DISMISS COMPLAINT BASED UPON AFFIRMATIVE DEFENSE UNDER STATUTE BECAUSE COMPLAINT DID NOT CONTAIN SUFFICIENT ALLEGATIONS REGARDING PURPOSE OF DEPOSIT

Wallisville Corporation, Inc. v. McGuinness, ___ So. 3d ___, 40 Fla. L. Weekly D163 (Fla. 4th DCA January 7, 2015)

The plaintiff sued the owners or operators of an offshore gambling website for failing to return his deposit, but the trial court dismissed his complaint based on Section 849.26, Florida Statutes, which "bars enforcement of gambling debts even if the debt was incurred in another state where the gambling was legal." The appellate court reversed. "[F]or a transaction to be unenforceable under the statute, there must be some knowledge that the proceeds were intended to be used for gambling. In this case, however, the record [was] insufficient for [the court] to determine, as a matter of law, that a claim seeking the return of the deposit [was] a transaction void under the statute. . . . [O]n a motion to dismiss, all reasonable inferences must be drawn in favor of the plaintiff. . . . As there [were] no allegations as to the terms on which the deposit was being held, [the court could not] conclude that part of the consideration was to repay an advance made by the website at the time of the gambling transaction."

Furthermore, the defendants raised the statute as an affirmative defense, but an affirmative defense may not be asserted by motion to dismiss "unless the face of the complaint is sufficient to demonstrate the existence of the defense," and "the complaint [in this case] did not contain sufficient allegations regarding the purpose of the deposit to determine whether [the plaintiff's] claim was barred by the statute."

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MOTOR VEHICLE REPAIRS: ATTORNEY'S FEES: APPEALS: RECORD ON APPEAL: APPELLATE COURT COULD NOT DETERMINE WHETHER TRIAL COURT ERRED BY REFUSING TO AWARD ATTORNEY'S FEES ON CLAIM FOR UNPAID MOTOR VEHICLE REPAIRS BECAUSE OF ABSENCE OF TRANSCRIPT

I-95 Motorsports, Inc. v. Goldberg, ___ So. 3d ___, 40 Fla. L. Weekly D164 (Fla. 4th DCA January 7, 2015)

The trial court, in an action for unpaid motor vehicle repairs, denied the plaintiff's motion for attorney's fees because the plaintiff did not "register with the Florida Department of Agriculture and Consumer Services before engaging in the business of motor vehicle repair." The appellate court affirmed. An award of prevailing party attorney's fees under Section 559.917(1)(b), Florida Statutes, is permissive because the statute provides that a "prevailing party . . . *may* be entitled to . . . reasonable attorney's fees." (Emphasis added) The appellate court was unable to determine whether the trial court abused its discretion by failing to award fees because the plaintiff did not provide the appellate court with a transcript of the hearing, and a "transcript may have shed light on the court's reasons for choosing not to award fees to the plaintiff." The appellate court was unwilling to "speculate on the trial court's rationale . . . when it exercised its discretion."

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REAL ESTATE: QUIET TITLE: ACTION TO QUIET TITLE FAILED TO STATE A CAUSE OF ACTION BECAUSE PLAINTIFF DID NOT ALLEGE THAT DEFENDANT'S MORTGAGES WERE INVALID; CIVIL PROCEDURE: AMENDMENT: TRIAL COURT ERRED BY DISMISSING ACTION WITH PREJUDICE BECAUSE A PLEADING MAY BE AMENDED ONCE AS A MATTER OF COURSE BEFORE A RESPONSIVE PLEADING IS FILED, AND A MOTION TO DISMISS IS NOT A PLEADING

D'Alessandro v. Fidelity Federal Bank & Trust, ___ So. 3d ___, 40 Fla. L. Weekly D164 (Fla. 4th DCA January 7, 2015)

The trial court granted with prejudice the bank's motion to dismiss the homeowners' complaint to quiet title, but the appellate court reversed. Although the complaint failed to state a cause of action because it did not allege that the bank's mortgages were invalid, the homeowners should have been granted leave to amend. A pleading may be amended once as a matter of course before a responsive pleading has been filed, and a motion to dismiss is not a pleading. "A judge's discretion to deny amendment of a complaint arises *only after the defendant files an answer or if the plaintiff already has exercised the right to amend once*."

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INTERNET LAW; TORTS: PERSONAL INJURY; CIVIL PROCEDURE: DISCOVERY: PLAINTIFF DOES NOT HAVE REASONABLE EXPECTATION OF PRIVACY IN PHOTOGRAPHS THAT SHE HAS POSTED ON FACEBOOK REGARDLESS OF HER PRIVACY SETTINGS: RELEVANCE OF PHOTOGRAPHS OVERWHELMS PLAINTIFF'S MINIMAL PRIVACY INTERESTS: STORED COMMUNICATIONS ACT DOES NOT APPLY TO INDIVIDUALS WHO USE THE COMMUNICATIONS SERVICES PROVIDED; APPEALS: CERTIORARI

Nucci v. Target Corporation, ___ So. 3d ___, 40 Fla. L. Weekly D166 (Fla. 4th DCA January 7, 2015)

The trial court ordered the plaintiff in a slip and fall case to produce all photographs depicting her on her Facebook account from the period two years before the accident to the present, and the appellate court denied the plaintiff's petition for certiorari. The appellate court held that the plaintiff did not have a reasonable expectation of privacy, regardless of the privacy settings on her account, because her friends had the ability to share her private photographs. The court analogized the photographs to "a 'day in the life' slide show produced by the plaintiff before the existence of any motive to manipulate reality." The court was influenced by surveillance demonstrating that the plaintiff may not have been candid about the impact of her accident related injuries. The Stored Communications Act, 18 U.S.C. Sections 2701-2712, did not constitute an impediment to discovery because it is inapplicable "to individuals who use the communications services provided."

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REAL ESTATE: MORTGAGES: STANDING:

BANK FAILED TO ESTABLISH STANDING AT TRIAL BECAUSE ENDORSEMENT ON NOTE WAS UNDATED, NO ASSIGNMENTS OF MORTGAGE WERE INTRODUCED, AND ITS REPRESENTATIVE DID NOT KNOW WHEN THE ORIGINAL PLAINTIFF ACQUIRED THE NOTE AND MORTGAGE

Joseph v. BAC Home Loans Servicing, LP, ___ So. 3d ___, 40 Fla. L. Weekly D171 (Fla. 4th DCA January 7, 2013)

During the trial of a mortgage foreclosure, the plaintiff failed to establish its standing when the complaint was filed because "[t]he endorsement on the note was undated, no assignments of mortgage were introduced, and the bank representative had no knowledge of when [its predecessor, the original plaintiff in the action] acquired the note and mortgage."

Section 673.3011(2), Florida Statutes, "allows enforcement by a 'nonholder in possession of the instrument who has the rights of a holder.'" Even if the plaintiff's predecessor was a loan servicer, the plaintiff was still required, but failed, to prove that predecessor "acquired possession of the note prior to filing the foreclosure complaint."

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REAL ESTATE: MORTGAGE FORECLOSURE: STANDING: PLAINTIFF FAILED TO ESTABLISH ITS STANDING TO FORECLOSE BECAUSE THE ORIGINAL NOTE CONTAINED AN UNDATED ENDORSEMENT IN BLANK, AN ASSIGNMENT OF THE NOTE CONTAINED AN UNDATED ENDORSEMENT IN BLANK, AN ASSIGNMENT OF THE MORTGAGE WAS EXECUTED AFTER THE DATE THE COMPLAINT WAS FILED FOR VALUE RECEIVED BEFORE THE COMPLAINT WAS FILED, AND THE PLAINTIFF'S WITNESS WAS UNABLE TO TESTIFY WHEN THE NOTE WAS ENDORSED, TO INTRODUCE THE POOLING AND SERVICING AGREEMENT UNDER WHICH THE NOTE WAS SUPPOSEDLY ASSIGNED TO THE PLAINTIFF, OR TO PROVIDE DETAILS REGARDING THE ASSIGNOR'S BANKRUPTCY PROCEEDINGS; APPEALS: RIGHT FOR WRONG REASON DOCTRINE

Deutsche Bank National Trust Company v. Boglioli, ___ So. 3d ___, 40 Fla. L. Weekly D173 (Fla. 4th DCA January 7, 2015)

The appellate court affirmed final judgment for the defendant in a mortgage foreclosure because the plaintiff failed to establish standing. (1) The original note contained an undated endorsement in blank, (2) an assignment of the note contained an undated endorsement in blank, (3) an assignment of the mortgage contained an undated endorsement in blank executed after the date the complaint was filed for value received before the date the complaint was filed, and (4) the plaintiff's witness was unable to (a) testify when the note was endorsed, (b) introduce the pooling and servicing agreement under which the note was supposedly assigned to the plaintiff, or (c) provide details regarding the assignor's bankruptcy proceedings. Although the trial court directed a verdict for the defendant on the ground that the assignments were invalid because they were executed during the grantor's bankruptcy, without adequate evidence to support that premise, the appellate court affirmed

under the right for the wrong reason doctrine because of the absence of evidence of the plaintiff's standing.

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REAL ESTATE: MORTGAGE FORECLOSURE: EVIDENCE: HEARSAY: BUSINESS RECORDS: LOAN PAYMENT HISTORY: CURRENT LOAN SERVICER'S BUSINESS RECORDS, WHICH INCLUDED BUSINESS RECORDS RECEIVED FROM PRIOR LOAN SERVICER, WERE ADMISSIBLE BECAUSE THE CIRCUMSTANCES SURROUNDING THE TRANSFER ESTABLISHED TRUSTWORTHINESS AND THE RECORDS CUSTODIAN ESTABLISHED THE FOUR REQUIREMENTS FOR APPLICATION OF THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE

Bank of New York v. Calloway, ___ So. 3d ___, 40 Fla. L. Weekly D173 (Fla. 4th DCA January 7, 2015)

The appellate court reversed an order of involuntary dismissal in a mortgage foreclosure following the exclusion of the borrower's loan payment history as inadmissible hearsay. At trial, the bank called a litigation specialist for the current (fourth) loan servicer, which assumed responsibility for servicing the loan five years after it went into default. The witness explained that the prior (third) loan servicer transferred the original loan documents and its business records, which included the entire loan payment history, to the current (fourth) loan servicer, and that the current loan servicer "reviewed the documents for accuracy before scanning them and inputting the payment information into its records system." "[The witness] testified that: (1) the proffered document was 'a true and accurate representation of the payment history for th[e] loan,' (2) it was 'kept during the regular course of regularly-conducted activities by a person with knowledge of the event or activity,' (3) the 'person making the record ha[d] a duty [to compile accurately the] information for th[e] record,' and (4) it is 'the regular practice of the servicer to make such record.'" The borrower testified that the records failed to account for payments that he had made before the loan went into default. The trial court ruled that the records were inadmissible because of the witness's lack of familiarity with the prior servicer's practices and procedures, her inability to testify about the accuracy of the prior servicer's business records, and her lack of knowledge about "who, how, or when the data entries were made into the prior servicer's business records." The appellate court reversed. Section 90.803(6), Florida Statutes, establishes a four prong test to qualify for the business records exception to the hearsay rule but, even if all four elements have been satisfied, the trial court may still exclude the records based upon "lack of trustworthiness." "In most instances, a proponent [of integrated business records] will clear [the trustworthiness] hurdle by providing evidence of a business relationship or contractual obligation between the parties that ensures a substantial incentive for accuracy. . . . In the alternative . . . the successor business itself may establish trustworthiness by independently confirming the accuracy of the third-party business records upon receipt." "In the case at bar, [the witness] confirmed the trustworthiness of the relied-upon third-party business records by testifying that [the current servicer] 'reviewed' [its predecessor's] supplied payment histories 'for accuracy' before integrating them into its own records." The court held that even without this testimony, "the circumstances of the loan transfer itself would have been sufficient to establish trustworthiness given the business relationships and common practices inherent among lending institutions acquiring and selling loans." The borrower's testimony that some of his payments were not reflected in the records did not justify their exclusion because "the trial court has broad discretion to reconcile any discrepancies, if warranted, based on the evidence presented. Minor discrepancies in calculations, given the volumes of records transferred from one business entity to another, should not render business records of a successor servicer untrustworthy for purposes of laying a foundation for the business records exception given that the trustworthiness of the records has been established." The court

emphasized that its opinion "should not be construed as a 'green light' for lenders to present a 'robo' witness to establish the business records exception. . . .[A]dmission of a business record is predicated on the proponent demonstrating (1) that the record was made at or near the time of the event, (2) that it was made by or from information transmitted by a person with knowledge, (3) that it was kept in the ordinary course of a regularly conducted business activity, and (4) that it was a regular practice of that business to make such a record. . . . The requirements of reliance and trustworthiness do not supplant this rule's provisions; 'rather, [the court] view[ed] them as necessary in these circumstances to satisfy the rule's requirements that the records were made in the course of a regularly conducted activity of the incorporating entity." "In the circumstances present, as long as a business entity's records obtained from prior servicers establish trustworthiness – i.e., that the records are what they purport to be and were subject to the business' internal practices and procedures to ensure accuracy of the records – the records are cleared for admission and satisfy the business record exception to hearsay."

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REAL ESTATE: MORTGAGE FORECLOSURE; CIVIL PROCEDURE: TRIAL COURT DID NOT ERR BY GRANTING SUMMARY JUDGMENT FOR PLAINTIFF BECAUSE FORECLOSURE COMPLAINT FAILED TO STATE A CAUSE OF ACTION: COMPLAINT DID NOT FAIL TO STATE A CAUSE OF ACTION BECAUSE ATTACHED NOTE WAS PAYABLE TO AN ENTITY OTHER THAN THE PLAINTIFF AND NOTE DID NOT CONTAIN INDORSEMENTS OR ALLONGES: NOTE MERELY RAISED POSSIBLE DEFENSES TO COMPLAINT RATHER THAN NEGATING IT: BORROWERS WAIVED AFFIRMATIVE DEFENSE OF LACK OF STANDING WHEN THE COMPLAINT WAS FILED BECAUSE THEY DID NOT FILE AN ANSWER OR AFFIRMATIVE DEFENSES AND A DEFAULT WAS ENTERED AGAINST THEM: DESPITE DEFAULT, LENDER WAS REQUIRED TO ESTABLISH STANDING WHEN SUMMARY JUDGMENT WAS ENTERED: FILING, SEVERAL MONTHS BEFORE HEARING, OF ORIGINAL NOTE WITH INDORSEMENT TO PLAINTIFF ESTABLISHED PLAINTIFF'S STANDING WHEN SUMMARY JUDGMENT WAS ENTERED, RATHER THAN CREATING GENUINE ISSUE OF MATERIAL FACT

Jaffer v. Chase Home Finance, LLC, ___ So. 3d ___, 40 Fla. L. Weekly D177 (Fla. 4th DCA January 7, 2015)

The borrowers appealed from summary final judgment of mortgage foreclosure entered after the borrowers were defaulted for failing to file an answer or affirmative defenses. The borrowers argued that summary judgment should not have been entered because the complaint failed to state a cause of action because the note attached to the complaint was payable to an entity other than the plaintiff, and the note did not contain indorsements or allonges. The appellate court affirmed. "[F]or exhibits to serve as a basis for dismissing a complaint for failure to state a cause of action, the exhibits must actually negate the cause of action – not simply raise possible defenses to it." In this case, the complaint alleged that the plaintiff was the current holder of the note and mortgage and/or was entitled to enforce them. Therefore, the note "did not *negate* the cause of action; it simply raised a possible standing

defense, which [was] not enough to serve as a basis to dismiss the complaint for failure to state a cause of action." Furthermore, the argument that the complaint failed to state a cause of action was a challenge to the plaintiff's standing when the complaint was filed, which was an affirmative defense that the borrowers waived when they were defaulted for failing to file an answer or affirmative defenses. Nevertheless, it was still incumbent upon the plaintiff to establish its standing when summary judgment was entered, but the plaintiff did so several months before summary judgment was entered by filing the original note with an indorsement to the plaintiff. Rather than creating a genuine issue of material fact, as contended by the borrowers, the original note with indorsement established the plaintiff's standing when summary judgment was entered. Judges Levine and Klingensmith concurred in the per curiam majority decision of the court. Judge Conner wrote a lengthy and spirited dissent.

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REAL ESTATE: MORTGAGE FORECLOSURE: STANDING: FINAL JUDGMENT OF MORTGAGE FORECLOSURE REVERSED BECAUSE BANK FAILED TO ESTABLISH STANDING WHEN COMPLAINT WAS FILED: NOTE ATTACHED TO COMPLAINT WAS PAYABLE TO A DIFFERENT LENDER; ORIGINAL NOTE, INTRODUCED IN EVIDENCE AT TRIAL, CONTAINED AN UNDATED ENDORSEMENT FROM ORIGINAL LENDER TO PLAINTIFF; AND SERVICING AGENT DID NOT KNOW WHEN ENDORSEMENT WAS PLACED ON NOTE

Wright v. Deutsche Bank National Trust Company, ___ So. 3d ___, 40 Fla. L. Weekly D183 (Fla. 4th DCA January 7, 2015)

The appellate court reversed final judgment of mortgage foreclosure after trial based upon the plaintiff's failure to prove that it possessed standing to foreclose when the complaint was filed. The note attached to the complaint was payable to an entity other than the plaintiff. Although the original note, introduced in evidence at trial, contained an endorsement from the original lender to the plaintiff, the endorsement was undated, and the loan servicer was unable to testify when the endorsement was placed on the note.

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CONTRACTS: COMMERCIAL LOAN GUARANTY: EQUAL CREDIT OPPORTUNITY ACT (ECOA): COMMERCIAL LENDER DID NOT VIOLATE ECOA BY REQUIRING WIFE TO GUARANTY LOAN TO HUSBAND'S BUSINESS BECAUSE HUSBAND'S FINANCIAL STATEMENT INCLUDED SUBSTANTIAL ASSETS TITLED IN BOTH HUSBAND AND WIFE'S NAMES AND LISTED SEVERAL COMPANIES, INCLUDING THE ONE FOR WHICH THE LOAN WAS SOUGHT, IN WHICH WIFE

APPEARED TO BE A PARTIAL OWNER: WIFE HAD INITIAL AND ULTIMATE BURDEN OF ESTABLISHING CREDIT DISCRIMINATION: COURT REJECTS WIFE'S ARGUMENT THAT SHE WAS DENIED EQUAL JUSTICE BECAUSE CO-OWNER'S WIFE WAS NOT REQUIRED TO GUARANTY THE LOAN BECAUSE TRIAL COURT FOUND THERE WERE NO JOINT ASSET ISSUES IN HER CASE, AND APPELLATE COURT WOULD NOT REWEIGH EVIDENCE, RETRY CASE, OR SUBSTITUTE ITS JUDGMENT FOR THAT OF TRIAL COURT ON FACTUAL MATTERS SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE

Richardson v. Everbank, ___ So. 3d ___, 40 Fla. L. Weekly D183
(Fla. 4th DCA January 7, 2015)

The appellate court affirmed a judgment holding a wife liable as a guarantor on a loan to a business owned by her husband and another man. The lender did not violate the Equal Credit Opportunity Act of 1974 (ECOA), by discriminating against the wife based on her marital status, because the husband's financial statement "included substantial assets titled in both his and his wife's names," and "list[ed] several companies which appear[ed] to show partial ownership by [his wife], including [the company for which the loan was sought]." Although "[the wife] contend[ed] that the bank had the burden of proving a non-discriminatory basis for its actions. . . . [the wife] first bore the burden of establishing a prima facie case of credit discrimination," and even if she did so, "the bank's reliance on the joint financial statement establishe[d] a legitimate basis for requiring [the wife] to execute a guaranty. [The wife] did not overcome this evidence with a showing that [the husband] was individually creditworthy. Moreover, for an ECOA claim, 'the ultimate burden of persuasion remains with the [claimant],'" and "[the wife] failed to meet her burden." The court rejected the wife's claim that she was denied equal justice because the co-owner's wife was not required to sign a guaranty because "the trial court specifically found that there were 'no joint asset issues' with regard to [the other wife]." In addition, the court refused to reweigh the evidence, retry the case, or substitute its judgment for that of the trial court "on factual matters supported by competent, substantial evidence."

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REAL ESTATE: MORTGAGE FORECLOSURE; CIVIL PROCEDURE: VOLUNTARY DISMISSAL: ATTORNEY'S FEES: DEFENDANT WAS ENTITLED TO PREVAILING PARTY ATTORNEY'S FEES UNDER SECTION 57.105(7), FLORIDA STATUTES, AND THE MORTGAGE AFTER PLAINTIFF VOLUNTARILY DISMISSED THE FORECLOSURE ACTION BECAUSE OF SHORT SALE OF PROPERTY; APPEALS: JURISDICTION PENDING APPEAL: ATTEMPT VOLUNTARILY TO DISMISS ACTION DURING APPEAL FROM SUMMARY JUDGMENT WAS A NULLITY

Kelly v. BankUnited, FSB, ___ So. 3d ___, 40 Fla. L. Weekly D187
(Fla. 4th DCA January 7, 2015)

The defendant's answer to the plaintiff's foreclosure complaint requested costs and reasonable attorney's fees under 15 U.S.C. 1640(a) and (e), Section 57.105, Florida Statutes, the note, and the mortgage. The trial court entered summary judgment for the plaintiff, and the defendant appealed. While the appeal was pending, a short sale of the

property occurred. As a result, the trial court granted the plaintiff's motion "to cancel the foreclosure sale, vacate the final summary judgment, dismiss the action, and return the original note and mortgage." The appellate court ultimately reversed and remanded for rehearing on the plaintiff's motion for summary judgment. The defendant moved for costs and attorney's fees, but the trial court deferred ruling on the motion pending rehearing of the plaintiff's motion for summary judgment. The rehearing never occurred because plaintiff voluntarily dismissed the action based upon the short sale. The trial court denied the defendant's motion for attorney's fees, but the appellate court reversed. Initially, the appellate court "note[d] that [the plaintiff's] attempt [voluntarily to dismiss] the case in the trial court while the final summary judgment order was pending on appeal [was] a nullity . . . ." The defendant's answer placed the plaintiff on notice that he would be seeking attorney's fees if he prevailed, and "[a] plaintiff's voluntary dismissal makes a defendant the 'prevailing party' within the meaning of subsection 57.105(7), even if the plaintiff refiles the case and prevails." Because "[the plaintiff] voluntarily dismissed the foreclosure action against [the defendant] on remand from the reversal of final summary judgment, [the defendant was] the prevailing party for purposes of section 57.105(7), which entitle[d] him to attorneys' fees and costs pursuant to the provision in the mortgage document."

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ARBITRATION: AN AGREEMENT TO ARBITRATE FUTURE DISPUTES IN ANOTHER JURISDICTION IS VOIDABLE UNDER THE FLORIDA ARBITRATION CODE (FAC) BUT NOT UNDER THE FEDERAL ARBITRATION ACT (FAA): AN EMPLOYMENT AGREEMENT BETWEEN A FLORIDA RESIDENT AND A NONRESIDENT CORPORATION IMPLICATES INTERSTATE COMMERCE AND IS GOVERNED BY THE FAA: ARBITRATION OF A WORKER'S COMPENSATION RETALIATORY DISCHARGE CLAIM DOES NOT VIOLATE THE PUBLIC POLICY: EMPLOYER DID NOT WAIVE ITS RIGHT TO ARBITRATE WORKER'S COMPENSATION RETALIATORY DISCHARGE CLAIM BY FAILING TO DEMAND ARBITRATION OF WORKER'S COMPENSATION CLAIM: THREAT TO FIRE PLAINTIFF IF HE DID NOT SIGN EMPLOYMENT CONTRACT WAS INSUFFICIENT TO CONSTITUTE DURESS: AGREEMENT TO ARBITRATE WORKER'S COMPENSATION RETALIATORY DISCHARGE CLAIM WAS NOT SUBSTANTIVELY UNCONSCIONABLE: AS A RESULT, IT WAS UNNECESSARY TO CONSIDER ISSUE OF PROCEDURAL UNCONSIONABILITY

AMS Staff Leasing, Inc. v. Taylor, ___ So. 3d ___, 40 Fla. L. Weekly D188 (Fla. 4th DCA January 7, 2015)

Although the plaintiff was hired as a truck driver by one company, he was subsequently told that he would be fired if he did not sign an employment agreement with an employee leasing company in Texas. The plaintiff signed the agreement, which contained a provision requiring arbitration of disputes in Texas. The plaintiff was discharged after he was injured on the job and filed a worker's compensation claim. As a result, he sued his initial and subsequent employers for retaliatory discharge. The trial court denied the employee leasing company's motion to abate and compel arbitration, but the appellate court reversed. Although an agreement to arbitrate future claims in another jurisdiction is voidable under the Florida Arbitration Code (FAC), it is valid under the Federal Arbitration Act (FAA). The employment agreement in this case implicated interstate commerce because the employee was a Florida resident, and the employer was a Texas corporation. Therefore, the FAA applied, and the requirement to arbitrate in Texas was valid and enforceable. The agreement did not violate the public policy by requiring the parties to arbitrate a worker's compensation retaliatory discharge claim because claims for wrongful discharge are distinct from claims for worker's compensation benefits. Moreover, the agreement was not invalid because it did not exclude claims for worker's compensation benefits from its scope. The employer did not waive the right to arbitrate the retaliatory discharge claim by failing to request arbitration of the worker's compensation claim, "which [it] might not have been legally entitled to arbitrate in the first place." The agreement was not unenforceable based upon duress, which "involves a dual concept of external pressure and internal surrender or loss of volition in response to outside compulsion." "The only evidence of a 'threat' in this case was the threat that the plaintiff's services were not needed if he did not sign the employment contract," and "[t]his was insufficient to constitute duress." Furthermore, the agreement to arbitrate the retaliatory discharge claim was not substantively unconscionable because it "[did] not defeat the remedial purpose of section 440.205, Florida Statutes. Both substantive and procedural unconscionability must exist to invalidate an arbitration agreement. As a result, it was unnecessary to consider the issue of procedural unconscionability because substantive unconscionability did not exist.

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INSURANCE: COMMERCIAL PROPERTY INSURANCE: WHEN PRIMARY INSURANCE POLICY WAS CONSIDERED AS A WHOLE, IT PROVIDED BLANKET INSURANCE RATHER THAN SCHEDULED INSURANCE: IF INSURED AND INSURER'S INTERPRETATIONS OF POLICY WERE BOTH REASONABLE, THEN POLICY WAS AMBIGUOUS AND SHOULD BE INTERPRETED IN INSURED'S FAVOR; EVIDENCE: HEARSAY: BUSINESS RECORDS: WITNESS LACKED SUFFICIENT KNOWLEDGE TO QUALIFY DATA COMPILATION AS A BUSINESS RECORD; CIVIL PROCEDURE: CONSOLIDATION: SEPARATE JUDGMENTS SHOULD BE ENTERED WHEN CASES ARE CONSOLIDATED FOR TRIAL; APPEALS: HARMLESS ERROR: RIGHT FOR WRONG REASON DOCTRINE

Landmark American Insurance Company v. Pin-Pon Corporation, ___ So. 3d ___, 40 Fla. L. Weekly D191 (Fla. 4th DCA January 7, 2015)

A hotel, covered under primary and form following excess policies, sustained damages from two hurricanes. After the loss, the insured and the excess carrier disputed whether the primary policy provided blanket coverage or scheduled coverage. Under blanket coverage, each item of covered property is insured to the full extent of the policy limits. Under scheduled coverage, a separate policy limit applies to each category of insurance. In this case, Endorsement 2 added the hotel to the schedule of locations and listed separate

amounts of insurance for building, contents, and business income. The total of the amounts designated far exceeded the policy limits. Paragraph 36 of the policy provided that the values and schedule of property were included for "premium purposes only." Paragraph 2 of the Occurrence Limit of Liability provision of the policy stated that the policy premium was based upon the Statement of Values attached to the policy. Initially, subparagraph 2.b. provided that the company's liability in the event of loss would be limited by the total on the Statement of Values less applicable deductible(s), but Endorsement 4 deleted subsection 2.b. Paragraph 2, as modified by Endorsement 4, limited the insurance company's liability to payment of the actual amount of loss less the deductible or the policy limits. Paragraph 1 provided that the policy limits established "the total limit of [the insurer's] liability applicable to each occurrence. Viewing the policy as a whole, the court concluded that it provided blanket insurance. Holding otherwise would result in the anomaly of exposing the insurer to liability in excess of its policy limits. "At a minimum, the insured's interpretation of [the primary] policy as a blanket policy [was] reasonable. Thus, even if [the excess insurer's] interpretation of the [primary policy] were also a reasonable one, the policy would be ambiguous and should be interpreted in the insured's favor." Although the primary insurer's responses to the insured's request for admissions provided extrinsic evidence in support of the insured's interpretation of the policy, the court recognized that that the excess insurer could not be bound by the primary carrier's admissions. Even if the trial court erred by considering the primary insurer's discovery responses in concluding that the primary policy was ambiguous, the appellate court would affirm based upon the right for the wrong reason doctrine.

The trial court erred by admitting a data compilation as a business record for the purpose of evaluating code upgrade damages. The insured sought to establish the foundation for admissibility through its architect, but he "could not testify as to when 25 of the 26 documents were made. And he had no information as to whether the person who made the documents had knowledge or received information from a person with knowledge. While it was not necessary for [the insured] to call the person who actually prepared the business records, [the court found] that [the insured] did not establish that the architect was either in charge of the activity constituting the usual business practice or was well enough acquainted with the activity to give the testimony. Although the documents in [the exhibit] may have qualified as the general contractor's business records, the mere fact that these documents were incorporated into the architect's file did not bring those documents within the business records exception. In short, [the insured] failed to lay the necessary foundation for the admission of [the exhibit] as a business record." The error was not harmless because "[the insured] . . . failed to prove that the erroneous admission of [the exhibit] did not contribute to the jury's verdict." As a result, the court reversed and remanded for a new trial on the sole issue of code upgrade damages.

The insured brought separate lawsuits involving each of the two hurricanes. Although the lawsuits were consolidated for the purposes of trial, the trial court should have entered separate judgments for each lawsuit. "[C]onsolidation has no effect on the substantive rights of the parties in an individual case, and does not destroy the separate identities of the consolidated cases." Entering one judgment instead of two could have an impact upon the validity of proposals for settlement.

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