

KASHI LAW LETTER

A Synopsis of Florida Case Law

Volume 7, Issue 04

January 28, 2015

CIVIL PROCEDURE: RELIEF FROM JUDGMENT: TIMELINESS: COURT AFFIRMS DENIAL OF UNTIMELY MOTION FOR RELIEF FROM JUDGMENT

Hollingsworth v. Deutsche Bank National Trust Company, ___ So. 3d ___, 40 Fla. L. Weekly D231 (Fla. 1st DCA January 20, 2015)

The appellate court affirmed the denial of a motion for relief from judgment, under *Fla. R. Civ. P.* 1.540(b)(1), (2), and (3), because the motion was untimely. The court's brief per curiam decision did not include a discussion of the underlying facts, but a motion under Rule 1.540(b)(1) is based upon mistake, inadvertence, surprise, or excusable neglect, a motion under Rule 1.540(b)(2) is based upon newly discovered evidence, and a motion under Rule 1.540(b)(3) is based upon fraud. A motion under all of these subsections must be brought within one year "after the judgment, decree, order, or proceeding was entered or taken." The appellate court also affirmed the denial of relief under *Fla. R. Civ. P.* 1.540(b)(5). A motion under Rule 1.540(b)(5) is based upon satisfaction, release, discharge, reversal, vacation, or inequity of prospective application, and a motion under this subsection must be made within a reasonable time. The court held that relief was unavailable under this subsection without explaining the basis for its conclusion.

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/>.

To read more briefs in the Appeals: Timeliness category of the Kashi Law Letter, please click here, <http://www.kashilawletter.com/category/appeals/timeliness/>.

To read more briefs in the Civil Procedure: Florida Rules of Civil Procedure category of the Kashi Law Letter, please click here, <http://www.kashilawletter.com/category/civil-procedure/florida-rules-of-civil-procedure/>.

ESTATES: TRUSTS: PROBATE: ATTORNEY'S FEES: CIVIL PROCEDURE: PLEADING: BENEFICIARY WAIVED OBJECTION THAT TRUSTEE'S CLAIM FOR ATTORNEY'S FEES WAS INADEQUATELY PLED BECAUSE PRETRIAL STIPULATION INCLUDED ISSUE WHETHER ANY PARTY WAS ENTITLED TO ATTORNEY FEES AND COSTS UNDER DESIGNATED AND APPROPRIATE STATUTES

**Vechten v. Anyzeski, ___ So. 3d ___, 40 Fla. L. Weekly D235
(Fla. 4th DCA January 21, 2015)**

The beneficiary filed a petition and an amended petition to revoke the amendment to a trust that reduced his distribution. Although the trustee prevailed, the trial court denied her motion for attorney's fees because the trustee's answer pled an entitlement to fees under the inherent power of the court and Section 57.105, Florida Statutes, but the trial court concluded that it lacked inherent authority to award fees and that Section 57.105 was inapplicable. The appellate court reversed because the beneficiary waived his objection to fees based upon the inadequacy of the trustee's pleadings because the pretrial stipulation included as an issue

whether any party was entitled to attorney's fees and costs under Sections 736.1005, 736.1006, and 736.1007, Florida Statutes. This stipulation reflected that the beneficiary was on notice of the trustee's claim for attorney's fees "under the proper basis of chapter 736." As a result, it was unnecessary to determine whether the trustee's pleadings were adequate, but the court cited *Caufield v. Cantele*, 837 So. 2d 371, 378 (Fla. 2002), for the proposition that "the specific statutory or contractual basis for a claim for attorney's fees need not be specifically pled, and . . . failure to plead the basis of such a claim will not result in waiver of the claim."

To read more briefs in the Estate Law category of the Kashi Law Letter, please click here, <http://www.kashilawletter.com/category/estate-law/>.

To read more briefs in the Estate Law: Probate category of the Kashi Law Letter, please click here, <http://www.kashilawletter.com/category/estate-law/probate/>.

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

To read more briefs in the Attorney's Fees category of the Kashi Law Letter, please click here, <http://www.kashilawletter.com/category/attorneys-fees/>.

To read more briefs in the Florida Statutes category of the Kashi Law Letter, please click here, <http://www.kashilawletter.com/category/florida-statutes/>.

**ESTATES: TRUSTS: RESULTING TRUST;
CIVIL PROCEDURE: DEFAULT: RELIEF FROM
JUDGMENT: SUCCESSIVE MOTIONS: COURT REVERSES
ORDER GRANTING SECOND MOTION FOR RELIEF FROM
JUDGMENT ON SAME GROUND ASSERTED IN FIRST
MOTION: SECOND MOTION WAS NOT AN AMENDMENT
OF FIRST MOTION BECAUSE NOT ALL OF THE GROUNDS
ASSERTED IN BOTH MOTIONS WERE THE SAME, AND
MOVANT NEVER ARGUED THAT THE SECOND MOTION WAS
AN AMENDMENT OF THE FIRST MOTION: TRIAL COURT
LACKED AUTHORITY TO GRANT SECOND MOTION ON
GROUND THAT JUDGMENT WAS VOID BECAUSE
COMPLAINT FAILED TO STATE CAUSE OF ACTION: DEFAULT
JUDGMENT BASED ON COMPLAINT THAT FAILED TO STATE
CAUSE OF ACTION IS VOIDABLE RATHER THAN VOID: CASE
JURISDICTION, CONTINUING JURISDICTION, OR
PROCEDURAL JURISDICTION IS THE AUTHORITY TO ACT IN
A PARTICULAR CASE: RES JUDICATA APPLIES TO
SUBSEQUENT ACTIONS RATHER THAN THE SAME ACTION:
THE GOAL OF BOTH RES JUDICATA AND FLA. R. CIV. P.
1.540 IS FINALITY
OF LITIGATION**

**Adams v. Henderson, ___ So. 3d ___, 40 Fla. L. Weekly D236
(Fla. 4th DCA January 21, 2015)**

The plaintiff filed an action against the estate for a resulting trust in the decedent's home. When the estate failed to respond to the complaint, the clerk entered a default, and the trial court entered final judgment imposing a resulting trust. The estate filed a motion for relief from judgment because (1) the estate was unaware of, and was not to blame for, its lawyer's failure to respond, and (2) the plaintiff was not entitled to a resulting trust based upon the allegations of her complaint. After the trial court held a hearing, but before it entered an order, on the estate's motion, the estate filed a second motion for relief from judgment because (1) the plaintiff did not provide the estate with notice of default before filing a motion for default, and (2) the final judgment was void because the complaint failed to state a cause

of action for a resulting trust. The trial court denied the first motion for relief from judgment but granted the second based solely upon the plaintiff's failure to state a cause of action for a resulting trust. The appellate court reversed because "a trial court is without legal authority to entertain a second motion for relief from judgment which attempts to relitigate a matter settled by a prior order denying relief." Although the trial court may have thought that it was authorized to grant the second motion because the judgment was void, *La Mer Estates, Inc. v. Bank of New York Mellon*, 137 So. 2d 396, 398 (fla. 4th DCA 2014), which was decided after the trial court's ruling, "held that a default judgment based on a complaint that failed to state a cause of action is voidable, not void." In this case, the trial court denied the first motion on both of the grounds upon which relief was sought. The second motion was not an amendment of the first motion "because the first ground in both motions [was] different," and "the Estate never argued that Motion Two was intended as an amendment to Motion One." Although worded differently, the second ground in both motions was the same, and the trial court denied relief on the second ground when it ruled on the first motion. As a result, the trial court lacked legal authority to grant the second motion based on the second ground. The court explained that it was dealing with what has been referred to as "case jurisdiction," "continuing jurisdiction," or "procedural jurisdiction," synonymous terms referring to "the authority of the court to act in a particular case." The court explained that it was not dealing with res judicata because res judicata applies to subsequent actions rather than the same action. Confusion may occur because both res judicata and *Fla. R. Civ. P. 1.540* have as their goal "finality of litigation." "[S]uccessive motions alleging the same grounds cannot be allowed under rule 1.540 if there is going to be finality to litigation."

To read more briefs in the Estate Law category of the Kashi Law Letter, please click here, <http://www.kashilawletter.com/category/estate-law/>.

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/>.

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

To read more briefs in the Civil Procedure: Florida Rules of Civil Procedure category of the Kashi Law Letter, please click here, <http://www.kashilawletter.com/category/civil-procedure/florida-rules-of-civil-procedure/>.

**CREDITOR'S REMEDIES: CIVIL PROCEDURE:
DISCOVERY IN AID OF EXECUTION: PRIVILEGE:
FIFTH AMENDMENT PRIVILEGE AGAINST SELF
INCRIMINATION: APPEALS: CERTIORARI: TRIAL COURT
DEPARTED FROM ESSENTIAL REQUIREMENTS OF LAW BY
REQUIRING JUDGMENT DEBTOR TO ANSWER WHETHER HE
FILED FEDERAL INCOME TAX RETURNS DURING A SIX YEAR
PERIOD BECAUSE IT WAS REASONABLY PROBABLE THAT
ANSWERS COULD BE USED AGAINST HIM IN PROSECUTION
FOR FAILING TO FILE TAX RETURNS
AND PAY TAXES**

**Appel v. Bard, ___ So. 3d ___, 40 Fla. L. Weekly D238
(Fla. 4th DCA January 21, 2015)**

During discovery in aid of execution, the trial court ordered the judgment debtor to answer whether he filed federal income tax returns over a six year period, but the appellate court granted the defendant's petition for certiorari and quashed the order. "Certiorari will lie to review an order compelling discovery in a civil case over an objection that the order violates the Fifth Amendment privilege against self-incrimination." The defendant in the present case was entitled to relief because it was reasonably probable that the information sought "might be used against him in a prosecution for failure to file and failure to pay his taxes." The court rejected the plaintiff's contention that "[the defendant] should be compelled to answer" "because the IRS [was] already aware of his filing status."

To read more briefs in the Creditor's Remedies category of the Kashi Law Letter, please click here, <http://www.kashilawletter.com/category/creditors-remedies-2/>.

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

To read more briefs in the Appeals: Certiorari category of the Kashi Law Letter, please click here, <http://www.kashilawletter.com/category/appeals/certiorari/>.

**REAL ESTATE: MORTGAGE FORECLOSURE:
STANDING: PLAINTIFF FAILED TO PROVE IT WAS A
NONHOLDER IN POSSESSION WITH THE RIGHTS OF A
HOLDER BECAUSE IT FAILED TO ESTABLISH THAT ITS
TRANSFEROR WAS ENTITLED TO ENFORCE THE NOTE**

**Murray v. HSBC Bank USA, ___ So. 3d ___, 40 Fla. L. Weekly D239
(Fla. 4th DCA January 21, 2015)**

The appellate court reversed final judgment of foreclosure following a nonjury trial because the plaintiff failed to prove that it was a nonholder in possession with the rights of a holder. “A ‘person entitled to enforce’ an instrument is: ‘(1) [t]he holder of the instrument; (2) [a] nonholder in possession of the instrument who has the rights of a holder; or (3) [a] person not in possession of the instrument who is entitled to enforce the instrument pursuant to s[ection] 673.3091 [dealing with enforcement of lost, destroyed, or stolen instrument] or s[ection] 673.4181(4) [dealing with payment or acceptance by mistake].’ § 673.3011, Fla. Stat. (2013). A ‘holder’ is defined as ‘[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession.’ § 671.201(21)(a), Fla. Stat. (2013). Thus, to be a holder, the instrument must be payable to the person in possession or indorsed in blank. See § 671.201(5), Fla. Stat. (2013).” The plaintiff in this case, HSBC “was not a holder of the note because the note [was] payable to Option One California, and there [was] no blank endorsement.” As a result, HSBC was relegated to proving that it was a nonholder in possession of the note with the rights of a holder. In order to do so, HSBC was required to establish a continuous chain of transfers from the original holder of the note to itself. “The chain of transfers start[ed] with Option One California as the original holder of the note. ACE, as the Depositor, transferred its right in the note to HSBC through [a pooling and servicing agreement]. However, there was no evidence that Option One California transferred its right in the note to ACE. This [was] the missing piece of the puzzle. . . . As HSBC [could not] prove that ACE had any right to enforce the note, it [could not] derive any rights from ACE and [was] not a nonholder in possession of the instrument with the rights of a holder to enforce. §§ 673.2013, .3011, Fla. Stat. (2013). Put simply, HSBC failed to prove standing.”

To read more briefs in the Real Estate: Mortgage Foreclosure category of the Kashi Law Letter, please click here, <http://www.kashilawletter.com/category/real-estate-law/mortgage-foreclosure/>.

To read more briefs in the Florida Statutes category of the Kashi Law Letter, please click here, <http://www.kashilawletter.com/category/florida-statutes/>.

**REAL ESTATE: MORTGAGE FORECLOSURE:
CIVIL PROCEDURE: PLEADING: MOTION TO DISMISS:
STATUTE OF LIMITATIONS: TRIAL COURT ERRED BY
DISMISSING FORECLOSURE ACTION BASED UPON STATUTE
OF LIMITATIONS BECAUSE COMPLAINT ALLEGED THAT
CONDOMINIUM UNIT OWNERS TOOK TITLE SUBJECT TO A
PRIOR RECORDED MORTGAGE, AND MORTGAGE WAIVED
STATUTE OF LIMITATIONS AS A DEFENSE: TWENTY YEAR,
RATHER THAN FIVE YEAR, STATUTE OF REPOSE APPLIED
BECAUSE ALL OF THE OBLIGATIONS SECURED BY THE**

RECORDED MORTGAGE WERE NOT ASCERTAINABLE FROM THE FACE OF THE RECORDED MORTGAGE

CCH Pathfinder Palm Harbor Management, LLC v. Unknown Heirs, ___ So. 3d ___, 40 Fla. L. Weekly D244 (Fla. 2d DCA January 21, 2015)

The trial court erred by dismissing an action to foreclose the mortgages on six condominium units based upon the statute of limitations and the statute of repose. Although the statute of limitations expired, “the recorded mortgage, which was attached to and incorporated into the amended complaint, contain[ed] an explicit provision waiving the statute of limitations as a defense to a foreclosure action. [A]lthough the current unit owners [were] not parties to the mortgage, the law is clear that if a recorded mortgage is valid on its face, a subsequent purchaser ‘is assumed to have recognized it as a valid lien against the property which he is buying. . . . Thus, a purchaser who takes title to property subject to a prior recorded mortgage is ‘estopped from contesting the validity of the mortgage.’ . . . Here, the complaint allege[d] that the unit owners took title to their units subject to the prior recorded mortgage, and the recorded mortgage waive[d] the statute of limitations as a defense. Therefore, it appear[ed] from the four corners of the amended complaint and its attachments that the unit owners [were] precluded from raising the statute of limitations as a valid defense [by motion to dismiss].” Nevertheless, the court held that the unit owners could raise the statute of limitations as an affirmative defense. Although the action would have been barred by the five year statute of repose, the twenty year statute of repose applied. If “the final maturity date of the obligation or obligations secured by the recorded mortgage is ascertainable from the face of the recorded mortgage,” “the statute of repose is five years from the date of maturity. If not, the statute of repose is twenty years.” In this case, the mortgage secured an unrecorded note and an unrecorded loan agreement. Although “the recorded mortgage identified the maturity date of the note, it did not identify the maturity date of the loan agreement. Hence, because the maturity date of all of the obligations secured by the recorded mortgage was not ascertainable from the face of the recorded mortgage, the twenty-year statute of repose of section 95.281(1)(b) applie[d],” and it had not expired.

To read more briefs in the Real Estate: Mortgage Foreclosure category of the Kashi Law Letter, please click here,

<http://www.kashilawletter.com/category/real-estate-law/mortgage-foreclosure/>.

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

To read more briefs in the Real Estate: Condominiums category of the Kashi Law Letter, please click here,

<http://www.kashilawletter.com/category/real-estate-law/condominiums/>.

INSURANCE: ACCIDENTAL DEATH AND DISMEMBERMENT: ALCOHOL EXCLUSION APPLIES IF THERE IS SOME CAUSAL RELATIONSHIP BETWEEN DEATH AND INTOXICATION: ALCOHOL NEED NOT BE THE SOLE CAUSE OF DEATH

American Heritage Life Insurance Company v. Morales, ___ So. 3d ___, 40 Fla. L. Weekly D250 (Fla. 3d DCA January 21, 2015)

The appellate court reversed summary judgment for the beneficiary under an accidental death and dismemberment policy, based upon an alcohol exclusion in the policy, because a causal relationship existed between the insured’s death and his intoxication. The insured died while operating a jet ski with a blood alcohol level of 0.10, which exceeds the legal limit of 0.08. “[T]he cause of death was multiple blunt force traumatic injuries sustained in a front-end collision with a fixed object.” The trial court granted summary judgment for the beneficiary based on the opinion of her expert that the insured’s intoxication was not the sole cause of the accident. The appellate court reversed because sole causation was unnecessary to trigger the exclusion; some causal relationship was sufficient and surely existed. “Because no genuine issues of material fact exist[ed] concerning whether the Insured’s alcohol intoxication contributed to his death, the Insurer carrier its burden to show sufficient causal relationship between death and intoxication.”

To read more briefs in the Insurance category of the Kashi Law Letter,

**REAL ESTATE: MORTGAGE FORECLOSURE:
CIVIL PROCEDURE: RELIEF FROM JUDGMENT: NOTICE:
TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO
GRANT RELIEF FROM ORDER CLOSING FORECLOSURE
ACTION WITHOUT NOTICE BECAUSE ORDER VIOLATED DUE
PROCESS AND WAS VOID**

**U.S. Bank National Association v. Proenza, ___ So. 3d ___, 40 Fla. L. Weekly D256
(Fla. 3d DCA January 21, 2015)**

The trial court abused its discretion by denying the plaintiff's motion for relief from a final order closing its foreclosure action. The order was void for violation of due process because it was entered without notice to the parties.

To read more briefs in the Real Estate: Mortgage Foreclosure category of the Kashi Law Letter, please click here, <http://www.kashilawletter.com/category/real-estate-law/mortgage-foreclosure/>.

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/>.

To read more briefs in the Constitutional Law: Due Process category of the Kashi Law Letter, please click here, <http://www.kashilawletter.com/category/constitutional-law/due-process/>.

**TORTS: NEGLIGENT DESIGN OF AIR CONDITIONING
SYSTEM IN NEW HOME: LOSS OF USE DURING REPAIR
PERIOD MEASURED BY FAIR RENTAL VALUE OF HOME:
TRIAL COURT ERRED BY DENYING DAMAGES FOR LOSS OF
USE BECAUSE PLAINTIFF'S EXPERT FAILED TO MAKE
ADJUSTMENT FOR LIMITED USE OF PROPERTY: ONCE
PLAINTIFF ESTABLISHED PRIMA FACIE CASE OF LOSS OF
USE, BURDEN SHIFTED TO DEFENDANT TO ESTABLISH ANY
SETOFF**

**Gonzalez v. Barrenechea, ___ So. 3d ___, 40 Fla. L. Weekly D258
(Fla. 3d DCA January 21, 2015)**

The plaintiff was unable to move into his new home for twenty months because the air conditioning system designed by the defendant was defective. Although the plaintiff's expert testified to the fair rental value of the property, the trial court, sitting without a jury, denied damages for loss of use because the expert failed to make adjustments for the plaintiff's limited use of the property, consisting of "storing furniture in the home, parking cars in the garage, docking a boat behind the home, and allowing his son to sleep in the home intermittently to serve as a de-facto security guard." The appellate court reversed. The plaintiff's expert established a prima facie case of loss of use damages by testifying to the fair rental value of the property. Once he did so, "the burden of proof shifted to the . . . defendants to establish any set-off." Judge Salter concurred in Judge Logue's majority opinion. Judge Suarez dissented in part.

To read more briefs in the Torts category of the Kashi Law Letter, please click here, <http://www.kashilawletter.com/category/torts/>.

APPEALS: SUPERSEDEAS: CASH BOND MAY BE POSTED WITH CLERK OF COURT TO SUPERSEDE MONEY JUDGMENT: STATUTORY COURT REGISTRY FEE CHARGED BY CLERK OF COURT IS A TAXABLE APPELLATE COST

Miccosukee Tribe of Indians of South Florida v. Bermudez, ___ So. 3d ___, 40 Fla. L. Weekly D261 (Fla. 3d DCA January 21, 2015)

A defendant may supersede a money judgment during an appeal by posting a cash bond with the clerk of the court. If the defendant does so, the clerk is required to “charge a court registry fee based on a statutory formula.” This fee is a taxable, under *Fla. R. App. P.* 9.400(a)(4), as “other costs permitted by law.”

To read more briefs in the Appeals category of the Kashi Law Letter, please click here, <http://www.kashilawletter.com/category/appeals/>.

To read more briefs in the Appeals: Florida Rules of Appellate Procedure category of the Kashi Law Letter, please click here, <http://www.kashilawletter.com/category/appeals/florida-rules-of-appellate-procedure/>.

CREDITOR’S REMEDIES: DISCOVERY IN AID OF EXECUTION: FIFTH AMENDMENT PRIVILEGE AGAINST SELF INCRIMINATION: ORDER COMPELLING JUDGMENT DEBTOR TO ANSWER QUESTIONS ABOUT HIS INCOME AND WHETHER HE FILED FEDERAL INCOME TAX RETURNS AND COMPELLING DEBTOR TO PRODUCE HIS FEDERAL INCOME TAX RETURNS; APPEALS: CERTIORARI: APPEAL TREATED AS PETITION FOR CERTIORARI: RECORD ON APPEAL: DENIAL OF PETITION FOR CERTIORARI BASED UPON ABSENCE OF HEARING TRANSCRIPTS AND EVIDENTIARY BASIS TO SUPPORT ASSERTION OF FIFTH AMENDMENT PRIVILEGE

Vaygensberg v. Barash, ___ So. 3d ___, 40 Fla. L. Weekly D262 (Fla. 3d DCA January 21, 2015)

During discovery in aid of execution, the trial court ordered the defendant to answer questions about his income and whether he filed federal income tax returns and to produce returns if they were filed. The appellate court treated the defendant’s appeal as a petition for certiorari and denied the petition because the defendant did not provide transcripts of the hearings or an evidentiary basis in support of his assertion of the Fifth Amendment privilege against self incrimination.

To read more briefs in the Creditor’s Remedies category of the Kashi Law Letter, please click here, <http://www.kashilawletter.com/category/creditors-remedies-2/>.

To read more briefs in the Appeals: Certiorari category of the Kashi Law Letter, please click here, <http://www.kashilawletter.com/category/appeals/certiorari/>.

INSURANCE: HOMEOWNERS’ INSURANCE: SINKHOLE: MISREPRESENTATION: CIVIL PROCEDURE: SUMMARY JUDGMENT: NEGATIVE RESPONSE TO QUESTION IN INSURANCE APPLICATION ABOUT CRACKING DAMAGE DID

**NOT UNEQUIVOCALLY ESTABLISH MISREPRESENTATION
BECAUSE QUESTION CONNOTED SOMETHING MORE
SERIOUS THAN COMMON DRYWALL CRACKING:
CONCLUSORY AFFIDAVIT OF UNDERWRITER DID NOT
EXPLAIN WHY CORRECT ANSWER TO QUESTION WOULD
HAVE DETERRED INSURER FROM ISSUING POLICY**

**Mora v. Tower Hill Prime Insurance Company, ___ So. 3d ___, 40 Fla. L. Weekly D262
(Fla. 2d DCA January 23, 2015)**

The appellate court reversed summary judgment rescinding a homeowner's insurance policy based upon material misrepresentation in the insurance application. The insureds answered that their home did not have cracking damage, although the builder's homeowner orientation report reflected the existence of cracking in the living, dining, family, and home theater rooms. This discrepancy did not unequivocally establish that the insureds misrepresented the condition of the property because the reference to "cracking *damage*" in the insurance application connoted the existence of a condition more serious than common household cracking. In addition, the underwriter's conclusory affidavit did not explain why a correct answer to the question would have deterred the insurer from issuing the policy.

To read more briefs in the Insurance: Homeowner's Insurance category of the Kashi Law Letter, please click here, <http://www.kashilawletter.com/category/insurance/homeowners-insurance/>.

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/>.

**FAMILY LAW: PETITION TO DETERMINE PATERNITY:
SPERM DONOR: CIVIL PROCEDURE: SANCTIONS:
ATTORNEY'S FEES: SECTION 57.105, FLORIDA STATUTES:
ALTHOUGH SPERM DONOR'S AMENDED PETITION TO
DETERMINE PATERNITY WAS DENIED WITH PREJUDICE,
TRIAL COURT ERRED BY GRANTING ATTORNEY'S FEES
AGAINST HIM UNDER SECTION 57.105, FLORIDA STATUTES,
BECAUSE SPERM DONOR WAS ATTEMPTING TO ADVANCE
A NOVEL QUESTION OF LAW**

**B.W.P. v. A.L.H., ___ So. 3d ___, 40 Fla. L. Weekly D267
(Fla. 2d DCA January 23, 2015)**

The appellate court affirmed an order dismissing with prejudice a sperm donor's amended petition to determine paternity, but the court reversed an order awarding attorney's fees against the donor as a sanction under Section 57.105, Florida Statutes, because the donor "attempted to advance a novel question of law."

To read more briefs in the Family Law category of the Kashi Law Letter, please click here, <http://www.kashilawletter.com/category/family-law/>.

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

To read more briefs in the Sanctions category of the Kashi Law Letter, please click here, <http://www.kashilawletter.com/category/sanctions/>.

To read more briefs in the Attorney's Fees category of the Kashi Law Letter, please click here, <http://www.kashilawletter.com/category/attorneys-fees/>.

To read more briefs in the Florida Statutes category of the Kashi Law Letter, please click here, <http://www.kashilawletter.com/category/florida-statutes/>.

**FAMILY LAW: ALIMONY; APPEALS: TIMELINESS:
TIME TO APPEAL RAN FROM DATE OF RENDITION OF
ORIGINAL ORDER BECAUSE AMENDED ORDER MERELY
CORRECTED AN ERRONEOUS DATE AND DID NOT EFFECT
A SUBSTANTIVE CHANGE**

**Panopoulos v. Panopoulos, ___ So. 3d ___, 40 Fla. L. Weekly D268
(Fla. 2d DCA January 23, 2015)**

The husband's time to appeal began to run from the date of rendition of the original order awarding durational alimony to the wife because the trial court's amended order merely corrected a date and did not effect a substantive change.

To read more briefs in the Family Law category of the Kashi Law Letter, please click here, <http://www.kashilawletter.com/category/family-law/>.

To read more briefs in the Appeals: Timeliness category of the Kashi Law Letter, please click here, <http://www.kashilawletter.com/category/appeals/timeliness/>.

**TORTS: NURSING HOME NEGLECT: ARBITRATION:
TRIAL COURT ERRED BY GRANTING MOTION TO COMPEL
ARBITRATION BECAUSE NURSING HOME PRODUCED ONLY
SIGNATURE PAGE OF ARBITRATION AGREEMENT, LEAVING
THE MATERIAL TERMS OF THE AGREEMENT SUBJECT TO
QUESTION**

**Davis v. Hearthstone Senior Communities, Inc., ___ So. 3d ___, 40 Fla. L. Weekly
D268 (Fla. 2d DCA January 23, 2015)**

The trial court erred by granting a nursing home's motion to compel arbitration because the nursing home produced only the signature page of a seven page agreement, leaving the terms of the agreement subject to question. The record "fail[ed] to indicate whether the arbitration [was] binding or nonbinding, how many arbitrators [were] to be used, how the arbitrator [would] be selected, or what issues [were] to be included." As a result, the nursing home failed to establish that a valid agreement to arbitrate existed.

To read more briefs in the Torts: Negligence category of the Kashi Law Letter, please click here, <http://www.kashilawletter.com/category/torts/negligence/>.

To read more briefs in the Nursing Home Law category of the Kashi Law Letter, please click here, <http://www.kashilawletter.com/category/nursing-homes-2/>

To read more briefs in the Arbitration category of the Kashi Law Letter, please click here, <http://www.kashilawletter.com/category/arbitration/>.

**LABOR LAW: FLORIDA CIVIL RIGHTS ACT (FCRA):
EMPLOYMENT DISCRIMINATION: EXHAUSTION OF
ADMINISTRATIVE REMEDIES: COURT AFFIRMS DISMISSAL
OF ASSISTANT WARDEN'S CLAIM FOR EMPLOYMENT
DISCRIMINATION AGAINST DEPARTMENT OF CORRECTIONS
(DOC) BASED UPON FAILURE TIMELY TO EXHAUST
ADMINISTRATIVE REMEDIES: EQUITABLE TOLLING: MERE
POSSIBILITY OF SELF INCRIMINATION DURING**

**ADMINISTRATIVE CLAIM PROCESS DID NOT RESULT IN
EQUITABLE TOLLING OF DEADLINE: EQUITABLE ESTOPPEL:
DOC WAS NOT EQUITABLY ESTOPPED TO ASSERT
UNTIMELINESS OF ADMINISTRATIVE CLAIM BECAUSE
PLAINTIFF DID NOT ALLEGE THAT DOC ENGAGED IN ACTIVE
DECEPTION OR MISCONDUCT THAT PREVENTED HIM FROM
FILING TIMELY ADMINISTRATIVE COMPLAINT**

**Williams v. Department of Corrections, ___ So. 3d ___, 40 Fla. L. Weekly D270
(Fla. 5th DCA January 23, 2015)**

The plaintiff, a former assistant warden at a State prison, alleged that his race was a factor in the Department of Corrections' (DOC) decision to accuse him of official misconduct and to terminate his employment. The trial court dismissed the plaintiff's complaint for employment discrimination based upon the plaintiff's failure to exhaust administrative remedies by filing a complaint with the Florida Commission on Human Relations or the Equal Employment Opportunity Commission within 365 days of the alleged violation, and the appellate court affirmed. The court rejected the plaintiff's claim that the 365 day deadline was equitably tolled during the period while the Florida Criminal Justice Standards and Training Commission was investigating the DOC's charges against him because the plaintiff raised only the mere possibility that the investigation "may have placed him[] at risk of self-incrimination. . . . [The plaintiff] could have filed his administrative complaint timely and then moved to stay the proceedings if and when an actual self-incrimination issue arose." The court also refused to apply the doctrine of equitable estoppel because the complaint did not allege that "DOC engaged in any active deception or misconduct that prevented [the plaintiff] from timely filing an administrative complaint."

To read more briefs in the Employment Law category of the Kashi Law Letter, please click here, <http://www.kashilawletter.com/category/employment-law/>.

**REAL ESTATE: FORECLOSURE; APPEALS: TIMELINESS:
SECOND TIER CERTIORARI: CIRCUIT COURT, SITTING
IN ITS APPELLATE CAPACITY, DID NOT VIOLATE CLEARLY
ESTABLISHED PRINCIPLE OF LAW, BY CONCLUDING
THAT IT LACKED JURISDICTION TO CONSIDER
UNTIMELY APPEAL**

**Samuels v. Tankel, ___ So. 3d ___, 40 Fla. L. Weekly D271
(Fla. 1st DCA January 23, 2015)**

The petitioner appealed to the circuit court from an order of the county court in a foreclosure case. The circuit court, on first tier certiorari review, dismissed the appeal because the petitioner did not timely invoke the jurisdiction of the circuit court. The district court denied the petitioner's petition for second tier certiorari review because the circuit court's decision "[did] not amount to a violation of clearly established principles of law."

To read more briefs in the Real Estate: Mortgage Foreclosure category of the Kashi Law Letter, please click here, <http://www.kashilawletter.com/category/real-estate-law/mortgage-foreclosure/>.

To read more briefs in the Appeals: Timeliness category of the Kashi Law Letter, please click here, <http://www.kashilawletter.com/category/appeals/timeliness/>.

To read more briefs in the Appeals: Certiorari category of the Kashi Law Letter, please click here, <http://www.kashilawletter.com/category/appeals/certiorari/>.

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

This newsletter is prepared by
Joseph S. Kashi of
Sperry & Kashi, P.A.
1776 North Pine Island Road, Suite 324
Plantation, FL 33322

Telephone : (954) 423-6553
Toll-free : 1-877-287-7345
Facsimile : (954) 423-6833

The firm concentrates principally on insurance coverage
disputes and bad faith litigation. The firm website may be
found at: ssklawgroup.com

You are receiving this email because
you opted in at our website,
kashilawletter.com
We respect your privacy.

View our privacy policy.

If you believe this has been sent to you
in error, please safely

***[UNSUBSCRIBE]*.**