

KASHI LAW LETTER

A Synopsis of Florida Case Law

Volume 7, Issue 5

February 04, 2015

CRIMINAL LAW: EVIDENCE: COURT REFUSES TO DECIDE WHETHER FLA. R. EVID. 90.608 SUPERSEDES FLA. R. EVID. 90.615(1), WHICH AUTHORIZES THE TRIAL COURT TO CALL COURT WITNESSES; APPEALS: PRESERVATION: DEFENDANT WAIVED POINT ON APPEAL BY OBJECTING ON DIFFERENT GROUND IN TRIAL COURT

**Phelps v. State, ___ So. 3d ___, 40 Fla. L. Weekly D282
(Fla. 1st DCA January 27, 2015)**

On appeal, the defendant argued that "the 1990 amendment to section 90.608, Florida Statutes, which [permits] any party, including the party calling a witness, to attack the witness's credibility," makes obsolete section 90.615(1), Florida Statutes, which permits the trial court to call witnesses so that the parties will not have to vouch for their credibility. The court refused to consider the issue because it was not preserved for appeal because the defendant objected on a different basis in the trial court.

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

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

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

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: RESTRICTIVE COVENANTS: COVENANT AGAINST LIGHTING THAT MAY BE OFFENSIVE TO ADJACENT NEIGHBORS DID NOT GIVE ONE NEIGHBOR VETO POWER OVER ANOTHER NEIGHBOR'S LIGHTING SYSTEM: ARCHITECTURAL REVIEW BOARD WAS REQUIRED TO DETERMINE WHETHER A LIGHTING SYSTEM IS OFFENSIVE, GIVING DEFERENCE, BUT NOT DECISIVE WEIGHT TO THE SENSIBILITIES OF NEIGHBORS

**Leamer v. White, ___ So. 3d ___, 40 Fla. L. Weekly D283
(Fla. 1st DCA January 27, 2015)**

The declaration of covenants in a townhouse community forbade "lighting systems which may be offensive to adjacent neighbors." Based on this covenant, the architectural review board determined that it was powerless to approve a lighting system to which an adjacent neighbor

objected. The trial court agreed and entered summary judgment for the objecting neighbor and the homeowners association, but the appellate court reversed. The covenant did not give neighbors veto power. The architectural review board was required to give deference, but not decisive weight, to the sensibilities of neighbors in determining what is offensive. The board had already determined that the lighting system was acceptable after it was modified to comply with the board's recommendations and would have approved the system but for the adjacent neighbor's objection.

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

**GUARDIANSHIP: INCAPACITATED PERSONS:
WARD'S SISTER COULD NOT BE COMPELLED
TO APPEAR THROUGH COUNSEL BECAUSE SHE
WAS NOT A GUARDIAN AND HAD NOT ABUSED
THE JUDICIAL PROCESS; CIVIL PROCEDURE:
PRO SE LITIGANTS: PRO SE LITIGANTS ARE HELD
TO THE SAME STANDARDS AS REASONABLY
COMPETENT ATTORNEY'S: APPEALS: CERTIORARI:
APPEAL TREATED AS PETITION FOR CERTIORARI
AND GRANTED**

**Silveira v. Quiroga, ___ So. 3d ___, 40 Fla. L. Weekly D287
(Fla 3d DCA January 28, 2015)**

When the ward's sister sought to be substituted for the public guardian, the trial court ruled that she had to appear through counsel, and the sister appealed. The appellate court treated the appeal as a petition for certiorari and granted the petition. *Fla. Prob. R. 5.030(a)*, which requires a guardian to be represented by counsel, was inapplicable because the sister was not a guardian, and the sister, although persistent, had not risen to the level of a vexatious litigant. The court admonished her, however, that "pro se litigants are not held to a lesser standard than a reasonably competent attorney."

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

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

**TRIAL COURT LACKED JURISDICTION TO SET CASE FOR
TRIAL AND TO REFER PARTIES TO MEDIATION EIGHTEEN
MONTHS AFTER RENDITION OF UNAPPEALED ORDER
DISMISSING CASE FOR LACK OF PROSECUTION;
APPEALS: PROHIBITION**

**Aqua Life Corporation v. Reyes, ___ So. 3d ___, 40 Fla. L. Weekly D288
(Fla. 3d DCA January 28,, 2015)**

Eighteen months after the trial court dismissed the plaintiff's action for lack of prosecution, the plaintiff, who had not appealed from the order, filed a motion for status conference. The defendant did not attend the hearing on the motion, possibly because he was not furnished with notice. After the hearing, the trial court set the case for trial and referred the parties to mediation, but the appellate court granted the defendant's petition for writ of prohibition because the trial court lacked jurisdiction to adjudicate the case after the dismissal became final.

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 Appeals: Prohibition category of the Kashi Law Letter, please click here, <http://www.kashilawletter.com/category/appeals/prohibition/>.

**CIVIL PROCEDURE: JURISDICTION:
PERSONAL JURISDICTION: SERVICE OF PROCESS:
SERVICE BY PUBLICATION; MOTION TO QUASH;
APPEALS: CONFESSION OF ERROR: DENIAL OF MOTION
TO QUASH SERVICE BY PUBLICATION REVERSED
BASED UPON DEFENDANT'S CONFESSION OF ERROR**

Mazine v. Branch Banking and Trust Company, ___ So. 3d ___, 40 Fla. L. Weekly D289 (Fla. 3d DCA January 28, 2015)

The appellate court reversed an order denying the defendant's motion to quash service by publication because of the plaintiff's confession of error that "the trial court's order was incorrectly predicated on a sworn statement made pursuant to 49.041(3)(a) [Florida Statutes], i.e., that [the defendant's] residence was '[u]nknown to the affiant.'"

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

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: INVOLUNTARY DISMISSAL:
TRIAL COURT ERRED BY INVOLUNTARILY DISMISSING
ACTION BEFORE PLAINTIFF RESTED BECAUSE ORIGINAL
NOTE WAS MISSING FROM COURT FILE: TRIAL COURT
ERRED BY DENYING PLAINTIFF'S MOTION FOR NEW TRIAL
AFTER CLERK FOUND MISSING NOTE**

Wachovia Mortgage, FSB v. Montes, ___ So. 3d ___, 40 Fla. L. Weekly D291 (Fla. 4th DCA January 28, 2015)

During the plaintiff's case in chief in a mortgage foreclosure, it was discovered that the original note was missing from the court file. When the plaintiff sought to proceed with a copy of the note, the defendant objected based on the best evidence rule, and the trial court involuntarily dismissed the action. One week later, the clerk found the missing note, and the plaintiff moved for a new trial, but the trial court denied the motion and entered final judgment for the defendant. The appellate court reversed because an involuntary dismissal under *Fla. R. Civ. P.* 1.420(b) may not be entered before a plaintiff rests its case. In this case, the plaintiff's case was dismissed prematurely, and the trial court compounded its error by denying the plaintiff's motion for new trial.

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 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/>.

**REAL ESTATE: MORTGAGE FORECLOSURE:
INCORRECT LEGAL DESCRIPTION OF PROPERTY;
CIVIL PROCEDURE: TRIAL COURT ERRED BY GRANTING
RELIEF FROM JUDGMENT, SALE, AND CERTIFICATE OF
TITLE TWO YEARS AFTER SUMMARY FINAL JUDGMENT OF
MORTGAGE FORECLOSURE WAS ENTERED: MOTION WAS
UNTIMELY BECAUSE IMPROPER LEGAL DESCRIPTION
RENDERED JUDGMENT VOIDABLE, RATHER THAN VOID**

**Epstein v. Bank of America, ___ So. 3d ___, 40 Fla. L. Weekly D293
(Fla. 4th DCA January 28, 2015)**

Two years after it obtained final summary judgment of mortgage foreclosure and purchased the property at judicial sale, the bank moved for relief from judgment. Initially, the bank sought relief based upon mistake and inadvertence, but its motion was denied without prejudice. The bank then sought relief based upon the additional ground that the improper legal description rendered the judgment void. Under *Fla. R. Civ. P.* 1.540(b)(1), a motion for relief from judgment based upon mistake, inadvertence, or excusable neglect must be brought within one year, but a motion for relief from a void judgment must be made within a reasonable time. The trial court granted the bank's second motion, but the appellate court reversed because the improper legal description rendered the judgment voidable, rather than void. As a result, the bank's motion for relief from judgment was untimely. The court adopted the reasoning of the Second District Court of Appeal in *Lucas v. Barnett Bank of Lee County*, 705 So. 2d 115, 116 (Fla. 2d DCA 1998): "When a mortgage contains an incorrect legal description, a court may correct the mistake before foreclosure. If, however, the mistaken legal description is not corrected before final judgment of foreclosure, and the mistake is carried into the advertisement for sale and the foreclosure deed, a court cannot reform the mistake in the deed and judgment; rather, the foreclosure process must begin anew."

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 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/>.

**REAL ESTATE: MORTGAGE FORECLOSURE:
PAYMENT HISTORY: NOTICE OF DEFAULT;
EVIDENCE: HEARSAY: BUSINESS RECORDS:
ALTHOUGH WITNESS FOR CURRENT NOTE HOLDER
TESTIFIED THAT THE TWO PRIOR NOTE HOLDERS
APPEARED TO COMPLY WITH GENERALLY ACCEPTED
PRACTICES IN THE MORTGAGE SERVICING INDUSTRY,
HE FAILED TO ESTABLISH FOUNDATION FOR BUSINESS
RECORDS EXCEPTION TO HEARSAY RULE BECAUSE
HE DID NOT IDENTIFY, OR TESTIFY THAT HE WAS**

PERSONALLY FAMILIAR WITH, THE RECORD KEEPING SYSTEMS USED BY THE PRIOR NOTE HOLDERS: JUDICIAL NOTICE: ALTHOUGH COURT MAY TAKE JUDICIAL NOTICE OF COURT FILE, INDIVIDUAL DOCUMENTS IN THE COURT FILE ARE INADMISSIBLE UNLESS THEY SATISFY RULES OF EVIDENCE: VERBAL ACTS: NOTICE OF DEFAULT IS A VERBAL ACT BECAUSE IT IS OFFERED TO SHOW THAT THE STATEMENTS IN IT WERE MADE RATHER THAN THAT THE STATEMENTS WERE TRUE: AFFIDAVITS IN COURT FILE WERE INADMISSIBLE HEARSAY FOR PURPOSE OF SHOWING THAT NOTICE OF DEFAULT WAS MAILED

Holt v. Calchas, LLC, ___ So. 3d ___, 40 Fla. L. Weekly D296 (Fla. 4th DCA January 28, 2015)

The trial court reversed final judgment of mortgage foreclosure and remanded with instructions “to dismiss the case for failure to prove a prima facie case at trial.” (1) The trial court erred by admitting the payment history into evidence because the plaintiff failed to introduce the evidence necessary to apply that the business records exception to the hearsay rule. The plaintiff was preceded by two prior note holders. Although the plaintiff called an asset manager, who testified that the two prior note holders appeared to comply with generally accepted practices in the mortgage servicing industry, the manager did not identify, or testify that he was personally familiar with, the record keeping systems used by the prior note holders. A current servicer may satisfy the business records exception by providing certifications from each prior servicer establishing that its records were made contemporaneously with the events recorded based upon information from a person with knowledge of the events, that the records were made in the ordinary course of business, and that it was part of the ordinary course of business to maintain the records. Alternatively, the current note holder could provide evidence that it “had procedures in place to check the accuracy of the information it received from the previous note holder[s].” These methods are not exclusive. “As long as the bank can provide sufficient testimony to lay the proper foundation, payment history documents should be admitted in evidence.” (2) The bank failed to prove that it complied with paragraph twenty-two of the mortgage, which required notice of default and opportunity to cure. The bank relied upon two affidavits, which were not admitted in evidence. Although the trial court could take judicial notice of the court file, the individual documents within the file were inadmissible unless they satisfied the rules of evidence. The notice of default in the court file was admissible as a verbal act because it was not offered to prove that the statements in it were true but only that they were made; however, the affidavits in the court file constituted inadmissible hearsay because they were offered to prove that the notice was sent to the defendant. The defendant testified that he did not recall whether he received the notice. As a result, his testimony did not establish whether he received or failed to receive the notice, and no other competent evidence was produced on this issue. Therefore, the plaintiff failed to establish a prima facie case, and the defendant was entitled to the entry of judgment in his favor.

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 Evidence: Hearsay category of the Kashi Law Letter, please click here, <http://www.kashilawletter.com/category/evidence/hearsay/>.

INSURANCE: HOMEOWNERS’ INSURANCE: BREACH OF CONTRACT: STATUTE OF LIMITATIONS: PAYMENT OF INITIAL CLAIM DID NOT CAUSE STATUTE OF LIMITATIONS TO BEGIN RUNNING ON SUPPLEMENTAL CLAIM: STATUTE OF LIMITATIONS ON SUPPLEMENTAL CLAIM DID NOT BEGIN TO RUN UNTIL SUPPLEMENTAL CLAIM WAS DENIED

Luciano v. United Property & Casualty Insurance Company, ___ So. 3d ___, 40 Fla. L. Weekly D299 (Fla. 4th DCA January 28, 2015)

After Hurricane Wilma, the insurer paid the homeowners for minor tile damage to their roof and damage to their fence and skylight. Four years later, the homeowners made a supplemental claim for the replacement of their roof and damage to the interior of their home. When the insurance company denied their supplemental claim, the insureds sued for breach of contract, but the trial court entered summary judgment for the insurance company based upon the statute of limitations. The appellate court reversed because none of the insurance company's letters or checks indicated that payment was being made in full or in complete settlement of all claims arising from the hurricane. As a result, the payments merely constituted evidence of performance under the policy, and a breach did not occur until the insurance company denied the insureds' supplemental claim.

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/>.

**ATTORNEY'S FEES: EVIDENCE: AFFIDAVITS:
JUDICIAL NOTICE: APPEALS: PRESERVATION:
OBJECTIONS ON APPEAL MUST BE THE SAME
AS THOSE MADE IN TRIAL COURT: OBJECTIONS
TO SPECIFIC ENTREES IN TIMESHEETS AND TO
QUALIFICATIONS OF THE OPPOSING PARTY'S EXPERT
WERE INSUFFICIENT TO PRESERVE AN OBJECTION TO
JUDICIAL NOTICE OF THE AFFIDAVITS OF OPPOSING
COUNSEL AND THE OPPOSING PARTY'S EXPERT**

**Waheed v. Brummer, ___ So. 3d ___, 40 Fla. L. Weekly D303
(Fla. 5th DCA January 30, 2015)**

The appellant appealed from an award of attorney's fees because the trial court took judicial notice of the affidavits of the appellees' attorney and expert witness, but the appellate court refused to consider this issue because it was not raised in the trial court. "Objections raised on appeal must be the same as those raised below." Objections to specific entrees on timesheets and to the qualifications of the appellee's expert "were insufficient to preserve an objection as to judicial notice."

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 Evidence category of the Kashi Law Letter, please click here, <http://www.kashilawletter.com/category/evidence/>.

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

**PUBLIC RECORDS: EXEMPTIONS: VIDEO FOOTAGE
CAPTURED BY SURVEILLANCE SYSTEM ON BUSES
WAS EXEMPT FROM DISCLOSURE UNDER THE PUBLIC
RECORDS ACT BECAUSE THE FOOTAGE RELATED
DIRECTLY TO AND REVEALED INFORMATION ABOUT
A SECURITY SYSTEM; STATUTES: STATUTORY
CONSTRUCTION: UNNECESSARY TO ANALYZE
LEGISLATIVE HISTORY OF UNAMBIGUOUS STATUTE**

Central Florida Regional Transportation Authority v. Post-Newsweek Stations, ___ So. 3d ___, 40 Fla. L. Weekly D306 (Fla. 5th DCA January 30, 2015)

The court held that video footage captured by the surveillance system on buses was exempt from disclosure under the public records act because the footage “directly relates to and reveals information about a security system.” “Section 119.071(3)(a), Florida Statutes (2014), provides that records, information, photographs, and audio and visual presentations that reveal a security system plan are confidential and exempt” “Section 281.301, Florida Statutes (2014), provides that information that either relates directly to or reveals security systems is confidential and exempt” The court explained, “The videos, which are records, reveal the capabilities – and as a corollary, the vulnerabilities – of the current system. Because the Legislature’s intent is apparent from the plain language, which in this case is free from ambiguity, [the court found] no need to analyze the legislative history.”

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

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

**TORTS: PERSONAL INJURY: ATTORNEY’S FEES:
PROPOSAL FOR SETTLEMENT; INSURANCE:
SUPPLEMENTARY PAYMENTS: ATTORNEY’S FEES
AWARDED UNDER A PROPOSAL FOR SETTLEMENT
ARE COVERED AS COSTS UNDER THE SUPPLEMENTARY
PAYMENTS PROVISION OF AN AUTOMOBILE LIABILITY
INSURANCE POLICY: CONTRACTS: CONSTRUCTION:
AMBIGUOUS POLICIES MUST BE CONSTRUED IN FAVOR
OF COVERAGE**

GEICO General Insurance Company v. Hollingsworth, ___ So. 3d ___, 40 Fla. L. Weekly D308 (Fla. 5th DCA January 30, 2015)

The appellate court, in a personal injury case, affirmed final judgment holding the automobile liability insurer liable for attorney’s fees awarded against its insured under a proposal for settlement. The liability of the insurer was based upon a provision in its policy that provided coverage for “additional payments” (traditionally referred to as a supplementary payments), including “All court costs charged to an *insured* in a covered lawsuit.” The court relied upon cases from the Third District Court of Appeal holding that (1) attorney’s fees, imposed as a sanction under *Fla. R. Civ. P.* 1.380, constituted costs against the insured, *Tri-State Insurance Co. of Minnesota v. Fitzgerald*, 593 So. 2d 1118 (Fla. 3d DCA 1992), and (2) a judgment for attorney’s fees “was a cost charged to the insured that was covered by the Additional Payments section of the [insured’s] policy,” *GEICO General Insurance Company v. Rodriguez*, ___ So. 3d ___, 39 Fla. L. Weekly D1937 (Fla. 3d DCA September 10, 2014). Based upon this case law and the rule of construction that ambiguous insurance policies will be construed in favor of coverage, the court held that attorney’s fees under a proposal for settlement qualify as “court cost charged to an insured in a covered lawsuit.” The court observed that “[the insurer] could have provided a definition of “court costs” that explicitly excluded attorney’s fees sought under the Offer of Judgment Statute.”

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

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

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 Proposal for Settlement category of the Kashi Law Letter, please click here, <http://www.kashilawletter.com/category/settlement/proposal-for-settlement-settlement/>.

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

**FAMILY LAW: ATTORNEY'S FEES:
INADEQUATE FINDINGS; APPEALS: PRESERVATION:
HUSBAND WAIVED OBJECTION TO INADEQUATE
FINDINGS BY FAILING TO MOVE FOR REHEARING**

**Spreng v. Spreng, ___ So. 3d ___, 40 Fla. L. Weekly D309
(Fla. 5th DCA January 30, 2015)**

The court affirmed an award of temporary attorney's fees and costs to the wife, despite her concession of error. "Although [the trial court's order] was deficient in its factual findings with regard to the factors set forth in *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985), [the appellate court found] this error was not preserved for appeal because Husband never filed a motion for rehearing."

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 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 Appeals: Preservation of Error category of the Kashi Law Letter, please click here, <http://www.kashilawletter.com/category/appeals/preservation-of-error/>.

**INSURANCE: HOMEOWNER'S INSURANCE:
SINKHOLE: NEUTRAL EVALUATION: INSURED
DID NOT VIOLATE THE SUITS AGAINST US PROVISION
OF THE POLICY AND FORFEIT COVERAGE BY FILING A
LAWSUIT AFTER THE INSURER INITIATED THE NEUTRAL
EVALUATION PROCESS UNDER SECTION 627.7074,
FLORIDA STATUTES**

Cuevas v. Tower Hill Signature Insurance Company, ___ So. 3d ___, 40 Fla. L. Weekly D310 (Fla. 2d DCA January 30, 2015)

The trial court entered summary judgment against the insured because he sued the insurer for breach of contract after the insurer initiated the neutral evaluation process for sinkhole losses under Section 627.7074, Florida Statutes. The appellate court reversed, holding that the insured did not commit a material breach of contract by violating the Suits Against Us provision of the policy, which incorporated Section 627.7074 as a term and condition of the insurance policy. The court previously held that the statute "provides neutral evaluation as both a potential precursor and as a parallel, contemporaneous process' to judicial proceedings. . . . Thus, neutral evaluation is not a presuit requirement. . . . The plain language of the statute does not preclude the filing of a lawsuit during the pendency of the neutral evaluation process. . . . Because initiation of neutral evaluation does not preclude the filing of a lawsuit nor violate the stay provision of section 627.7074, it also does not violate the "Suits Against Us" provision of the insurance policy. [The insurer] was not entitled to judgment as a matter of law on these bases."

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

**REAL ESTATE: MORTGAGE FORECLOSURE:
CIVIL PROCEDURE: BORROWER WAS NOT
ENTITLED TO ATTORNEY'S FEES AS COSTS UNDER
FLA. R. CIV. P. 1.420(d), AFTER VOLUNTARY DISMISSAL
OF FORECLOSURE ACTION, BECAUSE NOTE
AND MORTGAGE REFERRED SEPARATELY
TO COSTS AND ATTORNEY'S FEES**

**Creamer v. BAC Home Loans Servicing, LP, ___ So. 3d ___, 40 Fla. L. Weekly D311
(Fla. 2d DCA January 30, 2015)**

When the plaintiff in a mortgage foreclosure filed a notice of voluntary dismissal after the parties reached a settlement, the defendant moved for attorney's fees as costs under *Fla. R. Civ. P. 1.420(d)*. The trial court denied the motion, and the appellate court affirmed because the mortgage and note referred separately to costs and attorney's fees. The mortgage provided, "Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this paragraph 18, including, but not limited to, reasonable attorneys' fees and costs of title evidence." The note provided, "Lender may require Borrower to pay costs and expenses including reasonable and customary attorneys' fees." "[T]he agreement of the parties as expressed in the . . . note clearly distinguishes between the terms costs and expenses and expressly defines expenses, but not costs, to include attorney's fees. However, to the extent that . . . the term expenses in a contract may be read as a synonym for the word costs under rule 1.420, such language may be overly broad and is worthy of further consideration in the appropriate case." Because "the language of the parties' agreements [in this case] d[id] not define fees as costs, the trial court [was] correct to deny the award of fees sought as costs pursuant to rule 1.420(d)." The trial court erred, however, by failing to consider whether the borrower was entitled to \$85 as costs for the attendance of a court reporter at the hearing on a motion for summary judgment, which occurred before the settlement and voluntary dismissal of the foreclosure action, and the appellate court reversed and remanded for consideration of this issue.

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 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/>.

**CIVIL PROCEDURE: PERSONAL JURISDICTION:
SERVICE OF PROCESS: INTERNATIONAL DEFENDANT:
SERVICE ON DEFENDANT IN CHINA: SERVICE DID NOT
COMPLY WITH HAGUE CONVENTION BECAUSE IT
WAS NOT MADE THROUGH CENTRAL AUTHORITY:
SERVICE DID NOT COMPLY WITH FLORIDA LAW BECAUSE
RETURN OF SERVICE LACKED REQUIRED INFORMATION:
CONCLUSORY AFFIDAVIT OF LAWYER WHO RETAINED
PROCESS SERVER WAS INCOMPETENT TO ESTABLISH
THAT SERVICE WAS PROPER UNDER CHINESE LAW**

**SDS-IC v. Florida Concentrates International, LLC, ___ So. 3d ___, 40 Fla. L. Weekly
D316 (Fla. 2d DCA January 30, 2015)**

The appellate court reversed an order denying a Chinese corporation's motion to quash

service of process. Service was invalid under the Hague Convention because “[the plaintiff] did not utilize China’s Central Authority designated under the Hague Convention for service.” Service was invalid under Florida law because the return of service “lack[ed] statements regarding the time it was received by the process server, the time it was served on a defendant, the manner of service, the name of the person served, and the position of the person served. Additionally, the return-of-service allege[d] that only a copy was served rather than the original process.” Although the plaintiff contended that service was valid under Chinese law, the only support for this assertion was the conclusory and, therefore, incompetent affidavit of a lawyer at the firm that hired the process server.

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/>.

CIVIL PROCEDURE: VENUE: FORUM NON CONVENIENS: SECTION 47.122, FLORIDA STATUTES: TRIAL COURT ERRED BY FAILING TO CONSIDER SECTION 47.122 FACTORS IN RULING ON MOTION TO TRANSFER: TRANSFER WOULD NOT BE INCONVENIENT TO PLAINTIFF BECAUSE HE RESIDED IN TRANSFEREE COUNTY: TRANSFER WOULD PROMOTE CONVENIENCE OF WITNESSES BECAUSE MAJORITY WERE LOCATED IN TRANSFEREE COUNTY: TRANSFER WOULD PROMOTE INTERESTS OF JUSTICE BECAUSE THREE RELATED ACTIONS WERE PENDING IN TRANSFEREE COUNTY

Universal Property & Casualty Insurance Company v. Long, ___ So. 3d ___, 40 Fla. L. Weekly D324 (Fla. 2d DCA January 30, 2015)

The plaintiff sued two termite protection companies in Hillsborough County, but both cases were transferred to Brevard County. When his house collapsed as a result of termite damage, the plaintiff’s homeowner’s insurance company denied coverage, and the plaintiff sued his insurer in Hillsborough County. Ten months later, the insurer moved, under Section 47.122, Florida Statutes, to transfer the action to Brevard County based upon the convenience of the parties, the convenience of the witnesses, and the interests of justice. The trial court denied the motion without considering any of these factors because the case was set for trial, and a transfer would effect a continuance. The appellate court reversed because a trial court may not ignore the statutory factors. Transfer would not inconvenience the plaintiff because he lived in Brevard County. Transfer would promote the convenience of the witnesses because most of them were located in Brevard County. Transfer would promote the interests of justice because the plaintiff’s two lawsuits and the insurer’s third party action against the termite companies were pending in Brevard County, and a transfer would avoid duplication of testimony.

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 Venue category of the Kashi Law Letter, please click here, <http://www.kashilawletter.com/category/venue/>.

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

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]*.**