KASHI LAW LETTER
A Synopsis of Florida Case Law

Volume 7, Issue 6 February 11, 2015

CIVIL PROCEDURE: CONFLICT OF LAWS: CHOICE OF LAW: TRIAL COURT PROPERLY ENFORCED CHOICE OF LAW PROVISION IN FRANCHISE AGREEMENT; EVIDENCE: UNLAWFUL INTERCEPTION OF ORAL AND WIRE COMMUNICATIONS: CLANDESTINE RECORDING IN UTAH OF TELEPHONE CONVERSATION WITH INDIVIDUAL IN FLORIDA WAS INADMISSIBLE

Bath Fitter Franchising, Inc. v. Labelle, ___ So. 3d ___, 40 Fla. L. Weekly D335 (Fla. 3d DCA February 4, 2015)

The appellate court affirmed the trial court's application of the law of the State of Vermont based upon a choice of law provision in a franchise agreement. In addition, the appellate court held that the trial court did not abuse its discretion by excluding from evidence a telephone conversation that was secretly recorded by a party in Utah with a party in Florida. Although the result may have been different in a proceeding in Utah, the evidence was inadmissible in a proceeding in Florida.

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CIVIL PROCEDURE: DEFAULT: FAILURE TO FILE ANY PAPER IN ACTION: INEXCUSABLE NEGLECT: DEFENDANT WHOSE LAWYER COMMUNICATED WITH PLAINTIFF'S LAWYER BEFORE ACTION WAS FILED WAS ENTITLED TO NOTICE OF APPLICATION FOR DEFAULT: TRIAL COURT DID NOT ABUSE ITS DISCRETION BY VACATING DEFAULT AND DEFAULT FINAL JUDGMENT BASED UPON LACK OF NOTICE OF APPLICATION FOR DEFAULT

M.W. v. SPCP Group V, LLC, ___ So. 3d ___, 40 Fla. L. Weekly D336 (Fla. 3d DCA February 4, 2015)

The plaintiff's lawyer in a personal injury case made two demands for the defendant's policy limits. The defendant's lawyer replied in writing and spoke to the plaintiff's lawyer by telephone. The plaintiff's lawyer regarded the defendant's lawyer as uncooperative and filed suit. When the defendant did not file any paper in the action, the plaintiff's lawyer applied for a clerk's default without notice to the defendant. After the default was entered, the defendant's lawyer called the plaintiff's lawyer to determine whether the defendant's insurance company was defending the case. The plaintiff's lawyer instructed his assistant to tell the defendant's lawyer to contact the insurance company and to say that they did not know what the insurance company was doing. After this exchange, the plaintiff's lawyer

proceeded to trial on the issue of damages, and the jury returned a verdict of $1,250,000. The trial court subsequently granted the defendant's motion to vacate the default and default final judgment based upon the plaintiff's failure to provide notice of its application for default, and the appellate court affirmed because the trial court did not commit a gross abuse of discretion. "[N]otice of an application for default should always be served when the plaintiff is aware that a defendant is being represented by counsel who has expressed an intention to defend on the merits." This rule applies even if the "opposing party is uncooperative, neglectful, or incompetent." Judge Logue wrote the majority opinion, Judge Shepherd wrote a concurring opinion, and Judge Emas wrote a specially concurring opinion.

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ESTATES: TRUSTS: CIVIL PROCEDURE: PERSONAL JURISDICTION: WAIVER: DEFENDANTS DID NOT WAIVE THEIR OBJECTION TO PERSONAL JURISDICTION BY FILING A MOTION TO DISMISS BASED UPON THE STATUTE OF LIMITATIONS AND LACHES BECAUSE THE DEFENDANTS AMENDED THEIR MOTION BEFORE IT WAS HEARD TO ASSERT THE DEFENSE OF LACK OF PERSONAL JURISDICTION: DEFENDANTS DID NOT VOLUNTARILY SUBMIT TO THE JURISDICTION OF THE COURT OR SEEK AFFIRMATIVE RELIEF BY FILING NOTICE OF THEIR INTENT TO USE TRUST FUNDS TO PAY ATTORNEY'S FEES OR BY RESPONDING TWICE TO DISCOVERY ON THE MERITS OF THE CASE

Snider v. Metcalfe, ___ So. 3d ___, 40 Fla. L. Weekly D339
(Fla. 4th DCA February 4, 2015)

The plaintiff was a beneficiary under three trusts created by his deceased father's will. He sued the co-trustees for breach of fiduciary duty and breach of trust. Initially, the defendants moved to dismiss based upon the statute of limitations and laches. Two years later, they amended their motion to assert the defense of lack of personal jurisdiction. The trial court granted the motion, and the appellate court affirmed. The defendants did not waive their objection to personal jurisdiction because they amended their motion to assert the defense before the trial court conducted a hearing on their original motion. In addition, the defendants did not voluntarily submit to the jurisdiction of the court or seek affirmative relief by filing notice of their intent to use trust funds to pay attorney's fees and costs or by responding twice to discovery on the merits. Judge Stevenson concurred in Judge Forst's majority opinion, but Judge Klingensmith dissented.

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INSURANCE: WINDSTORM: APPRAISAL: CIVIL PROCEDURE: SUMMARY JUDGMENT: SUMMARY JUDGMENT FOR INSURER AFFIRMED IN ACTION TO COMPEL APPRAISAL BECAUSE TRIAL JUDGE WAS JUSTIFIED IN IMPLIEDLY FINDING THAT INSURED FAILED TO PROVIDE INSURER WITH SUFFICIENTLY DETAILED ESTIMATES BEFORE FILING SUIT, INSURER SUBMITTED TO APPRAISAL AFTER DETAILED ESTIMATES WERE PROVIDED, INSURER PAID APPRAISAL AWARD FOR DAMAGE TO BUILDING, AND THERE WAS NO EVIDENCE THAT ORDINANCE AND LAW DAMAGES HAD BEEN INCURRED: DECISION WAS WITHOUT PREJUDICE TO SEEK INCURRED ORDINANCE AND LAW DAMAGES

Pedersen v. Citizens Property Insurance Corporation, ___ So. 3d ___, 40 Fla. L. Weekly D341 (Fla. 4th DCA February 4, 2015)

When the parties were unable to agree on the amount of the insured's windstorm loss, she demanded appraisal, but the insurer protested because it had not been provided with detailed estimates of the damage. The insured filed an action to compel appraisal, the trial court ordered her to provide the insurer with detailed estimates, the insured complied with the order, an appraisal was performed, the appraiser made a monetary award for structural damage and ordinance and law damage, if incurred, and the insurer paid the award for structural damage. The trial court granted the insurer's motion for summary judgment, and the appellate court affirmed because the trial court was justified in impliedly finding that the insured failed to comply with her post loss obligations by providing sufficiently detailed estimates, appraisal had been performed, the award of structural damages had been paid, there was no evidence of incurred ordinance and law damages, and "nothing remained to be done." The court stated that its holding was without prejudice to the insured to seek incurred ordinance and law damages. Judge Lindsey concurred in Judge Stevenson's majority opinion, and Judge Warner specially concurred.

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CIVIL PROCEDURE: CLASS ACTIONS: JUDGMENTS: AMENDMENT: RELIEF FROM JUDGMENT: FRAUD: TIMELINESS: TRIAL COURT LACKED JURISDICTION TO AMEND JUDGMENT TEN YEARS AFTER IT WAS ENTERED: ALTHOUGH TRIAL COURT RETAINED JURISDICTION TO ENFORCE JUDGMENT, AMENDMENT MODIFIED, RATHER THAN ENFORCED, JUDGMENT

Juno Ocean Walk Condominium Association, Inc. v. The North County Company, Inc., ___ So. 3d ___, 40 Fla. L. Weekly D344 (Fla. 4th DCA February 4, 2015)

Ten years after a condominium unit owner opted out of a class action settlement with the developer, the class representative and the unit owner filed a motion to amend judgment to include the unit owner in the settlement because she had been wrongfully induced to opt out by misrepresentations, fraud, threats, and intimidation. The trial court granted the motion without a hearing based on the mistaken impression that it was unopposed, but the appellate court reversed. The trial court lacked jurisdiction to grant relief from judgment, under *Fla. R. Civ. P.* 1.540(b), based on fraud because the motion to amend was not filed within one year after the judgment was entered, and the record failed to reflect that an independent action

had been filed to modify the judgment. Although the trial court retained jurisdiction to enforce the judgment, the amendment could not be sustained on this ground because the trial court modified, rather than enforced, the judgment.

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EMINENT DOMAIN; APPEALS: ATTORNEY'S FEES: CIVIL PROCEDURE: LAW OF THE CASE: ONCE THE APPELLATE COURT DETERMINED THAT LITIGANT WAS ENTITLED TO APPELLATE ATTORNEY'S FEES, TRIAL COURT COULD NOT REFUSE TO AWARD FEES BASED ON LACK OF ENTITLEMENT

Ryan v. City of Boynton Beach, ___ So. 3d ___, 40 Fla. L. Weekly D345 (Fla. 4th DCA February 4, 2015)

The appellate court, in an eminent domain case in which the municipal plaintiff prevailed on appeal, granted the defendant landowner's motion for appellate attorney's fees but "direct[ed] the trial court to 'consider the result obtained on appeal in setting the amount of fees.'" On remand, the trial court refused to award fees to the defendant, but the appellate court reversed. Once the appellate court determined that the defendant was entitled to attorney's fees, this ruling became the law of the case, and the trial court was not authorized to revisit it. Although the trial court could have discounted the fee based upon the results obtained, it could not refuse to award fees altogether.

[Editor's Note: This summary does not address the court's discussion of the unique aspects of attorney's fee awards in eminent domain cases.]

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REAL ESTATE: CONDOMINIUMS: ASSESSMENT LIENS: FORECLOSURE: REDEMPTION: THE RIGHT OF REDEMPTION TERMINATED UPON FILING OF THE CERTIFICATE OF SALE, AND TRIAL COURT LACKED AUTHORITY TO GRANT REDEMPTION AFTER THAT EVENT: EQUITY OF REDEMPTION AT COMMON LAW IS SUBSUMED BY SECTION

45.0315, FLORIDA STATUTES

Waterview Towers Yacht Club v. Givianpour, ___ So. 3d ___, 40 Fla. L. Weekly D351 (Fla. 1st DCA February 5, 2015)

The condominium association obtained final judgment of foreclosure based upon unpaid assessments. Four days after the clerk filed a certificate of sale and the property was purchased by the association at a public sale, the owner sought to redeem the property, but the association refused the tender. The trial court granted the owner's motion to enforce redemption, but the appellate court reversed. Section 45.0315, Florida Statutes, provides that foreclosed property may be redeemed before the clerk of the court files a certificate of sale or the time specified in the judgment, whichever occurs later. In this case, the judgment provided that the property could not be redeemed after the certificate of sale was filed. Therefore, the right of redemption terminated when the certificate of sale was filed, and the trial court lacked authority to rule otherwise. The appellate court refused to recognize a distinction between the equity of redemption at common law and the right of redemption under the statute and to apply a different set of rules for each.

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CIVIL PROCEDURE: PERSONAL JURISDICTION: SERVICE OF PROCESS: SUBSTITUTED SERVICE UPON RESIDENT AT DEFENDANT'S USUAL PLACE OF ABODE: SERVICE PRESUMED TO BE VALID IF RETURN OF SERVICE IS REGULAR ON ITS FACE: RETURN IS NOT REQUIRED TO LIST THE REQUIRED ELEMENTS UNDER THE SERVICE STATUTE; APPEALS: CERTIFIED QUESTION OF GREAT PUBLIC IMPORTANCE

Koster v. Sullivan, ___ So. 3d ___, 40 Fla. L. Weekly S63 (Fla. February 5, 2015)

The Florida Supreme Court, in response to a certified question from the Second District Court of Appeal, upheld the validity of substituted service of process on the defendant. Service is presumed to be valid if the return of service is regular on its face, but this presumption may be overcome by clear and convincing evidence to the contrary. To be regular on its face, the return of service must comply with Section 48.21, Florida Statutes, which requires the process server to note on the return (1) the date and time when the server received the process, (2) the date and time of service, (3) the manner of service, (4) the name of the person served, and (5) the position of a person served in a representative capacity. In this case, the return "specifie[d] the date and time that the process server received the summons and complaint, the date and time of service," that substituted service was used, the name of the person served, that the person served was the defendant's sister-in-law, and that the defendant's sister-in-law resided with the defendant. The court rejected the defendant's assertion that the return was irregular on its face because it did not specifically refer to the requirements for substituted service under Section 48.031, Florida Statutes; namely, that service was left at the defendant's usual place of abode with a resident over fifteen years of age. "[T]he language in section 48.21 does not expressly incorporate section 48.031, nor does it refer to the factors contained within section 48.031(1)(a). Section 48.21 clearly states the information that *shall* be included in a return of service. Thus, section 48.21 cannot be strictly read to require that the factors in section 48.031(1)(a) be specified. It is still important, though, to state more than just the fact that the manner of service was 'substitute.' For instance, the name of the person who accepted substitute service must be listed, as provided in section 48.21. In this case, the return of service listed [the name of the person served] as 'sister in

law/co-resident' of [the defendant]. Therefore, the return of service here was sufficient."

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APPEALS: TIMELINESS: BANKRUPTCY: PREEMPTION: THE DEADLINE TO FILE A NOTICE OF APPEAL WAS STAYED BY THE APPELLANT'S PETITION FOR BANKRUPTCY

AmMed Surgical Equipment, LLC v. Professional Medical Billing Specialists, LLC, ___ So. 3d ___, 40 Fla. L. Weekly D352 (Fla. 2d DCA February 6, 2015)

Although the defendant filed a notice of appeal 70 days after rendition of a preliminary injunction against it, the court held that the appeal was timely under the unique circumstances of this case. Under *Fla. R. App. P.* 9.130(a)(3)(B), the preliminary injunction was an appealable nonfinal order, and appellate jurisdiction could be invoked by filing a notice within thirty days of rendition. Before the thirty day period elapsed, the defendant filed a petition under Chapter 11 of the Bankruptcy Code, and the defendant's notice of appeal was filed on the day that the bankruptcy court lifted the bankruptcy stay for the limited purpose of enabling the defendant to file the notice. 11 U.S.C. § 362(a)(1) provides that the "filing of a petition in bankruptcy operated as a stay . . . of . . . the commencement or continuation . . . of any action or proceeding against the debtor . . . ." 11 U.S.C. § 108 provides that an unexpired deadline under non-Bankruptcy law does not elapse until the end (including any suspensions) of the period "for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor" or thirty days after expiration of the stay under §362, whichever occurs later. The court held that "the filing of a notice of appeal should be considered the 'continuation of a judicial . . . proceeding against' the appellant" and that 11 U.S.C. §§ 362(a) and 108(c) preempt *Fla. R. App. P.* 9.130(b). The defendant's notice of appeal was timely because it was filed "within thirty days of the order lifting the bankruptcy stay."

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INSURANCE: HOMEOWNER'S INSURANCE: SINKHOLE: APPRAISAL: INSURED WAS NOT ENTITLED TO APPRAISAL OF SINKHOLE CLAIM AGAINST FIGA BECAUSE FIGA WAS LIMITED BY STATUTE TO PAYING CONTRACTOR FOR ACTUAL COST OF REPAIRS: INSURED WAIVED RIGHT TO APPRAISAL BY FILING SUIT AND ACTIVELY LITIGATING FOR TWO YEARS BY PERFORMING SUBSTANTIAL DISCOVERY, SETTING CASE FOR TRIAL, AND FILING WITNESS AND EXHIBIT LISTS

Florida Insurance Guaranty Association, Inc. v. Waters, ___ So. 3d ___, 40 Fla. L. Weekly D354 (Fla. 2d DCA February 6, 2015)

The appellate court reversed an order compelling FIGA to submit to the appraisal of a sinkhole claim. The insurer obtained a geological investigation, which concluded that compaction grouting was sufficient to remediate the problem. The insured disagreed and sought neutral evaluation, which resulted in the same opinion. The insured then hired her own contractor, who concluded that both compaction grouting and underpinning were necessary. When the insurer refused to agree to underpinning, the insured filed suit for breach of contract. The insured served interrogatories, a request for admissions, a request for production, and a notice for trial, but the insurer went into liquidation, and FIGA assumed responsibility for the insured's claim. When FIGA refused to agree to underpinning, the insured amended her complaint to sue FIGA for breach of contract and served interrogatories, requests for production, request for admissions, and a notice for trial. After the trial court set the case for trial, the insured demanded appraisal, but FIGA did not respond. Both parties filed their witness and exhibit lists. Six weeks before trial, the insured filed a motion to compel appraisal, and the trial court granted the motion. The appellate court reversed. (1) An appraisable issue did not exist. By statute, FIGA is responsible for paying covered claims. The definition of covered claims when the insured was adjudicated insolvent governs. Under that statute, FIGA was required to make payment directly to the contractor for the actual cost of repairs to the extent of the policy limits or the limit of FIGA's statutory obligation to pay, whichever was less. Because the actual cost of repairs is unascertainable before the repairs have been made, appraisal is not feasible in sinkhole claims against FIGA. (2) Furthermore, the insured waived the right to appraisal by taking action inconsistent with the right by actively litigating against both the insurer and FIGA for two years.

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TORTS: NEGLIGENCE: PREMISES LIABILITY: SLIP AND FALL; CIVIL PROCEDURE: CLOSING ARGUMENT: PROFESSIONAL RESPONSIBILITY: GOTCHA TACTICS: EVIDENCE: MEDICAL RECORDS: STATEMENTS IN MEDICAL RECORDS THAT PLAINTIFF SLIPPED ON SPILLED WATER WERE INADMISSIBLE HEARSAY BECAUSE THE SOURCE OF THE STATEMENTS WAS UNKNOWN, AND THE PLAINTIFF DENIED MAKING THEM: TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO REDACT TWO REFERENCES TO WATER SPILL THAT PLAINTIFFS' COUNSEL MISSED BEFORE THE RECORDS WERE ADMITTED IN EVIDENCE AND BY ALLOWING DEFENSE COUNSEL TO ARGUE THAT PLAINTIFF WAS DISHONEST BECAUSE SHE TESTIFIED THAT SHE SLIPPED ON SPRAYED INSECTICIDE: DEFENSE COUNSEL ENGAGED IN UNPROFESSIONAL, GOTCHA TACTICS AND UNDERMINED THE INTEGRITY OF THE JUDICIAL PROCESS

Andreaus v. Impact Pest Management, Inc., ___ So. 3d ___, 40 Fla. L. Weekly D357 (Fla. 2d DCA February 6, 2015)

The plaintiff alleged that she slipped and fell on insecticide that had been sprayed on the tile floor outside an elevator, but her medical records contained references to slipping and falling on spilled water. The trial court properly granted the plaintiffs' motion in limine to exclude from evidence any statements about slipping on water because the source of the statements was unknown, and the plaintiff denied making them. Although plaintiffs' counsel redacted most of the statements from the plaintiff's 1,500 pages of medical records, he missed two of them before submitting the records in evidence. During closing argument, defense counsel suggested that the plaintiff was being dishonest with the jury and obtained the trial court's permission to comment upon the two inadvertently unredacted statements in the medical records. The jury returned a defense verdict, but the appellate court reversed final judgment

for the defendants. The statements were inadmissible hearsay. The inadvertent failure to redact them did not change this fact, and this clerical error could easily have been corrected before the statements were used to inflame the jury. The trial court erred, and defense counsel engaged in unprofessional, gotcha tactics and undermined the integrity of the adjudicative process.

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REAL ESTATE: RESTRICTIVE COVENANTS: RULES OF CONSTRUCTION: COVENANTS THAT RUN WITH THE LAND MUST BE CONSTRUED IN FAVOR OF THE FREE USE OF REAL PROPERTY: AMBIGUOUS COVENANTS MUST BE CONSTRUED IN FAVOR OF LANDOWNER: PROVISION THAT BUILDINGS, FENCES, WALLS OR OTHER STURCTURES, AND EXTERIOR ADDITIONS TO OR CHANGES OR ALTERATIONS THEREIN WERE SUBJECT TO APPROVAL OF BOARD OF DIRECTORS OF HOMEOWNERS ASSOCIATION OR ARCHITECTURAL REVIEW BOARD WAS EITHER INAPPLICABLE TO SOFTSCAPE CHANGES TO HOMEOWNER'S FRONT YARD OR WAS AMBIGUOUS AND UNENFORCEABLE

Bendo v. Silver Woods Community Association, Inc., ___ So. 3d ___, 40 Fla. L. Weekly D358 (Fla. 5th DCA February 6, 2015)

The association approved the homeowner's proposed hardscape changes to his front yard but disapproved his proposed softscape changes because they did not include a grass lawn. Based upon its interpretation of a restrictive covenant, the trial court ruled that approval was necessary, but the appellate court, on de novo review, reversed. "Covenants that run with the land, such as the one at issue here, 'must be strictly construed in favor of free and unrestricted use of real property.' . . . Accordingly, an ambiguous covenant must be construed in favor of the landowner." The covenant in this case provided, "*No building, fence, wall or other structure shall be commenced, erected or maintained upon the Property, nor shall any exterior addition to or change or alteration therein be made* . . . until the plans and specifications showing the nature, kind, shape, height, materials, and location of the same shall have been submitted to and *approved in writing as to harmony of external design and location* in relation to surrounding structures and topography by the Board of Directors of the Association or by the Architectural Review Committee (ARC)." The association argued that the word "therein" modified the word "Property," but the homeowner argued that the word "therein" modified "building, fence, wall, or other structure," and approval of the board or ARC was unnecessary in this case. The appellate court agreed with the homeowner, concluding that his construction "comport[ed] with logic and reason." At the very least, the homeowner's construction was a reasonable interpretation of the covenant. Therefore, even if the homeowner's construction was incorrect, the covenant was ambiguous and unenforceable.

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REAL ESTATE: MORTGAGE FORECLOSURE: AFFIRMATIVE DEFENSES: NOTICE OF DEFAULT; CIVIL PROCEDURE: SUMMARY JUDGMENT: SUMMARY FINAL JUDGMENT OF MORTGAGE FORECLOSURE REVERSED BECAUSE BANK FAILED TO PROVIDE COMPETENT EVIDENCE REFUTING AFFIRMATIVE DEFENSE OF LACK OF NOTICE OF DEFAULT: AFFIRMATIVE DEFENSE WAS SUFFICIENTLY PLED: UNAUTHENTICATED DOCUMENTS CANNOT BE USED TO SUPPORT A MOTION FOR SUMMARY JUDGMENT: UNTIL MOVING PARTY SATISFIES ITS BURDEN OF DEMONSTRATING ABSENCE OF GENUINE ISSUES OF MATERIAL FACT, OPPOSING PARTY IS NOT OBLIGATED TO PROVE OTHERWISE: COMPLAINT ALLEGING PERFORMANCE OF ALL CONDITIONS PRECEDENT, VERIFIED ON INFORMATION AND BELIEF, WAS INADEQUATE TO SUPPORT SUMMARY JUDGMENT BECAUSE PERSONAL KNOWLEDGE IS REQUIRED UNDER FLA. R. CIV. P. 1.510(e)

Colon v. JP Morgan Chase Bank, NA, ___ So. 3d ___, 40 Fla. L. Weekly D361 (Fla. 5th DCA February 6, 2015)

The appellate court reversed summary final judgment of mortgage foreclosure because the lender failed to provide competent evidence to refute the borrower's affirmative defense of lack of notice of default. (1) The affirmative defense was pled with sufficient particularity under *Fla. R. Civ. P.* 1.120(c). The borrower alleged that the lender failed to comply with the notice requirements of paragraphs 15 and 22 of the mortgage and specifically "den[ied] receiving any demand, breach and/or acceleration letter from [the lender or its agents]." (2) The lender did not show that the affirmative defense was legally insufficient. As a result, the lender was required to refute the defense factually, but it failed to file an authenticated copy of the notice letter at least twenty days before the hearing. "Unauthenticated documents cannot be used in support of a motion for summary judgment. (3) The borrower was not required to produce evidence in opposition to the motion for summary judgment because the lender failed to satisfy its burden of demonstrating the absence of genuine issues of material fact. (4) The lender's complaint, alleging performance of all conditions precedent, was insufficient to support summary judgment because it was verified based upon information and belief, and personal knowledge is required under *Fla. R. Civ. P.* 1.510(e).

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REAL ESTATE: RESTRICTIVE COVENANTS: MARKETABLE RECORD TITLE ACT: MARKETABLE RECORD TITLE ACT DID NOT EXTINGUISH RESTRICTIVE COVENANTS REQUIRING HOMEOWNERS TO PAY ASSESSMENTS FOR THE MAINTENANCE OF COMMON ELEMENTS

Barney v. Silver Lakes Acres Property, ___ So. 3d ___, 40 Fla. L. Weekly D364 (Fla. 5th DCA February 6, 2015)

The appellate court affirmed an order of the trial court determining that the Marketable Record Title Act did not extinguish restrictive covenants requiring homeowners to pay assessments for the maintenance of "streets, street lights, beaches, marinas, and other purposes authorized by the [association]."

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CONTRACTS: CONSTRUCTION: AMBIGUITY: CONTRA PROFERENTUM IS A SECONDARY RULE OF INTERPRETATION, WHICH SHOULD BE USED ONLY IF THE INTENT OF THE PARTIES CANNOT BE DETERMINED BY OTHER MEANS: TRIAL COURT ERRED BY FAILING TO CONSIDER EXTRINSIC EVIDENCE TO CONSTRUE AMBIGUOUS CONTRACT: AMBIGUITY OF CONTRACT CREATES QUESTION OF FACT REGARDING INTENT OF PARTIES PRECLUDING SUMMARY JUDGMENT

Life Care Ponte Vedra, Inc. v. Wu, ___ So. 3d ___, 40 Fla. L. Weekly D367 (Fla. 5th DCA February 6, 2015)

The plaintiffs entered into a contract with a continuing care retirement community. Although the contract provided for termination before and after occupancy, a larger refund applied before occupancy. When the plaintiffs terminated their contract, the defendant paid the smaller, post occupancy refund, but the plaintiff's contended that they were entitled to the larger, pre occupancy refund and sued for breach of contract to recover the difference. The trial court entered summary judgment for the plaintiffs based upon its determination that the contract should be construed against the drafter because it was ambiguous. Although the appellate court agreed that the contract was ambiguous, it reversed because the trial court applied the doctrine of contra proferentum before attempting to determine the parties' intent by other means. This rule, which requires the court to construe a contract against the drafter, is a secondary rule of construction that should not be resorted to if other means of ascertaining the intent of the parties exists. The trial court erred by failing to consider extrinsic evidence and by granting summary judgment in the face of an ambiguous contract. "As a general rule, if a contract is ambiguous, the parties' intent becomes a question of fact for the fact-finder, precluding summary judgment."

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INSURANCE: HOMEOWNER'S INSURANCE: ALL RISKS COVERAGE: VACANCY EXCLUSION UNAMBIGUOUSLY APPLIED TO LOSS CAUSED BY ARSON BECAUSE ARSON WAS ENCOMPASSED WITHIN THE PHRASE "VANDALISM AND MALICIOUS MISCHIEF" IN THE EXCLUSION: BECAUSE INSURED'S CLAIM INVOLVED DAMAGE TO STRUCTURE, IT WAS UNNECESSARY TO CONSIDER NAMED PERILS COVERAGE FOR PERSONAL PROPERTY IN ORDER TO CREATE AN AMBIGUITY; CIVIL PROCEDURE: SUMMARY JUDGMENT:

SUMMARY JUDGMENT FOR INSURER AFFIRMED

Botee v. Southern Fidelity Insurance Company, ___ So. 3d ___, 40 Fla. L. Weekly D368 (Fla. 5th DCA February 6, 2015)

The appellate court affirmed summary judgment for the insurer on a homeowner's insurance claim. The policy provided all risks coverage on the structure and named perils coverage on personal property. The policy excluded coverage for vandalism and malicious mischief to the structure if it was vacant for more than thirty days on the date of loss. The trial court determined that the exclusion applied, and the appellate court agreed. The fact that the policy did not define "vandalism or malicious mischief" or "fire" did not make it ambiguous. The court "conclude[d] that the plain and ordinary meanings of 'vandalism' and 'malicious mischief' include 'arson.'" The court refused to consider the personal property coverage in order to create an ambiguity because the insured's loss was limited to the structure. The named perils under the personal property coverage included "fire or lightning" and "vandalism or malicious mischief." As a result, under the personal property coverage, a distinction could be drawn between fire and vandalism, but the personal property coverage was not implicated by the loss in question.

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TORTS: WRONGFUL DEATH: NEGLIGENCE: PHARMACISTS: COMPLAINT STATED CAUSE OF ACTION FOR NEGLIGENCE AGAINST PHARMACIST BASED UPON FILLING PRESCRIPTIONS THAT WERE ISSUED SO CLOSELY IN TIME THAT OVERDOSE WAS FORESEEABLE

Oleckna v. Daytona Discount Pharmacy, ___ So. 3d ___, 40 Fla. L. Weekly D370 (Fla. 5th DCA February 6, 2015)

The appellate court reversed summary judgment for a pharmacy in a wrongful death case arising from an overdose of prescribed medication. The plaintiff alleged that the pharmacy was negligent because it continued to fill prescriptions by the treating physician that were issued so closely in time that the patient could suffer an overdose. The court "h[e]ld that a pharmacist's duty to use due and proper care in filling a prescription extends beyond simply following the prescribing physician's directions. In the instant case, accepting the allegations of the amended complaint as true, Pharmacy filled, without question, numerous prescriptions that were so close together that Pharmacy could have been put on notice that [the patient] was getting too may pills within too short a period . . . . We refuse to interpret a pharmacist's duty to use 'due and proper care in filling the prescription' as being satisfied by 'robotic compliance' with the instructions of the prescribing physician." "[T]he prescriptions at issue here are alleged to be unreasonable on their face because they were written in a quantity, frequency, dosage, or combination that a reasonable pharmacist would either have checked with the prescribing doctor or warned the patient."

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