KASHI LAW LETTER
A Synopsis of Florida Case Law

Volume 7, Issue 9 March 04, 2015

CIVIL PROCEDURE: VENUE: DUE PROCESS: NOTICE: TRIAL COURT ERRED BY SUA SPONTE AND WITHOUT NOTICE TRANSFERRING TO LEON COUNTY INMATES' ACTION AGAINST GOVERNOR

Kunselman v. Offices of Governor, ___ So. 3d ___, 40 Fla. L. Weekly D493 (Fla. 1st DCA February 23, 2015)

The appellate court reversed an order sua sponte transferring to Leon County an action by prison inmates against the Governor because the order was entered without providing the inmates with "notice and an opportunity to respond."

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INJUNCTIONS: RESTRAINING ORDERS: MOTION TO DISSOLVE RESTRAINING ORDER: CIVIL PROCEDURE: DUE PROCESS: TRIAL COURT ERRED BY CONDUCTING HEARING ON INMATE'S MOTION TO DISSOLVE RESTRAINING ORDER BECAUSE TRIAL COURT'S FAILURE TO FOLLOW DEPARTMENT OF CORRECTIONS PROCEDURES PRECLUDED INMATE FROM PARTICIPATING BY TELEPHONE

Butler v. Norton, ___ So. 3d ___, 40 Fla. L. Weekly D493 (Fla. 1st DCA February 23, 2015)

A prison inmate filed a motion to dissolve a restraining order against him and a motion to appear telephonically. The trial court set the motion to dissolve for hearing in the morning and denied the motion when prison staff did not answer the telephone. The motion to appear telephonically was denied in the afternoon. The appellate court reversed. "[T]he Department of Corrections requires institutional staff to initiate all [telephone hearings]." By attempting to initiate the telephone call herself, the judge precluded the inmate "from participating in the hearing."

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CIVIL PROCEDURE: JUDGMENTS: CORRECTION: CLERICAL ERRORS: FAILURE OF JUDGMENT TO ADDRESS WHETHER INDIVIDUAL WAS THE SOLE REMAINING DEFENDANT AND ALL CLAIMS, RIGHTS, OR LIABILITIES OF THE OTHER PARTIES HAD BEEN ADJUDICATED IS NOT A CLERICAL ERROR THAT MAY BE CORRECTED UNDER FLA. R. CIV. P. 1.540(a)

Lorant v. Whitney National Bank, ___ So. 3d ___, 40 Fla. L. Weekly D494 (Fla. 1st DCA February 24, 2015)

The bank obtained a deficiency judgment against one of the defendants in a mortgage foreclosure. When the bank was unable to domesticate the judgment in Alabama because it did not specify whether the defendant "was the sole remaining defendant and that all claims, rights, or liabilities of the other parties had been adjudicated," the trial court in Florida granted the bank's motion, under *Fla. R. Civ. P.* 1.540(a), to correct the judgment to provide the missing information. The appellate court reversed because Rule 1.540(a) may be used to correct only clerical errors, and it was improperly used by the trial court in this case to make a substantive change.

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INSURANCE: HOMEOWNER'S INSURANCE: SINKHOLE: ORDER REQUIRING FIGA TO SUBMIT TO APPRAISAL OF SINKHOLE CLAIM REVERSED

Florida Insurance Guaranty Association v. Rodriguez, ___ So. 3d ___, 40 Fla. L. Weekly D497 (Fla. 2d DCA February 25, 2015)

Based on its decision in *Florida Insurance Guaranty Association v. de la Fuente,* ___ So. 3d ___ (Fla. 2d DCA January 7, 2015), the court reversed an order requiring FIGA to submit to the appraisal of a sinkhole claim.

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CIVIL PROCEDURE: SANCTIONS: ATTORNEY'S FEES: SECTION 57.105, FLORIDA STATUTES: TRIAL COURT ERRED BY DENYING MOTION FOR ATTORNEY'S FEES BECAUSE POLICE DEPARTMENT KNEW BEFORE FILING THAT ITS FORFEITURE PETITION WAS UNFOUNDED

Ospina v. Miami-Dade Police Department, ___ So. 3d ___, 40 Fla. L. Weekly D498 (Fla. 3d DCA February 25, 2015)

The appellate court reversed an order denying attorney's fees, under Section 57.105, Florida Statutes, to the plaintiff because the police department knew before filing its forfeiture petition that "[the plaintiff's] account of his actions and intentions was unrefuted and that no '*sufficient probability [existed] to warrant a reasonable belief* that [the] currency [the plaintiff brought with him from Columbia into Miami] was connected to criminal activity."

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TORTS: PREMISES LIABILITY: NEGLIGENCE; ARBITRATION: AGREEMENT TO ARBITRATE CLAIMS ARISING OUT OF EMPLOYMENT DID NOT EXTEND TO CLAIM ARISING OUT OF SEXUAL ASSAULT WHILE ASLEEP IN EMPLOYER PROVIDED DORMITORY ROOM; CIVIL PROCEDURE: VENUE: FORUM NON CONVENENS: FORUM SELECTION CLAUSE IN ARBITRATION AGREEMENT DID NOT WAIVE FORUM NON CONVENIENS CHALLENGE

Club Mediterranee, S.A. v. Fitzpatrick, ___ So. 3d ___, 40 Fla. L. Weekly D500 (Fla. 3d DCA February 25, 2015)

The plaintiff, who was employed by Club Med as a costume designer, was sexually assaulted while asleep in her employer provided dormitory room in the Bahamas. When the plaintiff brought an action for premises liability and negligence in Florida, Club Med moved to compel arbitration or to dismiss based upon forum non conveniens. The trial court denied both motions, but the appellate court reversed in part. The arbitration agreement applied to any claim or controversy arising out of the plaintiff's employment. Arbitration agreements may be narrow or broad in scope. Narrow agreements arise out of the contract. Broad agreements arise out of or relate to the contract. The agreement in this case was narrow and did not extend to the plaintiff's claims because of the absence of a "nexus between the terms and provisions of th[e] agreement and the assault on [the plaintiff]." As a result, the order denying the motion to compel arbitration was affirmed. The trial court denied the motion to dismiss because the agreement between the parties provided that "any arbitration would be conducted in Miami, Florida." The trial court erred by concluding that this forum selection clause waived the defendants' "forum non conveniens challenge" and, thus, "[giving] only perfunctory consideration to the *Kinney* factors." As a result, the appellate court reversed and remanded for reconsideration of the motion to dismiss based upon *Kinney System, Inc. v. Continental Insurance Company,* 674 So. 2d 86, (Fla. 1996).

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INJUNCTIONS: CIVIL PROCEDURE: PARTIES: INDISPENSABLE PARTIES: TRIAL COURT ERRED BY GRANTING INJUNCTION WITHOUT CONSIDERING THE INTERESTS OF NONPARTIES WHO WOULD BE DIRECTLY AFFECTED

Two Islands Development Corporation v. Clarke, ___ So. 3d ___, 40 Fla. L. Weekly D501 (Fla. 3d DCA February 25, 2015)

Three property owners moved for a temporary injunction to prevent the developers of the South Island on which their homes were situated from constructing a sidewalk along their lots. During the hearing on the motion, the developers made an oral motion to permit the developers of the adjacent North Island to intervene because they were indispensable parties. The trial court denied the motion to intervene and entered a temporary injunction, but the appellate court reversed because the developers of the North Island were indispensable parties because they were unable to obtain a building permit or financing for their project on the North Island until the sidewalk on the South Island was completed. A trial court lacks jurisdiction to enter an injunction that would interfere with the rights of nonparties. In this case, the impact of the injunction on the nonparties was sufficient to make them indispensable parties. As a result, the appellate court vacated the temporary injunction and reversed the order denying the motion to intervene. On remand, the interests of nonparties would have to be considered in setting the amount of the bond in the event another injunction were to be entered.

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INSURANCE: HOMEOWNERS' INSURANCE: APPRAISAL: ORDER COMPELLING APPRAISAL AFFIRMED BECAUSE INSUREDS SUFFICIENTLY COMPLIED WITH POST LOSS CONDITIONS OF POLICY: INSUREDS WERE NOT REQUIRED TO PROVIDE ADDITIONAL DOCUMENTATION OF DAMAGES BECAUSE THEY WERE CLAIMING THAT THEY HAD NOT BEEN ADEQUATELY COMPENSATED FOR THE DAMAGES THEY ORIGINALLY SUSTAINED RATHER THAN THAT THEY HAD SUSTAINED OR DISCOVERED ADDITIONAL DAMAGES

State Farm Florida Insurance Company v. Cardelles, ___ So. 3d ___, 40 Fla. L. Weekly D504 (Fla. 3d DCA February 25, 2015)

The appellate court affirmed an order requiring the insurer to submit to appraisal of the insureds' supplemental windstorm claim. The supplemental claim was based upon inadequate compensation for the damages originally sustained rather than the occurrence or discovery of additional damages. The insurer resisted appraisal on the ground that the insureds failed to comply with their post loss conditions under their policy by ignoring requests for "photographic or video evidence of the damages, receipts and documentation of purchases and repairs, bank account statements showing expenditures, and an updated sworn proof of loss," but the plaintiffs countered that they had nothing to submit because they had yet to make additional repairs. "The trial court found that the supplemental claim was based on the original damages from the [initial] claim rather than additional repairs that had been made, and that the Plaintiffs had no additional documents to provide." The appellate court held that a trial court may not exercise its discretion to compel appraisal until all post loss obligations have been satisfied, and the trial court in this case did not abuse its discretion by compelling appraisal. "[The insurer] admit[ted] that the Plaintiffs complied with all post-loss obligations immediately following the [loss], and the Plaintiff's . . . provided [the insurer] with an updated sworn proof of loss detailing all of the damages they [were] claiming. Moreover, because these damages [were] the same as those claimed from the original hurricane damage, [the insurer] already [had] all the required documentation of the damages, and the Plaintiff's . . . also agreed on many occasions to open their home to [the insurer] for further inspection of the damages."

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LABOR LAW: EMPLOYMENT DISCRIMINATION: GENDER DISCRIMINATION: CIVIL PROCEDURE: RES JUDICATA: RES JUDICATA BARRED ACTION FOR GENDER DISCRIMINATION BECAUSE PLAINTIFF FAILED TO RAISE GENDER DISCRIMINATION AS A DEFENSE DURING ADMINISTRATIVE PROCEEDINGS TO CONTEST HIS DISCHARGE

Gaberlavage v. Miami-Dade County, ___ So. 3d ___, 40 Fla. L. Weekly D505 (Fla. 3d DCA February 25, 2015)

When the Corrections Department terminated the plaintiff for "insubordination and incompetence in the transportation of a convicted police killer," he filed an administrative appeal. "[T]wo female sergeants in the Corrections Department[] received suspensions rather than termination of employment when inmates under their control escaped," but "[the plaintiff] did not raise 'disparate treatment based on gender' as a defense or affirmative defense in any motion or pleading in his administrative case, even though such defense related to the level of discipline imposed by the Corrections Department. Although his attorney cross-examined regarding an incident of supposedly-disparate treatment, [the plaintiff] did not explicitly ask the hearing examiner to determine that the discipline in his case was excessive in comparison to the discipline imposed in the case of the two female sergeants in the Corrections Department." When "the hearing examiner issued a report and recommendations upholding the discharge" and "the County Manager approved the hearing examiner's recommended order," the plaintiff appealed to the appellate division of the circuit court. After the circuit court affirmed, the plaintiff sued for employment discrimination, but the trial court granted the Corrections Department's motion for summary judgment, and the appellate court affirmed. "A later determination by a different factfinder that the sanction of termination was unduly harsh, constituting unlawful discrimination on the basis of gender, would be squarely inconsistent with the rulings by the first factfinder and the appellate division of the circuit court. That is why the doctrine of res judicata bars relitigation in a subsequent cause of action not only of claims raised, but also claims that could have been raised." "The trial court properly rejected the employee's attempt to relitigate the propriety of the discharge and the sanction for [his] misconduct." Judge Suarez concurred in Judge Salter's majority opinion, and Judge Shepherd wrote a specially concurring opinion.

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REAL ESTATE: LEASES: TRIAL COURT ERRED BY DENYING TENANT'S CLAIM FOR EVICTION OF SUBTENANT BECAUSE SUBTENANT REMAINED IN POSSESSION WITHOUT PAYING RENT WITHIN THREE DAYS AFTER RECEIVING TENANT'S NOTICE TO PAY RENT OR VACATE THE PREMISES; TRIAL COURT ERRED BY AWARDING DAMAGES FOR UNJUST ENRICHMENT TO SUBTENANT BASED UPON TENANT'S FAILURE TO PROVIDE MARKETING SERVICES BECAUSE THERE WAS NO EVIDENCE TO ALLOCATE THE PORTION OF RENT ATTRIBUTABLE TO OCCUPANCY AND THE PORTION OF RENT ATTRIBUTABLE TO MARKETING

Edge Pilates Corporation v. Tribeca Aesthetic Medical Solutions, LLC, ___ So. 3d ___, 40 Fla. L. Weekly D509 (Fla. 4th DCA February 25, 2015)

The tenant, who operated a Pilates gym, subleased a portion of its space to an internist, who catered to the same demographic. The rent included promotional services, but the sublease did not breakdown the amounts attributable to occupancy and promotion. When the subtenant failed to pay the rent, the tenant filed an action for eviction, and the subtenant counterclaimed for unjust enrichment based upon the failure to provide promotional services. The trial court, after a bench trial, denied eviction but awarded $100,000 on the counterclaim. The appellate court reversed. The tenant was entitled to eviction because it proved that the subtenant remained in possession three days after receiving the tenant's notice to pay rent or vacate the premises. The trial court also erred by awarding damages on the counterclaim because of the absence of evidence allocating the amount of rent due for occupancy and promotional services. The appellate court remanded for an apportionment.

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FAMILY LAW: DUE PROCESS: TRIAL COURT DID NOT VIOLATE DUE PROCESS BY DENYING PETITION FOR MODIFICATION WITHOUT A HEARING BECAUSE PETITION WAS ACTUALLY AN UNTIMELY MOTION FOR REHEARING OR RECONSIDERATION

Westwood v. Westwood, ___ So. 3d ___, 40 Fla. L. Weekly D539 (Fla. 5th DCA February 27, 2015)

The trial court entered a partial final judgment of dissolution of marriage permitting the minor children to move to the United Kingdom with their father. The mother did not appeal but, thirty four days later, she filed a petition for modification without obtaining a summons or serving the petition on the father. The appellate court held that the trial court did not violate due process by denying the petition without a hearing because the petition could properly be regarded as an untimely motion for rehearing or reconsideration. The court clarified that its "opinion [was] without prejudice to [the mother's] ability to refile a properly served petition for modification."

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TRUSTS: GUARDIANSHIP: CIVIL PROCEDURE: SUMMARY JUDGMENT: ORDERS: RULES OF CONSTRUCTION: AMBIGUOUS ORDER: PAROL EVIDENCE: TRIAL COURT ERRED BY ENTERING SUMMARY JUDGMENT DETERMINING THAT STIPULATION AND GUARDIANSHIP ORDER UNAMBIGUOUSLY PREVENTED MAKER FROM AMENDING HER TRUST: ON REMAND, TRIAL COURT SHOULD CONSIDER PAROL EVIDENCE

Whiting v. Whiting, ___ So. 3d ___, 40 Fla. L. Weekly D539
(Fla. 5th DCA February 27, 2015)

The mother created a trust, which provided for equal distributions to her three sons upon her death. Three years before she died, "concerns about [the mother's] mental competency arose," and two of her sons filed competing petitions for appointment as her guardian. Before a determination of mental capacity was made, the parties entered into a Stipulation for Limited Guardianship, which limited the mother's ability to dispose of her assets. Although the trial court entered an order adopting the Stipulation, the mother amended her trust to make one of her sons the sole residuary beneficiary. After the mother's death, the trial court entered summary judgment determining that the amendment was invalid because of the limitations imposed by the guardianship order. The appellate court reversed because the order was ambiguous. The order did not specify whether the guardianship was voluntary or involuntary. A voluntary guardianship requires a judicial determination of the ward's mental competency, but there was no determination of competency in this case. An involuntary guardianship requires a judicial determination of the ward's lack of capacity, but there was no determination of incapacity in this case. The lack of a judicial determination of incapacity pointed to a voluntary guardianship, but the lack of a certificate of competency from a physician and the mother's inability to terminate the guardianship without a court order were inconsistent with a voluntary guardianship. To add to the confusion, the stipulation and order did not specifically address the mother's ability to amend the trust, but it did prevent her from making gifts in excess of $1,500; however, the mother's lawyer executed an affidavit stating that both she and he "rejected the inclusion of any language in the Stipulation and Guardianship Order that would limit her ability to alter her estate plan." Based on these circumstances, a genuine issue of material fact existed whether the mother had the power to amend the trust, and the trial court erred by entering summary judgment setting aside the amendment. The trial court was directed on remand to consider parol evidence to assist in interpreting the Stipulation and Guardianship Order.

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TORTS: NEGLIGENCE: WRONGFUL DEATH: INHERENTLY DANGEROUS ACTIVITIES: WHETHER PARKING A FLAT BED TRUCK WITH REPLACEMENT POWER POLES ALONGSIDE A ROADWAY WAS AN ULTRAHAZARDOUS ACTIVITY WAS A QUESTION OF FACT FOR THE JURY, BUT THE EVIDENCE DID NOT AS A MATTER OF LAW SUPPORT

THE AWARD OF PUNITIVE DAMAGES: AN ATTEMPT TO COVER UP LIABILITY FOR AN ACCIDENT AFTER IT HAS OCCURRED DOES NOT JUSTIFY AN AWARD OF PUNITIVE DAMAGES

The L.E. Myers Company v. Young, ___ So. 3d ___, 40 Fla. L. Weekly D541 (Fla. 2d DCA February 27, 2015)

FPL hired a general contractor to replace four 85 foot power poles, weighing 21,000 pounds apiece. While the work was in progress, a motorist, who was "traveling at 91 miles per hour in a 40-mile-per-hour zone and weaving in and out of oncoming traffic[,] [w]ithout breaking, . . . slammed into the back of [a] stopped car," inflicting fatal injuries upon its driver. Prior to the trial of the estate's wrongful death case, the trial court entered summary judgment against the contractor determining that it was not entitled to a setoff, based upon the negligence of its subcontractors, because the contractor was engaged in an inherently dangerous activity. The trial court also granted the estate's motion to amend its complaint to add a claim for punitive damages. The jury returned a verdict for $1.2 million in compensatory damages and $9.8 million in punitive damages, but the trial court reduced the award of compensatory damages, based upon the negligence of the rear ending driver, and reduced the award of punitive damages to $3.6 million, based upon Section 768.73(1)(a), Florida Statutes, which limits punitive damages to three times the amount of compensatory damages. The appellate court reversed because (1) the issue whether the contractor was engaged in an inherently dangerous activity presented a question of fact for the jury rather than one of law for the court, and (2) the contractor's negligence, if any, was insufficient to support an award of punitive damages. (1) When the accident occurred, the flat bed truck that delivered the replacement power poles to the worksite was "parked on the shoulder of the road with its load intact. Although this scenario was not inherently dangerous, other circumstances created an issue of fact on the issue of inherent danger; namely, a trailer tire was partially within the roadway, a corner of the tractor-trailer may have impeded the flow of traffic, and a crane may have been lifting a pole when the accident occurred. (2) "However, there [was] simply no view of the evidence presented by the Estate that would support a conclusion that [the contractor's] conduct was of a gross or flagrant character that evinced a reckless disregard of human life. Arguably, there was some evidence from which a jury could have found that [the contractor] was negligent in how it handled the traffic flow around the work site at the time leading up to the accident. However, the evidence as a whole showed that the danger from the parked flatbed trailer was open and obvious and the collision itself was a freak accident unexpectedly set in motion by an excessively speeding driver who was apparently completely oblivious to the road construction ahead of him. If anything, the evidence would have supported a claim for punitive damages against [the driver.] But there was no evidentiary basis for an award of punitive damages against [the contractor]." Although disputed, plausible evidence existed that the contractor "[had] traffic cones or warning signs in place at the time of the accident," and, if so, this constituted a traffic plan, even if it may have been inadequate. The estate contended that the contractor attempted to cover up its alleged negligence after the accident occurred, but there was no evidence of an attempt to cover up the hazard before the accident occurred, and this was the relevant issue.

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REAL ESTATE: MORTGAGE FORECLOSURE; CIVIL PROCEDURE: AMENDMENT: SUMMARY JUDGMENT: TRIAL COURT ABUSED DISCRETION BY DENYING ORAL MOTION AT SUMMARY JUDGMENT HEARING TO AMEND ANSWER TO ALLEGE NONCOMPLIANCE WITH NOTICE OF DEFAULT REQUIREMENT IN PARAGRAPH 22 OF MORTGAGE

Cobbum v. CitiMortgage, Inc., ___ So. 3d ___, 40 Fla. L. Weekly D545 (Fla. 2d DCA February 27, 2015)

The borrowers' answer in a mortgage foreclosure admitted compliance with conditions precedent to filing suit; however, when the lender moved for summary judgment, the buyers filed an affidavit swearing that the lender failed to comply with a condition precedent by not furnishing the notice of default required by paragraph 22 of the mortgage. At the hearing on its motion for summary judgment, the lender argued that the affidavit was insufficient because the borrowers' answer admitted compliance with conditions precedent. As a result, the borrowers made an oral motion to amend their complaint, but the trial court denied their request, and entered summary judgment for the lender. The appellate court reversed. Leave to amend should be freely granted, particularly before or during the hearing on a motion for summary judgment. The lender would not have been prejudiced by the amendment because the borrowers filed their affidavit three months before the hearing. The borrowers did not abuse the privilege to amend because this was their first request to do so. Amendment would not have been futile because it would have provided the borrowers with a viable affirmative defense. "Although the initial answer generally admitted that all conditions precedent had been met, [the borrower] did not attach to its complaint any documentation of its compliance with paragraph 22 nor did it aver or argue that it had in fact complied with paragraph 22 when the issue was raised [by one of the borrowers]. And an alleged failure to comply with paragraph 22 creates a disputed issue of material fact."

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REAL ESTATE: MORTGAGE FORECLOSURE: BECAUSE NOTE EXPRESSLY INCORPORATED HUD REGULATIONS THAT REQUIRE WRITTEN NOTICE OF ACCELERATION, BORROWER WAS ENTITLED TO RAISE FAILURE TO COMPLY WITH THOSE REGULATIONS AS A VALID DEFENSE TO FORECLOSURE; CIVIL PROCEDURE: SUMMARY JUDGMENT: SUMMARY JUDGMENT REVERSED BECAUSE LENDER DID NOT DENY THAT IT FAILED TO PROVIDE NOTICE OF ACCELERATION OR ENTER NOTICE IN EVIDENCE

Laws v. Wells Fargo Bank, N.A., ___ So. 3d ___, 40 Fla. L. Weekly D548 (Fla. 1st DCA February 27, 2015)

The appellate court reversed final summary judgment of mortgage foreclosure for the lender. "Because the note contain[ed] language specifically and expressly incorporating HUD regulations that require a written notice of acceleration, [the borrower] was entitled to raise failure to comply with these regulations as a valid defense to foreclosure." "[The lender] did not deny that it failed to send [to the borrower] written notice of default and intent to accelerate. Nor was any such notice entered into evidence below." As a result, the court reversed summary judgment and remanded for trial.

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