KASHI LAW LETTER
A Synopsis of Florida Case Law

Volume 7, Issue 13 April 08, 2015

## JUDGES: DISQUALIFICATION: EX PARTE COMMUNICATIONS WITH ATTORNEY GENERAL'S OFFICE: RESPONDING TO PETITION FOR WRIT OF PROHIBITION FROM DENIAL OF MOTION TO DISQUALIFY: APPELLATE COURT DISQUALIFIES JUDGE FOR SENDING EMAIL TO ATTORNEY GENERAL WITH REFUTATION OF DEFENDANT'S APPELLATE CHALLENGE TO DENIAL OF MOTION TO STAY AND FOR SUBMITTING A RESPONSE TO DEFENDANT'S PETITION FOR WRIT OF PROHIBITION REFLECTING THAT JUDGE HAD A PERSONAL INTEREST IN THE APPEAL OF THE STAY AND AN EXPECTATION THAT THE ATTORNEY GENERAL WOULD REPRESENT HER INTERESTS IN THE APPEAL; APPEAL: PROHIBITION

**Masten v. State, ___ So. 3d ___, 40 Fla. L. Weekly D714**
**(Fla. 3d DCA March 20, 2015)**

The appellate court granted the defendant's petition for writ of prohibition from an order denying his motion to disqualify the trial judge. When the defendant appealed from an order denying a motion for stay of his sentence for violation of probation, the trial judge sent an email to the Attorney General's Office to assist in opposing the appeal. Subsequent emails from the judge's chambers attached documents and transcripts. When the Attorney General's Office disclosed the emails, the defendant moved to disqualify the trial judge, who denied the motion. The defendant responded by filing a petition for writ of prohibition, which the appellate court granted because the judge's emails constituted improper ex parte communications, and the judge compounded the problem by submitting a response to the petition for writ of prohibition reflecting that the judge "held both a personal interest in the appeal of the stay and an expectation the Attorney General's Office would represent 'her interest' in the appeal. 'In a prohibition proceeding . . . it is the safer practice for the judge to remain silent and let the adversarial party supply the response." Under the circumstances of this case, the defendant was justified in fearing that he would not receive a fair and impartial trial.

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## FAMILY LAW: DISSOLUTION OF MARRIAGE; JUDGES: DISQUALIFICATION: DISCOUNTING TESTIMONY ABOUT HUSBAND'S ACCOUNTANT BECAUSE HE WAS A FRIEND AND TELLING ACCOUNTANT THIS WAS A DIFFICULT CASE AND JUDGE WOULD HAVE TO PICK ONE PROPOSED ORDER OVER ANOTHER DID NOT WARRANT DISQUALIFICATION; APPEALS: PROHIBITION

**Clark v. Clark, ___ So. 3d ___, 40 Fla. L. Weekly D718 (Fla. 1st DCA March 25, 2015)**

The trial judge in an action for dissolution of marriage was not subject to disqualification because he discounted the testimony of the husband's accountant, who was the husband's friend, or because the judge told the accountant that this was a difficult case and the judge would have to pick one proposed order over another. The appellate court viewed the judge's statement to the accountant as a reflection of the antithesis of bias.

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## TORTS: WRONGFUL DEATH: NEGLIGENCE: TRAFFIC SIGNAL DESIGN: SLAVIN v. KAYE: TRIAL COURT PROPERLY SUBMITTED TO JURY ISSUES OF PATENCY OF DESIGN DEFECT AND ACCEPTANCE OF DESIGNER'S WORK

**McIntosh v. Progressive Design and Engineering, Inc., ___ So. 3d ___, 40 Fla. L. Weekly D723 (Fla. 4th DCA March 25, 2015)**

The plaintiff's father died in an intersectional collision because of a confusing traffic signaling system. The jury found that the traffic signal designer was negligent but that the defect was patent and FDOT had accepted the work. As a result, judgment was entered for the designer under the doctrine of *Slavin v. Kaye,*108 So. 2d 462 (Fla. 1959), which holds that "a contractor is not liable for patent defects after acceptance of a construction project by the owner." The appellate court affirmed. The trial court properly submitted to the jury the issues of the patency of the defect and acceptance of the work, and the verdict was supported by competent substantial evidence. "As between the parties to this construction project, FDOT was the entity to whom the design company owed its duty, because it controlled 'acceptance' of the design company's work. In turn, Broward County controlled acceptance of FDOT's work. At each step along the timeline, the party in control bore the burden of correcting patent defects because its control prevented anyone else from doing so." "Slavin is necessary to place the burden of responsibility upon the entity that controls the environment."

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## REAL ESTATE: MORTGAGE FORECLOSURE: CIVIL PROCEDURE: CONTINUANCE: UNTIMELY DISCLOSURE OF NEW WITNESSES AND EXHIBITS: NEW TRIAL: TRIAL COURT ABUSED DISCRETION BY DENYING PLAINTIFF'S UNOPPOSED MOTION FOR CONTINUANCE AND THEN VIOLATED DUE PROCESS BY ALLOWING PLAINTIFF TO CALL WITNESSES AND TO INTRODUCE EXHIBITS DISCLOSED ONLY FOUR DAYS BEFORE TRIAL

**Reive v. Deutsche Bank National Trust Company, ___ So. 3d ___, 40 Fla. L. Weekly D725 (Fla. 4th DCA March 25, 2015)**

The plaintiff in a mortgage foreclosure filed a motion for continuance ten days before trial because a new loan servicer had been appointed and needed more time to review the loan documents. When the trial court denied the motion, the plaintiff listed new witnesses and documents only four days before trial and was permitted to call the witnesses and introduce the documents in evidence during the trial. The appellate court reversed judgment for the plaintiff and remanded for a new trial. The trial court abused its discretion by denying the motion for continuance and violated due process by allowing the plaintiff to call witnesses and introduce documents without adequate notice to the defendant.

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## TORTS: WRONGFUL DEATH: PROBATE COURT LACKED JURISDICTION TO REALLOCATE DAMAGES TO SURVIVORS BASED UPON THEIR PRETRIAL AGREEMENT: AN AWARD OF WRONGFUL DEATH DAMAGES TO SURVIVORS IS NOT PROPERTY OF THE ESTATE THAT INTERESTED PARTIES MAY AGREE TO REALLOCATE

**Pitcher v. Waldo, ___ So. 3d ___, 40 Fla. L. Weekly D726 (Fla. 4th DCA March 25, 2015)**

The parents agreed to split wrongful death damages to survivors 60% to the mother and 40% to the father, but the jury awarded $1 million to the mother and only $100,000 to the father. The father filed a petition for declaratory judgment in probate court to reallocate the survivorship damages according to the parties' pretrial agreement, but the probate court denied the petition for lack of jurisdiction, and the appellate court affirmed. Although Section 733.815, Florida Statutes (2012), allows interested persons to alter their shares of property from an estate, the estate in this case had no assets. The damages awarded to survivors under the Wrongful Death Act are the property of the survivors rather than the estate and do not become part of the estate. "As the alleged agreement was between the father and mother but not the estate, the trial court correctly concluded that it had no jurisdiction to adjudicate the dispute."

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## REAL ESTATE: MORTGAGE FORECLOSURE: SURPLUS FUNDS: SUBORDINATE LIENHOLDER WAIVED ITS RIGHT TO SURPLUS FUNDS BY FAILING TO CLAIM THEM WITHIN SIXTY DAYS OF THE SALE: FAILURE TO RECEIVE

## ACTUAL NOTICE WAS NOT AN EXCUSE BECAUSE SUBORDINATE LIENHOLDER RECEIVED AT LEAST CONSTRUCTIVE NOTICE BECAUSE CLERK PUBLISHED FINAL JUDGMENT AND POSTED CERTIFICATE OF DISBURSEMENT ON ITS DOCKET: EQUITY: EQUITY FOLLOW THE LAW AND CANNOT BE USED TO ELIMINATE ITS ESTABLISHED RULES

**Saulnier v. Bank of American, N.A., ___ So. 3d ___, 40 Fla. L. Weekly D727 (Fla. 4th DCA March 25, 2015)**

The subordinate lienholder waived its right to surplus funds by failing to claim them within sixty days after the foreclosure sale. The surplus lienholder's claim that it did not receive the final judgment or certificate of disbursements did not alter the result: "First, sections 45.031 and 45.032 [Florida Statutes] do not contain any provision permitting a court to excuse a subordinate lienholder's untimely claim on the ground that it did not receive actual notice. Second, the final judgment facially indicate[d] that a copy thereof was sent to the subordinate lienholder, and the record contain[ed] no evidence indicating that the subordinate lienholder did not receive such notice. Third, even if [the court] assume[d] that the subordinate lienholder did not receive actual notice, the record indicate[d] that the clerk published the final judgment and posted the certificate of disbursements on its docket. Therefore, the subordinate lienholder received at least constructive notice that it had to file a claim to the surplus no later than (or within) sixty days after the sale, and that if it failed to file a timely claim, then it would not be entitled to any surplus." The court invoked the principle that "equity follows the law and cannot be used to eliminate its established rules."

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## REAL ESTATE: MORTGAGE FORECLOSURE: STANDING: STANDING WAS NOT ESTABLISHED BY UNDATED BLANK ENDORSEMENT INTRODUCED AT TRIAL OR BY BACKDATED ASSIGNMENT

**Matthews v. Federal National Mortgage Association, ___ So. 3d ___, 40 Fla. L. Weekly D729 (Fla. 4th DCA March 25, 2015)**

The trial court reversed final judgment of foreclosure based upon lack of standing. The note attached to the complaint was not payable to the plaintiff, and it did not contain any endorsements. Although the original note with a blank endorsement was introduced in evidence at trial, the endorsement was undated. A back dated assignment introduced in evidence at trial also was insufficient, and the plaintiff's witness did not know how it obtained ownership of the note.

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## REAL ESTATE: MORTGAGE FORECLOSURE: STANDING: PLAINTIFF FAILED TO ESTABLISH STANDING BECAUSE ITS WITNESS WAS UNABLE TO SAY WHETHER THE NOTE ATTACHED TO THE INITIAL COMPLAINT WAS THE MOST RECENT COPY OF THAT DOCUMENT AND DID NOT PROVIDE

## ANY INFORMATION DEFINITIVELY ESTABLISHING THAT PLAINTIFF HAD POSSESSION OF THE NOTE PRIOR TO THE TIME IT FILED ITS INITIAL COMPLAINT: STANDING WAS NOT ESTABLISHED BY BACKDATED ASSIGNMENT BECAUSE OF THE ABSENCE OF EVIDENCE THAT AN EQUITABLE TRANSFER OF THE NOTE AND MORTGAGE OCCURRED BEFORE SUIT WAS FILED

**Lloyd v. The Bank of New York Mellon, ___ So. 3d ___, 40 Fla. L. Weekly D732 (Fla. 4th DCA March 25, 2015)**

The appellate court reversed final judgment of mortgage foreclosure because the plaintiff failed to establish standing. The plaintiff's witness at trial "was unable to say whether the note attached to the initial complaint was the most recent copy of that document, and could only assume that was the case. He also did not provide any information definitively establishing that Plaintiff had possession of the note prior to the time it filed its initial complaint. As a result, Plaintiff was unable to prove it had 'standing to bring a mortgage foreclosure complaint by establishing an assignment or equitable transfer of the note and mortgage *prior to instituting the complaint.*'" A backdated assignment was insufficient to establish standing. "Because neither the information included in the record nor the witness's testimony resolved the issue of when the assignments to the Plaintiff occurred, it [could not] be said that the assignment of the note and mortgage took place 'prior to instituting the complaint.'"

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## TORTS: NEGLIGENCE PER SE: TREE TRIMMER ELECTROCUTED WHEN PALM FROND CAME IN CONTACT WITH POWER LINE: VIOLATIONS OF PROVISIONS OF NATIONAL ELECTRIC SAFETY CODE DEALING WITH RECORDATION AND REMEDYING OF DEFECTS AND TREE TRIMMING DID NOT CONSTITUTE NEGLIGENCE PER SE BECAUSE DECEDENT DID NOT FALL WITHIN THE CLASS OF PERSONS THE PROVISIONS WERE DESIGNED TO PROTECT

**Vitrano v. Florida Power & Light Company, ___ So. 3d ___, 40 Fla. L. Weekly D732 (Fla. 4th DCA March 25, 2015)**

A homeowner hired the decedent to trim his trees. The decedent was electrocuted when a palm frond came into contact with an overhead electrical wire, and the widow sued FP&L for wrongful death. The jury returned a verdict for FP&L, and the appellate court affirmed over the plaintiff's objection that the trial court erred by failing to instruct the jury that FP&L's violations of the National Electric Safety Code (NESC) constituted negligence per se. The provisions in question dealt with recording and remedying defects and trimming trees. "NESC section 214 requires FPL to inspect and discover defects in its lines and equipment and to remedy these defects promptly. This general regulation is not intended to protect a particular class of persons from a specific type of injury. Its general provisions create a duty on FPL to keep its equipment in good repair. It does not create a duty to take precautions to protect a *particular* class of persons from a particular type of injury. Section 218 requires the trimming of trees to protect the electrical lines. It does not establish any safety procedures regarding how to trim the trees. And while it places a duty on the electric company to trim the trees, the code provision is not for the protection of the tree trimmer but for the general public who might come into contact with the vegetation close to the power lines in a variety of ways, such as children climbing trees. It also is directed to the protection of the equipment of the power company from the danger of contact between the trees and the power line." Because the NESC provisions in issue "were not directed to a particular category of persons," the doctrine of negligence per se was inapplicable.

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## REAL ESTATE: MORTGAGE FORECLOSURE: STANDING: BREAK IN CHAIN OF OWNERSHIP OF, OR RIGHT TO POSSESS, NOTE

**Seffar v. Residential Credit Solutions, Inc., ___ So. 3d ___, 40 Fla. L. Weekly D734 (Fla. 4th DCA March 25, 2015)**

The appellate court reversed final judgment of foreclosure because of insufficient evidence of standing. RCS, a loan servicer, was the original plaintiff. Bayview, the subsequent loan servicer, was substituted as the plaintiff before trial. The original note was allegedly attached to the complaint, but the payee was ABN, and the note did not contain endorsements or allonges. Nine months later, RCS filed an original note with "an undated, blank allonge, payable to bearer, allegedly executed by a vice president of ABN," but there was no indication that the allonge "was affixed to the note with which it was filed." One of Bayview's litigation managers testified at trial, but he was not the records custodian for either servicer, he was unfamiliar with their computer systems or how they gathered information or input it in their computer systems, and was unable to vouch for the accuracy of RCS's records. Although he thought that Bayview purchased the note from RCS based on a screen shot on Bayview's computer system, he had not seen the purchase agreement and did not produce a copy of it or the screen shot. He did not know when the allonge was executed, whether it was signed by hand or stamped, whether it was affixed to the note before it was filed, whether the signatory was employed by ABN when loan servicing was transferred from ABN to Franklin Bank, or who held the note when RCS sent notice of default to the borrower. This evidence failed to establish standing. "First, while the note and mortgage were originally held by ABN, the only assignment of mortgage attached to the complaint and introduced at trial was one from FDIC, as receiver for Franklin Bank to MERS as nominee for RCS. There [was] no proof of any transfer of the note or mortgage from ABN to Franklin Bank. Second, while Bayview contend[ed] that the undated allonge supplie[d] the connection, as it showe[ed] a transfer payable to bearer, there was no proof that the allonge was attached to the note, and Bayview presented no proof of when it was executed. Finally, there was no competent evidence of what rights Bayview acquired from RCS." "Although, nine months after filing the complaint, RCS filed what purported to be the original note with an allonge payable to bearer, it was undated and there [was] no proof it was affixed to the promissory note. . . . The litigation manager did not know when the allonge was executed, or whether it was affixed to the note prior to filing." "Bayview did not prove that either RCS or [Bayview] was a nonholder in possession. It never connected FDIC as receiver of Franklin Bank, from which RCS acquired an assignment of mortgage, to ABN, the original note holder." The letters notifying the borrower that servicing of the loan had been transferred to RCS and then to Bayview failed to address the "right to enforce the note," and the servicing agreements were not introduced in evidence. Although the litigation manager thought that Bayview purchased the note and mortgage from RCS, he never "[saw] a purchase agreement, and no document memorializing the purchase was entered into evidence. Therefore, because there [was] a gap in the transfer of the note and mortgage, Bayview did not prove that RCS, and subsequently Bayview, were nonholders in possession. . . . Simply stated, the evidence presented was woefully inadequate to prove standing to foreclose. It was quite apparent from the record that Bayview's litigation manager did not have the requisite knowledge, nor did he produce documentary evidence, to support the claim."

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## REAL ESTATE: MORTGAGE FORECLOSURE: STANDING: ASSIGNMENT EXECUTED AFTER FORECLOSURE ACTION WAS FILED: UNDATED SPECIAL INDORSEMENTS WITHOUT EVIDENCE WHEN THEY WERE AFFIXED TO NOTE: LACK OF EVIDENCE OF INTENT TO TRANSFER INTEREST IN NOTE AND MORTGAGE

**Jelic v. LaSalle Bank, National Association, ___ So. 3d ___, 40 Fla. L. Weekly D737 (Fla. 4th DCA March 25, 2015)**

The appellate court reversed final judgment of mortgage foreclosure based upon insufficient evidence of standing because (1) an assignment of the note and mortgage occurred after the foreclosure complaint was filed, (2) special indorsements on the original note were undated, nobody testified that the indorsements were affixed to the note before the foreclosure complaint was filed, and the indorsements were made in favor of someone other than the plaintiff, (3) the pooling and servicing agreement did not clarify the situation, (4) an equitable assignment of the note and mortgage was not established because it was impossible to determine whether the individual who transferred the note and mortgage into the pooling and servicing agreement intended to transfer his interest.

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## MASTERS: TRIAL COURT MAY NOT APPOINT MASTER ON ITS OWN MOTION OR WITHOUT CONSENT OF PARTIES; APPEALS: MANDAMUS: MANDAMUS LIES TO VACATE ORDER APPOINTING SPECIAL MASTER WITHOUT CONSENT OF THE PARTIES

**Joara Freight Lines, Inc. v. Perez, ___ So. 3d ___, 40 Fla. L. Weekly D749 (Fla. 3d DCA March 25, 2015)**

The appellate court granted a petition for mandamus to vacate an order appointing a special master without the unanimous consent of the parties. "[A] trial court [may not] appoint a special master on its own motion" or without the consent of all parties.

To read more briefs in the Appeals: Writ of Mandamus category of the Kashi Law Letter, please click here, http://www.kashilawletter.com/category/appeals/writ-of-mandamus/.

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## CIVIL PROCEDURE: TRIAL COURT LACKED JURISDICTION TO VACATE DISMISSAL FOR LACK OF PROSECUTION BECAUSE A TIMELY MOTION FOR REHEARING OR RELIEF FROM JUDGMENT WAS NOT FILED AND THE TRIAL COURT'S ORDER DID NOT CONTAIN THE FINDINGS REQUIRED TO GRANT RELIEF FROM JUDGMENT

**Aqua Life Corporation v. Reyes, ___ So. 3d ___, 40 Fla. L. Weekly D752 (Fla. 3d DCA March 25, 2015)**

Eighteen months after it dismissed a case for lack of prosecution, the trial court granted the plaintiff's motion for status conference, vacated the order of dismissal, set the case for trial, and ordered the parties to attend mediation. The appellate court granted the defendant's petition for writ of prohibition, and quashed the trial court's orders because it lacked jurisdiction to enter them. The plaintiff did not file a timely motion for rehearing from the order of dismissal or a motion for relief from judgment, and the order vacating the dismissal did not contain the findings required to grant relief from judgment.

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## INDIAN TRIBES: TRIBAL SOVEREIGN IMMUNITY: TRIBAL SOVEREIGN IMMUNITY DID NOT BAR LAWSUIT BY TRIBE AGAINST ITS LAWYERS FOR FRAUDULENTLY BILLING TRIBE; CIVIL PROCEDURE: SUMMARY JUDGMENT: SUMMARY JUDGMENT AFFIRMED BECAUSE TRIBE DID NOT REBUT LAWYERS' PRIMA FACIE SHOWING OF ENTITLEMENT TO RELIEF

**Miccosukee Tribe of Indians of Florida v. Lewis, ___ So. 3d ___, 40 Fla. L. Weekly D752 (Fla. 3d DCA March 25, 2015)**

An Indian tribe sued its lawyers for fraudulent billing the tribe, representing tribal members when their interests conflicted with the tribe, paying kickbacks to the former chairman of the tribe, divulging tribal finances to the Internal Revenue Service, and failing to disclose that the former chairman was charging improper expenses to the tribe. The trial court dismissed the tribe's claims based upon tribal sovereign immunity, but the appellate court reversed. In this case, the tribe was not suing tribal members, and its theories of recovery were not based upon tribal law. The purpose of tribal immunity is to protect the tribe rather than to prevent the tribe from obtaining legal redress from nonmembers. "Here, even if some of the defenses might require the resolution of question of tribal law, this lawsuit by the Tribe against its Florida lawyers is not an intra-tribal dispute that the Tribe is barred from filing in State court." Nevertheless, the court affirmed summary judgment for the lawyers because they submitted unrebutted evidence that disproved the tribes claims against them.

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## CIVIL PROCEDURE: PROPOSAL FOR SETTLEMENT: ALL THREE DEFENDANTS' NOMINAL PROPOSALS FOR SETTLEMENT WERE MADE IN GOOD FAITH BASED UPON PLAINTIFF'S CONCESSIONS: TRIAL COURT ERRED IN AWARDING ONE DEFENDANT ONLY ONE-THIRD OF HIS ATTORNEY'S FEES BECAUSE ALL THREE DEFENDANTS HIRED ONE LAW FIRM TO REPRESENT THEM BASED UPON THE SAME THEORY OF DEFENSE

**Isaias v. The H.T. Hackney Co., ___ So. 3d ___, 40 Fla. L. Weekly D753 (Fla. 3d DCA March 25, 2015)**

The plaintiff sued three defendants for unpaid invoices. Each defendant filed a proposal for settlement for $500. After the defendants prevailed on the merits, the trial court found that only one of the proposals was made in good faith and awarded that offeror one-third of his attorney's fees. The appellate court reversed. All of the proposals were made in good faith because the plaintiff conceded that the invoices had been paid; however, even if only one proposal was made in good faith, that offeror would have been entitled to all of his attorney's fees because all three of the defendants hired the same law firm to assert the same defense.

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## REAL ESTATE: MORTGAGE FORECLOSURE: RIPENESS: DISTRIBUTION OF FIRE INSURANCE PROCEEDS MUST AWAIT FORECLOSURE SALE; CIVIL PROCEDURE: SUMMARY JUDGMENT: ERROR IN HEARING MOTION FOR SUMMARY JUDGMENT ONLY SIXTEEN DAYS AFTER IT WAS SERVED WAS HARMLESS BECAUSE NONMOVING PARTY DID NOT OBJECT TO HAVING THE MOTION HEARD, SHE WAS ALLOWED TO ADVANCE HER POSITION AT THE HEARING, AND SHE DID NOT CONTEND THE OUTCOME WOULD HAVE BEEN DIFFERENT IF THE COURT WAITED ANOTHER FOUR DAYS TO HEAR THE MOTION

**White v. Ocwen Loan Servicing, LLC, ___ So. 3d ___, 40 Fla. L. Weekly D756 (Fla. 3d DCA March 25, 2015)**

The trial court in a mortgage foreclosure entered summary judgment for the loan servicer on the borrower's counterclaims. The motion was heard at trial only sixteen days after it was filed, but the appellate court held that this procedural error was harmless because the borrower did not object to having the motion heard, she was allowed to advance her position at the hearing, and she did not contend the outcome would have been different if the trial court waited another four days to conduct the hearing.

The mortgaged property was destroyed by fire before foreclosure. The court held that disposition of the insurance proceeds must await the sale of the property. "'[W]here the loss precedes the foreclosure the mortgagee is the *creditor* of the owner at the time of loss, and has an election as to how to satisfy the debt. The mortgagee may either turn to the insurance company for payment as mortgagee . . . and recover, up to the limits of the policy, the mortgage debt; or the mortgagee may foreclose on the property . . . [.] If the mortgagee elects to foreclose on the property and the foreclosure sale does not bring the full amount of the mortgage debt, then the mortgagee may recover the *deficiency* under the insurance policy as owner.' . . . However, in no event is [the mortgagee] entitled to collect more than the debt secured."

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## TORTS: NEGLIGENCE: PREMISES LIABILITY: SLIP AND FALL: COMPARATIVE NEGLIGENCE: PLAINTIFF WAS NOT COMPARATIVELY NEGLIGENT FOR WEARING FOUR TO FIVE INCH HIGH-HEELED SHOES TO WORK

**Bongiorno v. Americorp, Inc., ___ So. 3d ___, 40 Fla. L. Weekly D760 (Fla. 5th DCA March 27, 2015)**

The plaintiff slipped and fell on an unusually slippery floor in the restroom of the office building where she worked. The trial court, sitting without a jury, found that the plaintiff was 50% comparatively negligent because she was wearing four to five inch high-heeled shoes when the accident occurred, but the appellate court reversed. The appellate court defined the issue as "whether [the defendant] sustained its burden of proving that [the plaintiff] had a duty not to wear high-heeled shoes to work," and the resolution of that issue depended upon whether the plaintiff's conduct created a foreseeable zone of risk. The court concluded that "[the defendant] failed to sustain its burden of proving that [the plaintiff] created a foreseeable zone of risk by wearing high-heeled shoes to work and, therefore, the trial court erred in finding her comparatively negligent for her injuries. Accordingly, [the appellate court] reverse[d] and remand[ed] for entry of a judgment in [the plaintiff's] favor without the

reduction for her alleged comparative negligence."

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## CRIMINAL LAW: EVIDENCE: HEARSAY: RULE OF COMPLETENESS: UNDER RULE OF COMPLETENESS, TRIAL COURT ERRED BY ADMITTING ONLY DEFENDANT'S INCULPATORY STATEMENT TO PARAMEDIC AND EXCLUDING EXCULPATORY STATEMENT ALTHOUGH IT WAS SELF-SERVING HEARSAY: WHEN THE STATE OPENS THE DOOR, OTHERWISE INADMISSIBLE EVIDENCE MAY BE INTRODUCED TO AVOID MISLEADING THE JURY

**Newton v. State, ___ So. 3d ___, 40 Fla. L. Weekly D761 (Fla. 5th DCA March 27, 2015)**

The defendant's girlfriend died when his truck rolled over after they left a bar. It was undisputed that the defendant was intoxicated, but he contended that his girlfriend was the driver. At trial, the State called a paramedic, who testified that the defendant said that he was drunk, but the trial court excluded, as self-serving hearsay, the defendant's statement that he was not driving. On appeal, the State confessed error in excluding the exculpatory statement. The appellate court agreed based on the rule of completeness. Although the defendant's exculpatory statement did constitute self-serving hearsay, the State opened the door by introducing half of the defendant's statement to the paramedic. "[W]hen the State opens the door, the defense can introduce *otherwise inadmissible* evidence to prevent the jury from being misled." Based on the other evidence in the case, however, the court held that the exclusion of the defendant's exculpatory statement to the paramedic was harmless error. Judges Lawson and Berger concurred in a per curiam decision. Judge Cohen dissented from the determination of harmless error.

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## INSURANCE: HOMEOWNERS' INSURANCE: SINKHOLE: APPRAISAL: FIGA: SINKHOLE CLAIMS AGAINST FIGA ARE NOT SUBJECT TO APPRAISAL UNDER THE 2011 AMENDMENT TO SECTION 631.54(3), FLORIDA STATUTES: INSUREDS WAIVED APPRAISAL BY ACTIVELY LITIGATING FOR TWO YEARS BEFORE SEEKING APPRAISAL; APPEALS: CERTIFIED QUESTIONS

**Florida Insurance Guaranty Association, Inc. v. Kirschner, ___ So. 3d ___, 40 Fla. L. Weekly D764 (Fla. 2d DCA March 27, 2015)**

Based upon its decision in *Florida Insurance Guaranty Association v. de la Fuente,* ___ So. 3d ___, 40 Fla. L. Weekly D123 (Fla. 2d DCA January 7, 2015), the court held that sinkhole claims against FIGA are not subject to appraisal under the 2011 amendment to Section

631.54(3), Florida Statutes. In any event, the insureds waived their right to appraisal by actively litigating for two years before requesting appraisal. The court re-certified to the Florida Supreme Court the questions of great public importance that it raised in the *de la Fuente* case; namely, whether (1) the amended 2011 definition of covered claim in Section 631.54(3), Florida Statutes, applies to a sinkhole loss that occurred after the amendment if the policy was issued before the amendment, and (2) the statutory provision limiting payment to the amount of actual repairs precludes appraisal of sinkhole claims against FIGA.

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## INSURANCE: HOMEOWNER'S INSURANCE: SINKHOLE: INSURED IS NOT BOUND BY SCOPE OF REPAIRS RECOMMENDED BY INSURER'S ENGINEER; CIVIL PROCEDURE: SUMMARY JUDGMENT: SUMMARY JUDGMENT FOR INSURER REVERSED BECAUSE THE PARTIES' ENGINEERS DISAGREED ABOUT THE SCOPE OF APPROPRIATE REPAIRS TO REMEDIATE SINKHOLE LOSS

**Roker v. Tower Hill Preferred Insurance Company, ___ So. 3d ___, 40 Fla. L. Weekly D764 (Fla. 2d DCA March 27, 2015)**

When the insured's engineer disagreed with the insurer's engineer about the scope of appropriate repairs to remediate the insured's sinkhole loss, the insurer invoked neutral appraisal, and the appraiser substantially agreed with the insurer's engineer. As a result, the insurer refused to pay for the insured's repair protocol, and the insured sued for breach of contract. The trial court entered summary judgment for the insurer, but the appellate court reversed. The recommendations of the insurer's engineer are not binding upon the insured; otherwise, neutral appraisal would be superfluous, and even neutral appraisal is not binding upon the insured. It would be unconstitutional to make the recommendations of the insurer's engineer irrebuttable. In this case, a bona fide disagreement existed between the parties, precluding adjudication of the dispute by summary judgment.

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