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### Florida Rules of Civil Procedure 1.510 Summary Judgment

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**(a) For Claimant.** A party seeking to recover upon a claim, counterclaim, crossclaim, or third-party claim or to obtain a declaratory judgment may move for a summary judgment in that party's favor upon all or any part thereof with or without supporting affidavits at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party.

**(b) For Defending Party.** A party against whom a claim, counterclaim, crossclaim, or third-party claim is asserted or a declaratory judgment is sought may move for a summary judgment in that party's favor as to all or any part thereof at any time with or without supporting affidavits.

**(c) Motion and Proceedings Thereon.** The motion shall state with particularity the grounds upon which it is based and the substantial matters of law to be argued and shall specifically identify any affidavits, answers to interrogatories, admissions, depositions, and other materials as would be admissible in evidence ("summary judgment evidence") on which the movant relies. The movant shall serve the motion at least 20 days before the time fixed for the hearing, and shall also serve at that time copies of any summary judgment evidence on which the movant relies that has not already been filed with the court. The adverse party shall identify, by notice mailed to the movant's attorney at least 5 days prior to the day of the hearing, or delivered no later than 5:00 p.m. 2 business days prior to the day of the hearing, any summary judgment evidence on which the adverse party relies. To the extent such summary judgment evidence has not already been filed with the court, the adverse party shall serve copies on the movant by mailing them at least 5 days prior to the day of the hearing, or by delivering them to the movant's attorney no later than 5:00 p.m. 2 business days prior to the day of hearing. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, admissions, affidavits, and other materials as would be admissible in evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

**(d) Case Not Fully Adjudicated on Motion.** On motion under this rule if judgment is not rendered upon the whole case or for all the relief asked and a trial or the taking of testimony and a final hearing is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall ascertain, if practicable, what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. On the trial or final hearing of the action the facts so specified shall be deemed established, and the trial or final hearing shall be conducted accordingly.

**(e) Form of Affidavits; Further Testimony.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or by further affidavits.

**(f) When Affidavits Are Unavailable.** If it appears from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

**(g) Affidavits Made in Bad Faith.** If it appears to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorneys' fees, and any offending party or attorney may be adjudged guilty of contempt.

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## Florida Case Law

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VERIZZO v. THE BANK OF NEW YORK, 28 So.3d 976 (Fla.App. 2 Dist. 2010)  
David VERIZZO, Appellant, v. The BANK OF NEW YORK, as Successor Trustee  
Under Novastar Mortgage Funding Trust, Series 2006-3, Appellee.  
No. 2D08-4647.  
District Court of Appeal of Florida, Second District.  
March 3, 2010.

Appeal from the Circuit Court, Sarasota County, Robert W. McDonald, Jr., J.

David Verizzo, pro se.  
**Page 977**

Patricia A. Arango of Law Offices of Marshall C. Watson, P.A., Fort Lauderdale, for Appellee.

SILBERMAN, Judge.

David Verizzo, pro se, appeals a final judgment of foreclosure entered after the trial court granted the motion for summary judgment filed by the Bank of New York, as successor trustee under Novastar Mortgage Funding Trust, Series 2006-3 (the Bank). Because the Bank's summary judgment evidence was not timely served and filed and because a genuine issue of material fact remains, we reverse and remand for further proceedings.

The Bank filed a two-count complaint against Verizzo seeking to reestablish a lost promissory note and to foreclose a mortgage on real property. Included in the attachments to the complaint was a copy of the mortgage. The mortgage indicated that the lender was Novastar Mortgage, Inc., a Virginia corporation (Novastar), and that the mortgagee was Mortgage Electronic Registration Systems, Inc. (MERS), acting as a nominee for Novastar. The attachments to the complaint did not include copies of the note or any assignment of the note and mortgage to the Bank. Verizzo filed a motion for enlargement of time to respond to the complaint. The Bank agreed to the entry of an order allowing Verizzo to file a response within 20 days from the date of entry of the order.

On August 5, 2008, before Verizzo had responded to the complaint, the Bank served its motion for summary final judgment of foreclosure. The summary judgment hearing was scheduled for August 29, 2008. On August 18, 2008, the Bank served by mail a notice of filing the original promissory note, the original recorded mortgage, and the original recorded assignment of mortgage. The assignment reflects that MERS assigned the note and mortgage to the Bank of New York. However, the note bears an endorsement, without recourse,

signed by Novastar stating, "Pay to the Order of: JPMorgan Chase Bank, as Trustee."

On the date of the summary judgment hearing, Verizzo filed a memorandum in opposition to the Bank's motion. He argued, among other things, that his response to the complaint was not yet due in accordance with the agreement for enlargement of time, that the Bank did not timely file the documents on which it relied in support of its motion for summary judgment, and that the documents were insufficient to establish that the Bank was the owner and holder of the note and mortgage.

On August 29, 2008, the trial court granted the motion for summary judgment and entered a final judgment of foreclosure. We review the summary judgment by a de novo standard. *Estate of Githens ex rel. Seaman v. Bon Secours-Maria Manor Nursing Care Ctr., Inc.*, 928 So.2d 1272, 1274 (Fla. 2d DCA 2006). "A movant is entitled to summary judgment if the pleadings, depositions, answers to interrogatories, admissions, affidavits, and other materials as would be admissible in evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id.* (quoting Fla.R.Civ.P. 1.510(c)). If a plaintiff files a motion for summary judgment before the defendant answers the complaint, "the plaintiff must conclusively show that the defendant cannot plead a genuine issue of material fact." *E.J. Assocs., Inc. v. John E. & Aliese Price Found., Inc.*, 515 So.2d 763, 764 (Fla. 2d DCA 1987).

Rule 1.510(c) requires that the movant "serve the motion at least 20 days

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before the time fixed for the hearing[] and shall also serve at that time copies of any summary judgment evidence on which the movant relies that has not already been filed with the court." Further, cases have interpreted the rule to require that the movant also file the motion and documents with the court at least twenty days before the hearing on the motion. *See Mack v. Commercial Indus. Park, Inc.*, 541 So.2d 800, 800 (Fla. 4th DCA 1989); *Marlar v. Quincy State Bank*, 463 So.2d 1233, 1233 (Fla. 1st DCA 1985); *Coastal Caribbean Corp. v. Rawlings*, 361 So.2d 719, 721 (Fla. 4th DCA 1978). The promissory note and assignment constituted a portion of the evidence that the Bank relied on in support of its motion for summary judgment, and it is undisputed that the Bank did not attach those documents to the complaint or serve them at least twenty days before the hearing date. In fact, although the Bank's notice of filing bears a certificate of service indicating that the notice was served on August 18, 2008, the notice and the documents were not actually filed with the court until August 29, 2008, the day of the summary judgment hearing.

In addition to the procedural error of the late service and filing of the summary judgment evidence, those documents reflect that at least one genuine issue of material fact exists. The promissory note shows that Novastar endorsed the note to "JPMorgan Chase Bank, as Trustee." Nothing in the record reflects assignment or endorsement of the note by

JPMorgan Chase Bank to the Bank of New York or MERS. Thus, there is a genuine issue of material fact as to whether the Bank of New York owns and holds the note and has standing to foreclose the mortgage. See *Mortgage Electronic Registration Sys., Inc. v. Azize*, 965 So.2d 151, 153 (Fla. 2d DCA 2007) (recognizing that the owner and holder of a note and mortgage has standing to proceed with a mortgage foreclosure action); *Philogene v. ABN Amro Mortgage Group, Inc.*, 948 So.2d 45, 46 (Fla. 4th DCA 2006) (determining that the plaintiff "had standing to bring and maintain a mortgage foreclosure action since it demonstrated that it held the note and mortgage in question").

Therefore, based on the late service and filing of the summary judgment evidence and the existence of a genuine issue of material fact, we reverse the final summary judgment and remand for further proceedings.

Reversed and remanded.

WHATLEY and MORRIS, JJ., Concur.

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Florida Case Law

*AS*  
*Def*

FROST v. REGIONS BANK, 15 So.3d 905 (Fla.App. 4 Dist. 2009)

Sherry A. FROST and Jerry Frost, Appellants, v. REGIONS BANK, successor by merger to Union Planters Bank, N.A., successor by merger with Union Planters Mortgage, Inc., Appellee.

No. 4D08-3168.

District Court of Appeal of Florida, Fourth District.

August 5, 2009.

Appeal from the Circuit Court, Fifteenth Judicial Circuit, Palm Beach County, Jeffrey J. Colbath, J.

Ronald E. D'Anna of McClosky, D'Anna & Dieterle, LLP, Boca Raton, for appellants.

Les C. Shields of Ben-Ezra & Katz, P.A., Fort Lauderdale, for appellee.

GERBER, J.

The circuit court entered a final summary judgment of foreclosure against the defendants below, Sherry and Jerry Frost.

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The Frosts appeal, arguing the plaintiff, Regions Bank, did not negate the Frosts' affirmative defense that the bank did not provide notice of the alleged default and a reasonable opportunity to cure. We agree and reverse.

The bank filed a mortgage foreclosure action against the Frosts. The Frosts' answer asserted, among other defenses, that the bank failed to satisfy the condition precedent of providing notice of the alleged default and a reasonable opportunity to cure. For that defense, the Frosts did not refer to any language from the mortgage. However, the bank attached the mortgage to its complaint, and the mortgage states, in pertinent part:

Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument . . . . The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property.

The bank filed a motion for summary judgment, along with an affidavit of indebtedness, an attorney's fee affidavit, and the original note. The Frosts did not file any papers or affidavits in opposition to the motion. Instead, at the hearing on the motion, the Frosts argued that the bank failed to address their affirmative defenses. The circuit court discussed with the parties some of the defenses, but not the lack of notice and opportunity to cure defense. The circuit court then granted the bank's motion for summary judgment and entered a written final judgment of foreclosure. This appeal followed.

The standard of review of an order granting summary judgment is *de novo*. *Allenby & Assocs., Inc. v. Crown St. Vincent Ltd.*, **8 So.3d 1211, 1213** (Fla. 4th DCA 2009) (citation omitted). When reviewing a ruling on summary judgment, an appellate court must examine the record in the light most favorable to the non-moving party. *Id.* Summary judgment cannot be granted unless the pleadings, depositions, answers to interrogatories, and admissions on file together with affidavits, if any, conclusively show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Id.* (citing Fla.R.Civ.P. 1.510(c)). "[T]he burden is upon the party moving for summary judgment to show conclusively the complete absence of any genuine issue of material fact." *Allenby*, **8 So.3d at 1213** (citation omitted). "Before a plaintiff is entitled to a summary judgment of foreclosure, the plaintiff must either factually refute the alleged affirmative defenses or establish that they are legally insufficient to defeat summary judgment." *Knight Energy Servs., Inc. v. Amoco Oil Co.*, **660 So.2d 786, 788** (Fla. 4th DCA 1995) (citation omitted).

Here, the bank did not factually refute the Frosts' lack of notice and opportunity to cure defense. Nothing in the bank's complaint, motion for summary judgment, or affidavits indicate that the bank gave the Frosts the notice which the mortgage required. The bank also did not establish that the Frosts' lack of notice and opportunity to cure defense was legally insufficient. Although the bank argues that the defense did not refer to any language from the mortgage, the bank cites no authority which requires the defense to contain such a reference.

Because the bank did not meet its burden to refute the Frosts' lack of notice and opportunity to cure defense, the bank is **Page 907** not entitled to final summary judgment of foreclosure. The Frosts' other arguments are without merit and it is not necessary to address them.

*Reversed and remanded.*

GROSS, C.J., and DAMOORGIAN, J., concur.

**Florida Case Law**

MARCHION TERRAZZO, INC. v. ALTMAN, 372 So.2d 512 (Fla.App. 3 Dist. 1979)

MARCHION TERRAZZO, INC., D/B/A SUPER SURFACE SALES, APPELLANT, v. ROBERT S.  
ALTMAN, APPELLEE.

Nos. 78-2042, 78-2047.

District Court of Appeal of Florida, Third District.

June 26, 1979.

Appeal from the Circuit Court for Dade County, Leonard Rivkind,  
J.

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Richard Touby, Miami, for appellant.

Weissenborn & Burr and Lee Weissenborn, Miami, for appellee.

Before PEARSON, HUBBART and SCHWARTZ, JJ.

PEARSON, Judge.

These appeals - an interlocutory appeal and an appeal from a final judgment - present the same question in the same case. The question involved is whether an allowance of a \$500.00 attorney's fee, pursuant to Section 501.210(3), Florida Statutes (1977), **[fn1]** is so inadequate, based upon the record, as to constitute an abuse of discretion. We hold that the trial judge did abuse his discretion and that the order must be reversed under the principles stated in the Code of Professional Responsibility, DR 2-106(B). See also *Folmar v. Davis*, **108 So.2d 772** (Fla. 3d DCA 1959).

The trial judge recognized the appropriateness of an allowance of an attorney's fee for the defendant in this cause where a violation of the Florida Deceptive and Unfair Trade Practices Act was affirmatively pled as a defense to an action to recover the balance due on a construction contract. At the hearing on the defendant's motion for costs and attorney's fee, the judge had before him an uncontroverted affidavit showing at least 25 hours spent on this aspect of the litigation. The parties also presented, at the court's suggestion, affidavits on the value of the services rendered. The plaintiff's affidavit on the value of these services was based solely on the witness's examination of the file of the plaintiff's attorney. The affidavits of the parties on the value of the services varied so greatly in amount (plaintiff \$250; defendant \$3,500) that one of them must be wrong.

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While the setting of an attorney's fee upon affidavits presented is allowed where neither party objects, it is not the proper method for determining this issue of fact. See *Thoni v. Thoni*, **179 So.2d 420** (Fla. 3d DCA 1965). Expert witnesses should present testimony showing the basis for the amount suggested to

the court.

Although we are usually not inclined to tread upon the trial court's discretion in matters involving attorney's fees, nevertheless, we must do so where we find a clear abuse evidenced in the record before us, see *Bryan and Sons Corp. v. Klefstad*, 265 So.2d 382, 385 (Fla. 4th DCA 1972), and this principle applies not only where the fee is found to be excessive, but also where it is found to be inadequate. See, e.g., *Flagala Corporation v. Hamm*, 302 So.2d 195 (Fla. 1st DCA 1974), and *Canal Authority v. Ocala Manufacturing Ice and Packing Company*, 253 So.2d 495 (Fla. 1st DCA 1971).

It is clear in this case that the fee allowed is not in keeping with time expended and with the novelty and importance of the legal work involved. In addition, the proofs submitted do not support the amount awarded.

The order appealed is reversed and the cause remanded for proceedings in accordance with the views herein expressed.

Reversed and remanded.

[fn1] This section is a part of the Florida Deceptive and Unfair Trade Practices Act. It provides in part:

"501.210 Attorney's fees. -

"(1) In any civil litigation resulting from a consumer transaction involving a violation of this part, except as provided in subsection (5), the prevailing party, after judgment in the trial court and exhaustion of all appeals, if any, shall receive his reasonable attorney's fees and costs from the nonprevailing party.

"(2) The attorney for the prevailing party shall submit a sworn affidavit of his time spent on the case and his costs incurred for all the motions, hearings, and appeals to the trial judge who presided over the civil case.

"(3) The trial judge shall award the prevailing party the sum of reasonable costs incurred in the action plus a reasonable legal fee for the hours actually spent on the case as sworn to in an affidavit."

### Florida Case Law

DHONDY v. SCHIMPELER, 528 So.2d 484 (Fla.App. 3 Dist. 1988)

SAROSH S. DHONDY, APPELLANT, v. CHARLES S. SCHIMPELER, CARR SMITH & ASSOCIATES, INC., RAYMOND KAISER ENGINEERS, INC., POST BUCKLEY, SHUH & JERNIGAN, INC., SCHIMPELER-CORRADINO, P.S.C., AND HARRY WEESE & ASSOCIATES, LTD., APPELLEES.

No. 87-1230.

District Court of Appeal of Florida, Third District.

July 12, 1988.

Appeal from the Circuit Court, Dade County, Robert P. Kaye, J. Alan Eichenbaum, Hollywood, for appellant.

Blackwell, Walker, Fascell & Hoehl and James E. Tribble, Miami, for appellees.

Before SCHWARTZ, C.J., and NESBITT and JORGENSON, JJ.

PER CURIAM.

We reverse the final judgment assessing an expert witness fee against Sarosh Dhondy. The trial court erred in not affording **Page 485**

Dhondy a full evidentiary hearing on the reasonableness of the amount of the expert witness fee pursuant to this court's directive in *Dhondy v. Schimpeler*, **498 So.2d 641** (Fla. 3d DCA 1986).

A review of the various hearings held on the question of the expert witness fee of engineer John C. Pistorino reveals that Dhondy was never afforded his due process right to cross-examine Pistorino as to the reasonableness of his fee. See *American Indem. Co. v. Comeau*, **419 So.2d 670** (Fla. 5th DCA 1982); *Posner v. Flink*, **393 So.2d 1140** (Fla. 3d DCA), rev. denied, 402 So.2d 612 (Fla. 1981). Although the dissent maintains that Dhondy was able to question Pistorino sufficiently at the first evidentiary hearing, the transcript of that hearing reveals otherwise. Pistorino furnished no documentation of the amount of time expended. Indeed, he admitted that without his time sheets he could not provide an accurate statement of hours. Significantly, the time sheets were not produced at the first evidentiary hearing. In response to the trial court's request for a breakdown of his hours, Pistorino submitted an abbreviated affidavit in which he stated that he had devoted 74.5 hours to the case at an hourly rate of \$85. The trial court rejected Dhondy's objection to the affidavit's "failure to establish the reasonableness of the fee" and assessed Pistorino's expert witness fee against Dhondy.

This court reversed the award in *Dhondy* and remanded the cause for an evidentiary hearing on the reasonableness of the fee. Pistorino did not appear at the second evidentiary hearing. In lieu of his testimony, his affidavit, merely reciting that a fee of \$6,332.50 had been incurred by his expenditure of 74.5 hours at \$85 per hour, was submitted. Engineer Bertram Warshaw, the only witness to testify at the second evidentiary hearing, stated that his review of the litigation file and the affidavit compelled his conclusion that Pistorino's quoted fee was reasonable. At the close of the hearing, Dhondy again objected to the absence of an opportunity to examine Pistorino as to the reasonableness of his fee. The trial court concluded that the fee was reasonable based upon Pistorino's affidavit and Warshaw's testimony.

We agree with Dhondy that the most recent evidentiary hearing did not comport with this court's directive in *Dhondy*. Neither did the latest hearing fulfill the evidentiary hearing standard established by *American Indem.* and *Posner*. The trial court erred in assessing Pistorino's fee based wholly on Pistorino's conclusory affidavit and Warshaw's testimony. See *In re One 1972 Volvo Vehicle I.D. # 1426363290699 Florida Tag # NUE 848*, **489 So.2d 1240** (Fla. 4th DCA 1986) (error to award attorney's fees to attorney who did not personally testify to services performed); *Soundcrafters, Inc. v. Laird*, **467 So.2d 480** (Fla. 5th DCA 1985) (trial court erred in permitting defendant's sole expert to testify to amount of fee incurred by way of affidavit where plaintiff objected to lack of opportunity to cross-examine expert). Cf. *Insurance Co. of North America v. Julien P. Benjamin Equip. Co.*, **481 So.2d 511** (Fla. 1st DCA 1985) (trial court properly awarded attorney's fees on basis of affidavit by expert witnesses where opposing party did not object to use of affidavits). In this case, Dhondy repeatedly objected to the lack of opportunity for effective cross-examination.

Dhondy's claim that he is also entitled to cross-examine the expert witness regarding the necessity for his services is without merit. Dhondy raised the necessity issue in his prior appeal. In *Dhondy*, we expressly limited the evidentiary hearing to be held by the trial court to the question of the reasonableness of the witness's fee. By that restriction, we implicitly rejected the necessity argument. Our *Dhondy* opinion became the law of the case, thus precluding Dhondy from again presenting the necessity argument to this court. See *Dunham v. Brevard County School Bd.*, **401 So.2d 888** (Fla. 5th DCA 1981); *S/D Enters., Inc. v. Chase Manhattan Bank, N.A.*, **375 So.2d 1109** (Fla. 3d DCA 1979).

Accordingly, we reverse the final judgment and remand for further proceedings consistent with this opinion.

Reversed and remanded.

SCHWARTZ, C.J., and JORGENSON, J., concur.

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NESBITT, Judge (dissenting):

I respectfully dissent. I cannot accept the major premise of the majority which holds that the failure of an expert witness to personally appear and testify at the trial or evidentiary hearing

in support of his fee automatically constitutes a deprivation of due process to the opposing party. Secondly, even accepting the premise, it is not applicable to the present case. We are not dealing here with a case where no evidentiary hearing was held as in *American Indem. Co. v. Comeau*, **419 So.2d 670** (Fla. 5th DCA 1982); *Posner v. Flink*, **393 So.2d 1140** (Fla. 3d DCA), review denied, 402 So.2d 612 (Fla. 1981); nor is this a case where the professional whose fee is at issue did not testify as in *In re One 1972 Volvo Vehicle I.D. # 1426363290699, Florida Tag # NUE 848*, **489 So.2d 1240** (Fla. 4th DCA 1986). At the first hearing, appellant had an opportunity to cross-examine the expert witness. This court affirmed the necessity of his fee. After appeal and upon rehearing, a second expert witness testified that he considered the number of hours spent and the hourly rate of pay to be reasonable. Additionally, the affidavit of Mr. Pistorino was submitted. Based on this evidence, the trial judge could properly decide that the fee was reasonable. See *Lafferty v. Lafferty*, **413 So.2d 170**, 171 (Fla. 2d DCA 1982). Such procedure amply complied with due process requirements.

I would affirm the trial court's decision.

## Florida Case Law

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SOUNDCRAFTERS, INC. v. LAIRD, 467 So.2d 480 (Fla.App. 5 Dist. 1985)  
SOUNDCRAFTERS, INC., ETC., APPELLANT, v. THOMAS CARL LAIRD, APPELLEE.

No. 84-710.

District Court of Appeal of Florida, Fifth District.

April 18, 1985.

Appeal from the Circuit Court, Volusia County, James T. Nelson,  
J.

Kelvin L. Averbuch, Port Orange, for appellant.

Chobee Ebbets and F. Bradley Hassell of Smalbein, Eubank,  
Johnson, Rosier & Bussey, P.A., Daytona Beach, for appellee.

FRANK D. UPCHURCH, Jr., Judge.

Soundcrafters appeals from an order entered pursuant to final judgment awarding it attorney's fees and costs. Soundcrafters contends that the amount awarded for attorney's fees was inadequate.

After a non-jury trial, judgment was entered for Soundcrafters. Attorney's fees and costs were awarded pursuant to the contract involved in the litigation. At a hearing on the matter, counsel for Soundcrafters produced a detailed statement reflecting 42.2 hours of work and based on an hourly rate of \$100 claimed entitlement to \$4,220. A local attorney testified for Soundcrafters and produced an affidavit which reflected that in his opinion, \$5,500 would be a reasonable fee. Counsel for Laird cut this witness' testimony short saying

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that the affidavit was sufficient and there was no need for the witness to further testify.

Counsel for Laird then requested he be allowed five days to file an affidavit from another local attorney. Over the objection of Soundcrafters, the court permitted it. This affidavit was filed with the court and averred that a competent attorney would have spent fifteen hours on the case and charged \$75 per hour. This came to \$1,125, the amount ultimately awarded by the court.

We conclude that the trial court erred in permitting Laird's sole expert to testify by way of affidavit over Soundcrafters' objection. Soundcrafters was deprived of any opportunity to cross-examine the expert as to the basis for his opinion, while Laird had been given an opportunity to cross-examine Soundcrafters' witness. In saying this, we do not imply that the fee awarded by the trial court was inadequate, only that the procedure followed was improper.

We REVERSE and REMAND for reconsideration. See *Dunn v. Sentry*

*Insurance*, **462 So.2d 107** (Fla. 5th DCA 1985).

COBB, C.J., and DAUKSCH, J., concur.

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## Florida Case Law

GERACI v. KOZLOSKI, 377 So.2d 811 (Fla.App. 4 Dist. 1979)

CATHERINE GERACI AND CHARLES GERACI, HER HUSBAND, APPELLANTS, v. ALEX  
KOZLOSKI AND ANNA KOZLOSKI, HIS WIFE, APPELLEES.

No. 78-325.

District Court of Appeal of Florida, Fourth District.

December 12, 1979.

Appeal from the Circuit Court, Broward County, Thomas J.  
Reddick, Jr., J.

**Page 812**

Karen Holmes and James R. Holmes of Zamer & Holmes, Oakland  
Park, for appellants.

Brian L. Kimber of Allsworth, Doumar, Schuler, Padula &  
Laystrom, Fort Lauderdale, for appellees.

DOWNEY, Chief Judge.

This is a plenary appeal from a final judgment granting  
foreclosure of a mortgage on appellants' property. Although three  
issues are posed for our decision, only one requires any extended  
examination.

The thrust of appellants' defense to the foreclosure is that  
appellees were guilty of fraud and misrepresentation in the sale  
of the property involved. Thus, appellants sought rescission of  
the sale and other relief. We have carefully examined the record  
and briefs with reference to this issue and find adequate support  
in the record for the decision of the trial judge denying  
rescission and ordering foreclosure.

The final judgment of foreclosure awarded appellees an  
attorneys fee in the amount of \$15,000. This fee was assessed by  
the court based solely upon the affidavit of a lawyer and over  
the objection of appellants. In an adversary proceeding such as  
this the determination of an attorneys fee for the mortgagee  
based upon affidavits over objection of the mortgagor is  
improper. Evidence should be adduced so that the full range of  
cross examination will be afforded both parties. *Demaso v.*  
*Demaso*, **345 So.2d 391** (Fla. 3rd DCA 1977); *Thoni v. Thoni*, **179 So.2d 420**  
(Fla. 3rd DCA 1965); cf. *Mullane v. Lorenz*, **372 So.2d 168**  
(Fla. 4th DCA 1979).

Appellees filed cross assignments of error directed to two  
orders of the trial court, entered post final judgment on March  
29, 1978, and October 3, 1978, and after the notice of appeal  
from the final judgment was filed. We, of course, cannot review  
judicial acts of the trial court which take place after the  
filing of the notice of appeal, unless those judicial acts are

themselves made the subject of a new notice of appeal or other appropriate proceeding for appellate review. We note in passing that appellees did perfect an interlocutory appeal from the October 3rd, 1978, order, which is presently pending in this court. Thus, for all intents and purposes the judicial acts involved in that order will be considered in that appellate proceeding.

The final judgment appealed from is affirmed in all respects except as to the provision for attorneys fees. The provision of the judgment regarding attorneys fees is reversed and the cause is remanded with directions to hold an evidentiary hearing in order to determine the appropriate amount of said fees.

AFFIRMED IN PART; REVERSED IN PART, with directions.

GLICKSTEIN and HURLEY, JJ., concur.

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT  
IN AND FOR PINELLAS COUNTY, FLORIDA  
CIVIL DIVISION

GMAC MORTGAGE, LLC,

Plaintiff,

v.

Case No.: 07013084CI

DEBBIE VISICARO, et al.,

Defendant(s).

---

TRANSCRIPT OF: PROCEEDINGS  
BEFORE: Honorable Anthony Rondolino  
DATE: April 7, 2010  
TIME: 4:05 p.m.  
PLACE: Pinellas County Courthouse  
Room 317  
545 First Avenue North  
St. Petersburg, Florida  
REPORTED BY: Kimberly Ann Roberts  
Notary Public  
State of Florida at Large

**ORIGINAL**

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## APPEARANCES:

STEVEN CHAPMAN FRASER, ESQUIRE  
Law Offices of David J. Stern, PA  
900 South Pine Island Road  
Suite 400  
Plantation, Florida 33324-3920  
Appeared via telephone for Plaintiff

MICHAEL ALEX WASYLIK, ESQUIRE  
Ricardo, Wasylik & Kaniuk, PL  
Post. Office Box 2245  
Dade City, Florida 33526  
Appeared for Defendant

1           The transcript of proceedings, before the  
2 Honorable Anthony Rondolino, taken on the 7th day  
3 of April, 2010, at the Pinellas County Courthouse,  
4 Room 317, 545 First Avenue North, St. Petersburg,  
5 Florida, beginning at 4:05 p.m., reported by  
6 Kimberly Ann Roberts, Notary Public in and for the  
7 State of Florida at Large.

8                           \* \* \* \* \*

9           THE COURT: Okay. We're here today in  
10 GMAC versus Visicaro. This is a motion for  
11 rehearing regarding the previously drafted  
12 motion for summary judgment. Are we ready to  
13 proceed?

14           MR. WASYLIK: Yes, Your Honor.

15           MR. FRASER: Yes, sir.

16           THE COURT: Okay.

17           MR. WASYLIK: Your Honor, my name is  
18 Michael Wasylik. I'm here for Defendants  
19 Debbie and Frank Visicaro. We are here, as  
20 the Court has already noted, on the motion for  
21 rehearing of the previously granted motion for  
22 summary judgment on the plaintiff's behalf.

23           We have submitted a fairly detailed  
24 brief on the reasons we believe that the  
25 motion was -- should not have been granted in

1 the initial hearing.

2 And in support of that, Your Honor, we  
3 have cited numerous cases mostly from the 2nd  
4 DCA which demonstrate the fact that there was  
5 no admissible evidence submitted by the  
6 plaintiff in support of the motion.

7 THE COURT: And I've reviewed your  
8 submissions and read numerous cases, including  
9 the ones that you've submitted; in addition,  
10 the Court's reviewed other cases.

11 What's the plaintiff's position  
12 regarding the motion at this time?

13 MR. FRASER: I object, and do not abuse  
14 your discretion by denying their motion for  
15 rehearing. You've considered all the evidence  
16 before you when you entered the summary  
17 judgment back in January of 2010.

18 The opposing party then could not offer  
19 proof to support their position on any genuine  
20 and material facts. Right now, Your Honor,  
21 there are no convincing exigent, you know,  
22 circumstances being offered up at the time.

23 THE COURT: Did you not read the  
24 motion? It sounds like you're making a very  
25 generalized argument, and this is an, as I

1 viewed it, extremely targeted motion which  
2 basically elaborates on the assertions that  
3 were raised at the time of the motion for  
4 summary judgment.

5 As I recall that, counsel appeared on  
6 behalf of his clients. I think it was by  
7 phone --

8 MR. WASYLIK: That's correct, Your  
9 Honor.

10 THE COURT: -- and made arguments that  
11 the Court really gave short shrift to it, did  
12 not review the cases at that time.

13 Since that time, for a number of  
14 reasons, the Court has delved further into it  
15 prior to receiving the motion for rehearing,  
16 which the Court believes to be very well  
17 drafted, and independent of the motion have  
18 researched the issues that are raised in the  
19 motion.

20 I've had several events which have  
21 occurred in cases which cause the Court to  
22 have great concern about the validity of the  
23 filings in our mortgage foreclosure cases, and  
24 that precipitated my reevaluation of the  
25 evidentiary considerations.

1 I'll give you an example of that. I  
2 have one case that was called up for summary  
3 judgment hearing, and I thought it was going  
4 to be the typical granted situation, and then  
5 a lawyer showed up for the defendant homeowner.

6 I was beginning to recite to the lawyer  
7 what I had typically recited, that there was  
8 no affidavits in opposition. And the lawyer  
9 said, "Well, I thought you might be interested  
10 in this," and handed me some documents which  
11 were out of another file in our circuit, and  
12 as it turned out, it was the same note and  
13 mortgage that was in a separate and  
14 independent file.

15 There was a different plaintiff pursuing  
16 a foreclosure proceeding on the same note and  
17 mortgage as the one that was being proceeded  
18 on. Both of the cases contained allegations  
19 in the original complaints that the separate  
20 plaintiffs were the owners and holders of the  
21 note. Both of them had a count to reestablish,  
22 and both of them had gone so far as to have  
23 affidavits filed in support of a summary  
24 judgment whereby an individual represented to  
25 the Court in the affidavit that the separate

1 plaintiffs had possessed the note and had lost  
2 the note while it was in their possession.

3 Interestingly, both affidavits, although  
4 they were different plaintiffs, purported the  
5 same facts and they were executed by the same  
6 individual in alleged capacity as a director  
7 of two separate corporations, one of which was  
8 ultimately found to me to be an assignee of  
9 the original note.

10 So that really increased my interest in  
11 this subject matter, because I really honestly  
12 -- I don't have any confidence that any of the  
13 documents the Court's receiving on these mass  
14 foreclosures are valid.

15 But be that as it may, I'm still  
16 granting summary judgments unless it appears  
17 on the face of the submissions that there is a  
18 problem. And I've had a discussion with some  
19 of the other judges about whether the Court  
20 can grant a summary judgment based upon  
21 inadmissible evidence.

22 And it has been argued to me that the  
23 evidence not objected to can be received by a  
24 Court in trial, and so it certainly could be  
25 considered by a Court at a summary judgment

1 hearing.

2 Now, that's about all that's keeping me  
3 from denying summary judgment hearings even an  
4 -- motions in unopposed mortgage foreclosure  
5 cases. So I've said enough.

6 I'll go back to the defendant and say,  
7 would you like to address, say, the  
8 proposition that the affidavit, which was  
9 objected to, is inadmissible; that is, it's  
10 not offered properly to support the facts upon  
11 which it's asserted?

12 There's what seems to be the equivalent  
13 of a business record establishment in the  
14 affidavit, but there's no business record.

15 So do you have any specific arguments  
16 that contradict or shed a different light on  
17 the numerous 2nd District cases which have  
18 been cited by the movant?

19 MR. WASYLIK: Your Honor, I believe the  
20 Court said "defendant." I think you meant the  
21 plaintiff.

22 THE COURT: The plaintiff, yes.

23 MR. FRASER: Yes, Judge. You know,  
24 Courts can take hearsay evidence at the  
25 summary judgment proceeding. I believe there

1 is a case -- I don't have it with me --

2 THE COURT: Yes, what is that, Courts  
3 can take it?

4 MR. FRASER: Yeah. Sure. My  
5 understanding is that a Court can at the  
6 summary judgment level accept hearsay.

7 THE COURT: Over objection? I --

8 MR. FRASER: I do have a case that  
9 stands for the proposition, not on me, that  
10 Courts can take hearsay evidence at a summary  
11 judgment level.

12 THE COURT: Okay.

13 MR. FRASER: Whether or not over  
14 objection, if it's objected to, I --

15 THE COURT: Over objection?

16 MR. FRASER: -- I have no case to either  
17 refute or support that.

18 THE COURT: You're going to have to  
19 speak up. I know that when you're getting  
20 pummeled, it's hard to talk loudly, so  
21 perhaps --

22 MR. FRASER: Judge, my position is that  
23 the Court -- you have the discretion to accept  
24 hearsay evidence at summary judgment hearing.  
25 There is -- today before you, my argument --

1 and I do not have the motion in front of  
2 me --

3 THE COURT: So let me get this right.  
4 We're here for the hearing, it was adequately  
5 scheduled, you had plenty of time, there are  
6 numerous case citations in his motion. You  
7 don't have it in front of you?

8 MR. FRASER: No, I do not, Judge.

9 THE COURT: Okay. And you're purporting  
10 to base your opposition on a case that's out  
11 there that you don't have with you that I  
12 should rely on.

13 MR. FRASER: But --

14 THE COURT: Yes, sir.

15 MR. FRASER: -- my argument today is you  
16 have the discretion under Willis v. L.W. Foster  
17 Sportswear Company, 352 So.2d 922, Florida  
18 Appellate 2nd District -- it's a 1971 case --  
19 whereby you have the discretion to deny any  
20 motion for rehearing because there must be  
21 convincing exigent circumstances before  
22 accepting any new affidavits being offered up  
23 for the first time.

24 THE COURT: Well, how about the idea  
25 that I was wrong, and instead of having an

1 appeal where I'd be overturned and we had  
2 wasted all of that time, that I would rule  
3 correctly?

4 You know, I guess you're telling me I've  
5 got the discretion to be -- continually be  
6 wrong. What we're trying to address here is  
7 the fact that not that they failed to bring  
8 something up or that they've sat on their  
9 hands or anything. They attended the hearing,  
10 they pointed these matters out to the Court,  
11 the Court ruled unfavorably, they're giving me  
12 another chance before they appeal.

13 Now, to point out the case law -- and  
14 I'm sort of thinking, well, gee, I'm not  
15 hearing anything upon which I could base  
16 admitting the evidence that was the foundation  
17 for the summary judgment over their objection  
18 other than your assertion that there is some  
19 unnamed, unknown, uncited case out there which  
20 supports the propositions. I've got a little  
21 trouble with that.

22 I mean, do you need a minute or two to  
23 go scramble around and get that case for me?

24 MR. FRASER: No, Judge.

25 THE COURT: Well, I really want you to

1 send that to me. So I'm going to request that  
2 you send me the cases upon which you're  
3 asserting that I'm well within my reasonable  
4 exercise of my discretion to ignore all of  
5 these 2nd District Court cases, his objection,  
6 and allow hearsay as the only basis to support  
7 the summary judgment.

8 MR. FRASER: That -- that -- you know,  
9 that was not my argument.

10 My argument is that at the summary  
11 judgment level you can consider hearsay  
12 evidence.

13 MR. WASYLIK: Your Honor, may I  
14 respond --

15 MR. FRASER: I'm not saying -- I'm not  
16 -- my argument is not, no, Judge, do not  
17 follow everything that -- my argument is  
18 this: You ruled correctly at the summary  
19 judgment hearing. You can accept hearsay  
20 evidence at the summary judgment hearing.

21 MR. WASYLIK: I apologize.

22 THE COURT: No. Go ahead.

23 MR. FRASER: That it's within your  
24 discretion to deny their motion for rehearing  
25 because at the time that the summary judgment

1 was entered into it was entered into --

2 THE COURT: Okay. Well, let me just --

3 MR. FRASER: -- correctly. That's our  
4 position.

5 THE COURT: -- okay. Well, you know,  
6 I'm not really trying to be argumentative.  
7 I'm trying to --

8 MR. FRASER: Sure.

9 THE COURT: -- you know, I'm trying to  
10 rule correctly, and I'm in the hot seat  
11 because I'm the one who gets appealed and  
12 reversed on the thing if I just listen to you  
13 and I don't have a -- you know, a founded  
14 basis for it.

15 What I did was, I just put "summary  
16 judgment and hearsay" in Westlaw. The very  
17 first case that comes up is a January 12 case  
18 out of the 1st District. And it said,  
19 "Unsworn medical record review report attached  
20 to records custodian affidavit presented by  
21 insured in opposition to the uninsured  
22 motorist's motion for summary judgment motion  
23 was hearsay and could not be considered when  
24 ruling on the summary judgment motion."

25 The next case, Mitchell versus

1 Westfield, "Objected on the ground the  
2 affidavit and attached schedule was hearsay,  
3 insufficient to establish damages on summary  
4 judgment. We agree."

5 Lloyds Underwriters, "Hearsay statements  
6 on the matter would not be admissible into  
7 evidence and could not be relied upon to create  
8 an issue of fact of summary judgment."

9 Every single case that I'm going through  
10 here says can't do it. That's totally  
11 consistent with all of the cases that I've  
12 reviewed.

13 So I'm just begging you to send me some  
14 cases that would help me because I've got --  
15 well, in one morning, I've got 50 summary  
16 judgments in mortgage foreclosures.

17 I'm looking down at these affidavits,  
18 and I'm telling you what's going on in the  
19 judge's mind. I'm looking at them and saying,  
20 nobody has objected to this, but maybe I  
21 shouldn't be granting this summary judgment.

22 So you might help me out if you could  
23 give me a case which stands for the  
24 proposition that maybe simply if it's not  
25 objected to, I can consider it. I know that's

1 not the case here. But, I mean, that would at  
2 least be something, because I haven't even  
3 found any cases which support the proposition  
4 I can rely on hearsay even if it's not  
5 objected to.

6 MR. FRASER: The affidavit in the  
7 instant case is distinguishable than the  
8 affidavit in the first case in which you cited  
9 in Westlaw. I think that -- ours is a signed  
10 affidavit.

11 THE COURT: Yeah, but the affidavit does  
12 not constitute a basis upon which the personal  
13 knowledge of the facts contained therein can  
14 be determined. It's a business record  
15 qualification affidavit is what it is.

16 MR. FRASER: Paragraph Two of our  
17 affidavit says that based upon their personal  
18 knowledge, they're authorized to make certain  
19 statements therein.

20 THE COURT: You know what I'd really  
21 like to see? I'd like to see in one of these  
22 cases where a defense lawyer cross-examines,  
23 takes a deposition of these people, and we can  
24 see whether they ought be charged with perjury  
25 for all of these affidavits.

1 I would just love to see that, because  
2 I'm going to tell you the truth, I had a  
3 lawyer on the phone from Miami telling me that  
4 they've got somebody in their office who is  
5 authorized by reason of a power of attorney  
6 filed as a public record. So that was  
7 supposed to be the support that they have for  
8 these personal knowledge affidavits.

9 MR. WASYLIK: Sir, that was in this  
10 case.

11 THE COURT: Okay.

12 MR. WASYLIK: That was this affidavit.  
13 I apologize for interrupting. I just wanted  
14 -- I remember the Court coming to that  
15 conclusion at the time.

16 THE COURT: Okay.

17 MR. WASYLIK: If I may briefly, I think  
18 I may assist the Court in very briefly  
19 directing the Court to Page Seven of our  
20 brief, which addresses the issue of hearsay.

21 Both cases that we have cited on Page  
22 Seven, which is the CSX Transport case -- was  
23 actually cited on Page Six, but quoted on Page  
24 Seven. The last line of that, Your Honor,  
25 says, "Thus, the affidavit is based on hearsay

1 and is not sufficient to support summary  
2 judgment."

3 The next case, Your Honor, cited Zoda v.  
4 Hedden --

5 THE COURT: I've got Zoda in my hand.

6 MR. WASYLIK: -- and the last line we  
7 cite of Zoda v. Hedden says, "His affidavit  
8 was based on hearsay and was incompetent to  
9 support summary judgment."

10 Your Honor, I believe that the Rule  
11 1.510(e), which sets out the requirements for  
12 affidavits, requires that the affidavit be  
13 made on personal knowledge. Hearsay, of  
14 course, is not personal knowledge. Business  
15 records, unless they meet the hearsay  
16 exception, do not qualify.

17 And I think, Your Honor, that  
18 conclusively addresses the issue of whether or  
19 not affidavits that are hearsay can be used to  
20 support for summary judgment.

21 Your Honor, the point about whether or  
22 not it's objected to, I think, is a point that  
23 while not alive in this issue today is  
24 something that probably the Court should --  
25 the Court would be well to continue to

1 consider.

2           However, with respect to hearsay in  
3 affidavits when that hearsay is objected to, I  
4 think, Your Honor, that both the rule  
5 expressly prohibits it and the case law  
6 interpreting that rule also expressly prohibits  
7 it.

8           And I think the reason for that, Your  
9 Honor, the basis for that will be more clear  
10 when the Court considers the last case that we  
11 cited in our brief, which is the Bifulco case,  
12 Bifulco v. State Farm, 693 So.2d 707.

13           And, Your Honor, that's a 4th DCA case  
14 from 1997. But I think it illustrates the  
15 point pretty well. And the reason, Your  
16 Honor, that the Courts are to -- this is my  
17 word -- rigidly apply the requirements of  
18 1.510(e) regarding evidence -- summary  
19 judgment evidence is because granting of  
20 summary judgment cuts off a party's right to  
21 trial, which the Bifulco court observes is a  
22 constitutional right.

23           The standard, Your Honor, in granting  
24 summary judgment, again, cited in the first  
25 -- the opening page of our brief -- I'll flip

1 to that -- but the standard, Your Honor, I  
2 think the Court is well familiar with, is that  
3 the facts, the evidence before the Court on  
4 summary judgment, have to be shown beyond the  
5 slightest doubt, beyond the slightest doubt.

6 And that's Mivan or Mivan, M-i-v-a-n,  
7 Florida versus Metric Constructors, Inc., 857  
8 So.2d 901, and that's a 5th DCA case from  
9 2003, talking about the slightest doubt. Your  
10 Honor, where there is the slightest doubt of  
11 -- that's a higher burden than a criminal  
12 defendant enjoys.

13 A non-movant in summary judgment enjoys  
14 an actual higher burden. A slightest doubt  
15 is, of course, a stricter standard than a more  
16 reasonable -- than a reasonable doubt. And so  
17 like a criminal defendant who comes clothed in  
18 a presumption of innocence to the Court, a  
19 non-movant in a summary judgment proceeding  
20 comes to the Court clothed in the presumption  
21 that the judgment should not be entered  
22 against them, that they will get their right  
23 to trial, you know, barring the conclusive  
24 proof by the plaintiff in using the admissible  
25 evidence described by the rule.

1           So when put in the context of the  
2 constitutional right of the parties to have  
3 their trial on any facts that could decide  
4 their case, I think that that would -- that  
5 pretty thoroughly rebuts the discretion  
6 argument being lobbied by the plaintiff in  
7 this case.

8           THE COURT: Well, I have in my hand when  
9 you started your argument Zoda and CSX. Both  
10 of those cases deal with an insufficiency of  
11 an affidavit based upon examination of  
12 business records or the contents of records,  
13 and they both are 2nd District cases which  
14 seem to be very closely on point with the case  
15 that we have today.

16           I'm also enlightened by Jones versus  
17 Florida Workers' Compensation, which is a 2001  
18 2nd District case that finds that the  
19 affidavit was insufficient in that it had  
20 allegations that all the assertions and  
21 allegations in the complaint are true, that  
22 kind of an affidavit is insufficient.

23           I also reviewed Hurricane Boats versus  
24 Certified Industrial Fabricators and found  
25 that affidavit to be insufficient when it

1 related to the allegations in the complaint  
2 being true.

3 I'll note that there are -- there is a  
4 significant difference in the foundation a  
5 witness has for establishment of business  
6 records and the ability of that witness to  
7 testify about those facts. Authentication  
8 of a record is different than admissibility.

9 And I'll note the case of Dollar  
10 versus State of Florida, which is 685 So.2d  
11 901. Similar concerns have been expressed by  
12 the Courts with regard to the authentication  
13 of official records in Monroe County versus  
14 McCormick at 692 So.2d 214 and other cases.

15 In regard to the inadmissibility and  
16 hearsay, this Court has determined that the  
17 1st, 2nd, 3rd and 4th and 5th Districts have  
18 all recited in cases the fact that inadmissible  
19 hearsay cannot be considered at a summary  
20 judgment and applies this rule, not only to the  
21 affidavits of the plaintiff in support of -- or  
22 a movant in support of a summary judgment, but  
23 also affidavits in opposition.

24 The 5th DCA in Mullan versus the  
25 Bishop of the Diocese at 540 So.2d 174

1 reversed a summary judgment based upon  
2 hearsay. The 1st District in Rose versus  
3 ADT, 989 So.2d 1244, reversed a summary  
4 judgment. And the 1st District in Pawlik,  
5 P-a-w-l-i-k, at 528 So.2d 965 had some  
6 observations about the inadmissible hearsay,  
7 the 3rd District in Capello, 625 So.2d 474.

8 And to perhaps address the concerns  
9 that I brought up about the non-objection, I  
10 have found one case which appears to stand for  
11 the proposition that even under circumstances  
12 where the -- there was an unopposed affidavit,  
13 the appellate court reversed lower court. And  
14 this was in a forfeiture case, 2nd District  
15 Court of Appeal. This is the In Re: Forfeiture  
16 of a 1980 Ford Pickup, 779 So.2d 450. There  
17 was a summary judgment proceeding.

18 The detective's affidavit was  
19 inadmissible hearsay and, thus, was not  
20 competent to support the summary judgment of  
21 forfeiture in the case, even though it's noted  
22 in the opinion that "We reversed the  
23 forfeiture because it was based upon a summary  
24 judgment that the trial court had entered in  
25 reliance on unopposed but insufficient

### Florida Case Law

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ZODA v. HEDDEN, 596 So.2d 1225 (Fla.App. 2 Dist. 1992)

HENRY GEORGE ZODA, A/K/A HENRY G. ZODA, HANK G. ZODA; JOHN BOSWELL, INC., R.A. HARRELL DISTRIBUTORS, INC., ST. LUKE'S CATARACT AND INTRAOCULAR LENS INSTITUTE, LARRY GOLDSTEIN; CONSOLIDATED FOODS CORPORATION, DIVISION OF MONARCH INSTITUTIONAL, APPELLANTS, v. SHARON HEDDEN, A/K/A SHARON LOUIS ZODA, A/K/A SHARON LOUIS HEDDEN, A/K/A SHARON LOUIS (ZODA) PETERS, A/K/A SHARON ZODA PETERS AND R. DONALD PETERS, APPELLEES.

No. 91-02410.

District Court of Appeal of Florida, Second District.

April 10, 1992.

Appeal from the Circuit Court, Pinellas County, Gerald J. O'Brien, J.

Page 1226

Henry George Zoda, pro se.

Sharon Lois Peters and R. Donald Peters, pro se.

THREADGILL, Judge.


Henry Zoda challenges the entry of summary judgment in favor of his ex-wife, Sharon Zoda Peters, and her present husband, R. Donald Peters. The summary judgment was entered on the Peters' complaint to quiet title in certain parcels of land which had been the subjects of a property settlement agreement entered into at the time of the Zodas' divorce. We find that there was insufficient evidence to support the summary judgments and reverse.

In support of their motion for summary judgment, the Peters relied upon the affidavits of Sharon Zoda Peters, R. Donald Peters, and the Peters' trial counsel, Walter E. Smith. Mr. Smith's affidavit purported to establish the alienation of a parcel of land which alienation, under the terms of the settlement agreement, would operate to vest the wife's remainder interest in the parcels involved in this action. As such, the statements contained in Mr. Smith's affidavit were essential in resolving the factual issues created by the pleadings. In his affidavit, Mr. Smith stated that he had "examined the Public Records of Pinellas County, Florida and has personal knowledge of the facts set forth herein." The affidavit then recounted certain property transactions reflected in settlements, deeds, and judgments contained in the public records of Pinellas County. The affidavit also set forth conclusions of law.

Florida Rule of Civil Procedure 1.510(e) provides in pertinent part that

[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

Mr. Smith did not state the facts upon which his personal knowledge of the transactions was based except for his review of the public records. Also, there were no certified copies of the public records attached to Mr. Smith's affidavit. Authentication of evidence is a condition precedent to its admissibility. § 90,901, Fla. Stat. (1989). Since Mr. Smith is not a custodian of the public records, he is unable to authenticate the documents referred to in his affidavit. Therefore, Mr. Smith is not competent to testify to the matters contained in his affidavit as is required by rule 1.510(e). Moreover, since no copies of the public records were presented to satisfy the hearsay exceptions of sections 90.803(8) and (14), Florida Statutes (1989), his affidavit was based upon hearsay and was incompetent to support summary judgment. See *Topping v. Hotel George V*, 268 So.2d 388 (Fla. 2d DCA 1972) (attorney's affidavit that he was familiar with his client's records and that the records reflected certain information constituted hearsay and could not support summary judgment); see also *Crosby v. Paxson Elec. Co.*, 534 So.2d 787 (Fla. 1st DCA 1988); *Thompson v. Citizens Nat. Bank of Leesburg, Florida*, 433 So.2d 32 (Fla. 5th DCA 1983). Furthermore, the conclusions of law stated in the affidavit did not satisfy the Peters' burden. See *Seinfeld v. Commercial Bank & Trust Co.*, 405 So.2d 1039, 1041 (Fla. 3d DCA 1981). Since the Peters failed to establish the nonexistence of material issues by competent evidence, Mr. Zoda was not required to come forward with evidence in opposition to the motion for summary judgment. *Greer v. Workman*, 203 So.2d 665, 667 (Fla. 4th DCA 1967).



We have examined Mr. Zoda's other arguments on appeal and find them to be without merit.

We therefore reverse the final summary judgment quieting title without prejudice to renew the motion upon the presentation to the trial court of competent evidence in support thereof.

Reversed and remanded.

FRANK, A.C.J., and HALL, J., concur.

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## Florida Case Law

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ENTERPRISE LEASING CO. v. DEMARTINO, 15 So.3d 711 (Fla.App. 2 Dist. 2009)

ENTERPRISE LEASING COMPANY, Appellant, v. John DEMARTINO; Judy Demartino; Lisa Simat, as Personal Representative of the Estate of Gary Simat; and Windsor Group, Appellees.

No. 2D08-4433.

District Court of Appeal of Florida, Second District.

July 10, 2009.

Rehearing Denied September 4, 2009.

Appeal from the Circuit Court, Collier County, Hugh D. Hayes, J.  
**Page 712**

Michael A. Tonelli of Barr, Murman & Tonelli, Tampa, for Appellant.

K. Jack Breiden of Breiden & Associates, Naples, for Appellees John and Judy Demartino.

Clark W. Berry of Vernis & Bowling of Southwest Florida, P.A., Fort Myers, for Appellee Lisa Simat.

No appearance for Appellee Windsor Group.

VILLANTI, Judge.

Enterprise Leasing Company appeals from the final summary judgment entered in favor of John and Judy Demartino, which judgment finally adjudicated the reformation count of the Demartinos' complaint and completely disposed of the case as to Windsor Group. Because the evidence submitted by the Demartinos in support of their claim of mutual mistake was incompetent, the trial court erred in relying on that evidence to enter the final summary judgment. Therefore, we reverse and remand for further proceedings.

The facts here are fairly straightforward. The Demartinos were involved in an auto accident with Gary Simat on June 29, 1996. Gary was driving a vehicle owned by Enterprise and leased by his wife, Lisa. At the time, Gary and Lisa carried automobile liability insurance with Windsor Group.

In February 1998, the Demartinos wanted to settle only Judy's claims under the Windsor Group policy issued to Gary and Lisa. In exchange for payment of \$25,000, both Demartinos signed a release that specifically provided that they would

release, and forever discharge Gary Simat, Lisa M.

Simat, American Deposit Insurance Company, and Windsor Group and his, her, their, and its successors and assigns, and each of their heirs, executors, and administrators, and all other persons, firms, and corporations, of and from any and all claims, demands, rights, and causes of action, of whatsoever kind or nature, arising from or by reason of any and all known and unknown, foreseen and unforeseen bodily

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and personal injuries, loss and damage to property, and the consequences thereof, resulting, and to result, from an automobile accident which happened on or about the 29 day of June, 1996 at or near SR 93 and CR 896, Naples, FL.

(Emphasis added.) The release contains language stating that the personal injury claims of John Demartino and his consortium claim based on Judy's injuries are not released. The names "Gary Simat, Lisa M. Simat, American Deposit Insurance Company, and Windsor Group" were typed on the form. The remaining language concerning releasees was preprinted.

Despite this release, on November 10, 1999, the Demartinos sued Gary and Enterprise for the personal injuries of both John and Judy Demartino. [fn1] In response to Judy's claims, Enterprise raised the affirmative defense of release, contending that the 1998 release of Judy's claims was a general release, that Enterprise was an intended beneficiary of that release, and that Judy's claims were therefore barred. On November 20, 2001, the trial court granted summary judgment in favor of Enterprise as to Judy's claims on the basis of the 1998 release.

In response to this ruling, the Demartinos sought and obtained leave of court to file an amended complaint. In the amended complaint, the Demartinos added a count for reformation of the 1998 release, naming only Windsor Group as a defendant to that count. The reformation count alleged that the 1998 release was never intended to release any entity other than Windsor Group, that the general release language was included by mutual mistake, and that the court should permit the 1998 release to be reformed to exclude the release of any entities other than Windsor Group.

The Demartinos subsequently moved for summary judgment on the reformation count. In support of their motion, they filed affidavits stating that when they signed the release in 1998, they intended to release only Windsor Group so as to obtain the insurance proceeds under the policy issued to Gary and Lisa. They alleged that they never intended to release any other party, and they specifically did not intend to release Enterprise. The Demartinos also filed the affidavit of their former attorney, who attested to the same intent on the part of the Demartinos.

In an effort to establish Windsor Group's intent in entering into the 1998 release, the Demartinos took the deposition of Mary Anne Ragoza-Miller, who was identified by Infinity Insurance Company, the successor to Windsor Group, as the person with the most knowledge about the 1998 release. During her deposition, Ragoza-Miller testified that she had never

worked for Windsor Group and that she was not employed by either Infinity or Windsor Group when the 1998 release was negotiated and signed. She testified that she was identified as the person with the most knowledge of the 1998 release only because she was the adjuster currently assigned to the claim. While she testified that she had no personal knowledge that would contradict the Demartinos' allegations in their affidavits, her testimony also clearly established that she had no personal knowledge of the intent or motivations of Windsor Group when it entered into the 1998 release.

After considering this evidence and hearing argument, the trial court granted summary judgment in favor of the Demartinos,  
**Page 714**

reforming the 1998 release to release only Windsor Group. Enterprise now appeals this decision, contending that the trial court erred in finding that the Demartinos had established the mutual mistake necessary to support the reformation count as a matter of law.

As an initial matter, we note that Enterprise has standing to challenge the entry of this final summary judgment. This court has held that an intended third-party beneficiary of a release has standing to enforce that release. See *Olsen v. O'Connell*, **466 So.2d 352, 354** (Fla. 2d DCA 1985). This holding arises out of general principles of contract law, which provide that an intended third-party beneficiary of a contract may sue to enforce that contract. See, e.g., *Marianna Lime Prods. Co v. McKay*, **109 Fla. 275, 147 So. 264, 265** (1933); *M-I LLC v. Util. Directional Drilling, Inc.*, **872 So.2d 403, 404-05** (Fla. 3d DCA 2004). Further, this court and others have held that when a release clearly states that it releases "all other persons and/or corporations who are or may be liable" for the subject damages, the other persons and corporations may be third-party beneficiaries of that release and thus have standing to enforce the release. See, e.g., *Hester v. Gatlin*, **332 So.2d 660, 662** (Fla. 2d DCA 1976); *Quarterman v. City of Jacksonville*, **347 So.2d 1036, 1038** n. 2 (Fla. 1st DCA 1977); *Dean v. Bennett M. Lifter, Inc.*, **336 So.2d 393, 395** (Fla. 3d DCA 1976).

Here, as noted above, the 1998 release signed by the Demartinos clearly released not only Gary and Lisa, Windsor Group, and another specifically named insurer, but also "all other persons, firms, and corporations, of and from any and all claims, demands, rights, and causes of action . . . arising from . . . an automobile accident which happened on or about the 29 day of June, 1996 at or near SR 93 and CR 896, Naples, FL." When the 1998 release was signed, the Demartinos knew that Enterprise owned the vehicle driven by Gary, and they signed the 1998 release containing this broad release language despite this knowledge. On these facts, Enterprise has at least a colorable claim to being a third-party beneficiary of the 1998 release, and it therefore has standing to enforce that release.

Turning to the merits of the appeal, we must reverse the summary judgment in favor of the Demartinos because the record evidence failed to establish a mutual mistake. "A movant is entitled to summary judgment 'if the pleadings, depositions, answers to interrogatories, admissions, affidavits, and other

materials as would be admissible in evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Estate of Githens ex rel. Seaman v. Bon Secours-Maria Manor Nursing Care Ctr., Inc.*, 928 So.2d 1272, 1274 (Fla. 2d DCA 2006) (quoting Fla.R.Civ.P. 1.510(c)). The "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Fla.R.Civ.P. 1.510(e) (emphasis added). When a supporting affidavit does not comply with these requirements, it is legally insufficient to support the entry of summary judgment in favor of the moving party. See, e.g., *W. Edge II v. Kunderas*, 910 So.2d 953, 954 (Fla. 2d DCA 2005) (noting that affidavit in support of action for reformation based on mutual mistake was incompetent when it contained allegations concerning matters about which the affiant could not have personal knowledge); *In re Forfeiture of 1998 Ford Pickup, Identification No. 1FTZX1767WNA34547*, 779 So.2d 450, 451 (Fla. 2d DCA 2000) (holding that when a supporting affidavit affirmatively showed on its face that the affiant was not competent to testify to the matters included in the affidavit, the trial court erred by relying on that affidavit when granting summary judgment); *Zoda v. Hedden*, 596 So.2d 1225, 1226 (Fla. 2d DCA 1992) (holding that when the affidavit in support of the moving party's motion for summary judgment showed on its face that the affiant was incompetent to testify, the moving party had not met its burden and the burden did not shift to the opposing party to come forward with countervailing evidence).

In this case, the Demartinos alleged that they were entitled to summary judgment on the reformation count because the 1998 release was the product of a mutual mistake. "A mistake is mutual when the parties agree to one thing and then, due to either a scrivener's error or inadvertence, express something different in the written instrument." *Providence Square Ass'n v. Biancardi*, 507 So.2d 1366, 1372 (Fla. 1987); see also *DR Lakes Inc. v. Brandsmart U.S.A. of W. Palm Beach*, 819 So.2d 971, 974 (Fla. 4th DCA 2002) ("When an instrument is drawn and executed which is intended to carry into execution an agreement but which by mistake of the draftsman violates or does not fulfill that intention, equity will reform the instrument so as to conform to the intent of the parties."); cf. *Leo v. MacLeod*, 752 So.2d 627, 629 (Fla. 2d DCA 1999) (holding that a contract is voidable when there is a mistake by both parties when the contract is entered concerning a basic assumption upon which the contract was made). Thus, to prevail on their reformation count, the Demartinos were required to show that both they and Windsor Group intended to release only Windsor Group and that the release language stating otherwise was the result of inadvertence or a scrivener's error.

Here, the affidavits signed by the Demartinos and their counsel establish their intent to release only Windsor Group. However, no competent evidence established Windsor Group's intent.

Instead, the only evidence on that issue – the deposition testimony of Mary Anne Ragoza-Miller – is incompetent on its face. Ragoza-Miller testified in her deposition that she never worked for Windsor Group and that she had been employed by Infinity – Windsor Group's successor – for only one year. She was not the adjuster who handled the Demartinos' claim when the 1998 release was signed, and she had no file or documents related to their claim. She testified that she was designated as the person with the most knowledge of the Demartinos' claim only because "anybody else who may have handled it before is no longer with the company." Ragoza-Miller did testify that she had no personal knowledge that would contradict anything in the Demartinos' affidavits. However, it is readily apparent that she had no personal knowledge of Windsor Group's intent in negotiating and signing the 1998 release because she did not become involved in the case until nine years after that release was signed.

In light of Ragoza-Miller's lack of personal knowledge relating to Windsor Group's intent when the 1998 release was signed, her deposition testimony, like the affidavit testimony at issue in *West Edge II, In re Forfeiture of 1998 Ford Pickup*, and *Zoda*, is not competent evidence of Windsor Group's intent when it drafted and signed the 1998 release. Ragoza-Miller's testimony is thus incompetent to support the Demartinos' claim of mutual mistake. Because the Demartinos presented no other competent evidence to establish Windsor Group's intent, the trial court erred in entering summary judgment in their favor on their reformation count.

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In this appeal, Enterprise argues that this court should not only reverse the summary judgment in favor of the Demartinos, but also should order the trial court to enter summary judgment in its favor on remand. This we cannot do. The supreme court has held that when a release has both written and preprinted provisions concerning the intended releasees, the intent of the parties as to who is to be released is a question of fact.

*See Hurt v. Leatherby Ins. Co.*,

**380 So.2d 432, 434** (Fla. 1980) (holding that because the pre-printed language routinely included in releases was often "boilerplate" language that did not necessarily reflect the intent of the parties, the presence of that "boilerplate" language could not be construed as a matter of law to reflect the parties' intent). Thus, when there are two types of release language – some written and some preprinted – within a single form, a latent ambiguity exists that requires the parties' intent to be determined as a matter of fact. *Id.*

Here, like the release at issue in *Hurt*, the 1998 release contains both written and preprinted terms within a single form. Pursuant to *Hurt*, the "boilerplate" release of other entities cannot be construed to release Enterprise as a matter of law. Instead, the question of whether both the Demartinos and Windsor Group intended to release entities other than Windsor Group is a question of fact. Accordingly, on this record, Enterprise is not entitled to summary judgment in its favor on remand.

Reversed and remanded for further proceedings.

SILBERMAN, J., and DAKAN, STEPHEN L., Associate Senior Judge,  
Concur.

[fn1] Lisa Simat, as personal representative of the Estate of  
Gary Simat, was subsequently substituted as a party  
defendant.

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## Florida Case Law

IN RE FORFEITURE OF 1998 FORD PICKUP, 779 So.2d 450 (Fla.App. 2 Dist. 2000)

In re forfeiture of: 1998 Ford Pickup, Identification No. 1FTZX1767WNA34547

BOBBY E. WILLIAMS, Appellant, v. CAL HENDERSON, Sheriff of Hillsborough

County, Florida, Appellee.

No. 2D00-472

District Court of Appeal of Florida, Second District.

Opinion filed October 13, 2000.

Appeal from the Circuit Court for Hillsborough County; Robert H. Bonanno, Judge.

Bobby E. Williams, pro se.

Christopher Sabella, Tampa, for Appellee.

DAVIS, Judge.

Bobby E. Williams challenges the final order declaring his 1998 Ford pickup truck forfeited as contraband under section **932.701**, Florida Statutes (1997). We reverse the forfeiture because it was based on a summary judgment that the trial court had entered in reliance on unopposed, but insufficient, affidavits pursuant to Florida Rule of Civil Procedure 1.510(e).

In its complaint for forfeiture, the Sheriff's Office alleged that, while sitting inside

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his truck, Williams exposed himself to two young girls, in violation of section **800.04**, Florida Statutes (1997), which proscribes lewd and lascivious acts in the presence of a child under sixteen. The Sheriff's Office subsequently moved for summary judgment, alleging the same facts and stating that those facts were supported by the affidavit of a Hillsborough County Sheriff's Office detective. The detective averred in that affidavit that he investigated a lewd and lascivious act on May 6, 1999, and was personally present at the time and place of the arrest and the seizure of the vehicle. The detective further averred that Williams was arrested and charged with two counts of lewd and lascivious acts in the presence of a child under sixteen. He then recited the same facts alleged in the initial complaint. In a separate document entitled, "Verification of Complaint for Forfeiture Affidavit," the detective averred that the facts alleged in the complaint were "true and correct based upon personal knowledge of information developed during the course of my investigation."

The detective's affidavits were insufficient under Florida Rule of Civil Procedure 1.510(e), which requires that all summary judgment affidavits be made on personal knowledge and affirmatively show that the affiant is competent to testify to the matters in the affidavit. See Zoda v. Hedden, **596 So.2d 1225** (Fla. 2d DCA 1992). The rule also requires the affidavit to set

forth facts that would be admissible in evidence. The detective's affidavits do not comply with any of these requirements.

First, despite the detective's averment that the facts in the complaint were true based on his personal knowledge, that simply could not be true. He was not an eyewitness to the offense. He did not arrive at the scene until after the acts had been completed. Therefore, the facts he recited as personal knowledge had to have come from the statements of the two victims, which makes those statements hearsay. See § 90.801, Fla. Stat. (1997). Second, because the detective was not present when the acts occurred, he is not competent to testify to what did occur. Third, because the facts as stated constituted hearsay, and did not fall within any of the hearsay exceptions, they could not be introduced into evidence. See § 90.803, Fla. Stat. (1997).

Since the trial court granted the motion for summary judgment and entered its final judgment of forfeiture based solely on the detective's incompetent and insufficient affidavit, we must conclude that the trial court entered summary judgment without the benefit of any facts. Accordingly, summary judgment was improper. See Holl v. Talcott, 191 So.2d 40 (Fla. 1966).

We acknowledge that the State is correct that Williams' acquittal or conviction for the underlying charge is irrelevant to a civil forfeiture action, see Vasquez v. City of Hialeah, 487 So.2d 72 (Fla. 3d DCA 1986), and that the standard of proof in criminal cases is far greater than in civil forfeiture actions, where the standard is clear and convincing evidence. See § 932.704(8), Fla. Stat. (1997). However, the trial court in this case was not presented with clear and convincing evidence to support the forfeiture. In fact, the State presented no evidence to support the forfeiture.

Reversed and remanded for further proceedings.

THREADGILL, A.C.J., and FULMER, J., Concur.  
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## Florida Case Law

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CSX TRANSP., INC. v. PASCO COUNTY, 660 So.2d 757 (Fla.App. 2 Dist. 1995)

CSX TRANSPORTATION, INC., APPELLANT, v. PASCO COUNTY, R.E. PURCELL  
CONSTRUCTION, INC., AND DONALD E. MURPHY, APPELLEES.

No. 94-00822.

District Court of Appeal of Florida, Second District.

August 23, 1995.

Appeal from the Circuit Court, Pasco County, Wayne L. Cobb, J.

Edward M. Rooks, of Melkus & Fleming, Tampa, and Stephen H. Shook, Jacksonville, for appellant.

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Peter Wansboro, Assistant County Attorney, New Port Richey, for appellee Pasco County.

No appearance for appellees Purcell Construction and Murphy.

QUINCE, Judge.

CSX Transportation, Inc. (CSX) appeals from the entry of a summary judgment in favor of Pasco County (the County), the sole appellee who was still a defendant. We reverse because there are material issues of fact in dispute, making summary judgment inappropriate.

Beginning in February 1991, Pasco County was in the process of constructing a road known as the Zephyrhills ByPass (the By-Pass). The County entered into a contract with CSX for an easement across the right-of-way and tracks owned and maintained by CSX for a highway crossing. The contract provided that the County would require its contractors to purchase and maintain throughout the crossing construction railroad protection liability insurance and commercial liability insurance with CSX listed as an insured. These policies were not procured prior to the incident giving rise to this litigation.

When Purcell, the County's contractor, began construction, the County closed off access to the ByPass from State Road 54 by placing barricades at the intersection of the two roads. Later the barricades were moved further down the ByPass toward the tracks near the parachute center. Purcell, at the direction of the County, required a subcontractor to remove all trees and shrubs as a part of general clearing of the area around the end of the roadway and CSX's tracks. A two-foot trench, located six feet from the rails on each side of the tracks, was dug along both sides of the tracks.

On February 19, 1991, Donald Murphy was operating a motor vehicle on the ByPass. He struck the railroad tracks, causing

substantial damage which led to a train derailment. Mr. Murphy indicated when he turned off State Road 54 onto the ByPass there were no barricades or other obstructions to the entrance of the road. There was striping on the road which led him to believe it was a normal, open road. As he travelled further on the ByPass, he still did not encounter any warnings, barricades or other indications that the road was under construction. He operated his vehicle to a point just prior to the railroad tracks where the paved portion of the ByPass ended. He struck the tracks and landed on the opposite side of the tracks.

Although Mr. Murphy indicated he did not encounter any barricades on the ByPass, the project superintendent indicated at 5:00 p.m. on February 18, 1991, there were end-to-end barricades across that road near the parachute center. He also stated splintered barricades were found on the side of the road on the morning of February 19, 1991. However, no barricade fragments were found on Mr. Murphy's car, and no paint markings from his car were found on the splintered barricades.

CSX initiated an action against the County, R.E. Purcell Construction, Inc. and Donald Murphy to recover for losses sustained in the derailment. The amended complaint against the County alleged breach of contract, negligence and trespass. In granting the County a final summary judgment on all counts, the trial court found, *inter alia*, that the County was not engaged in constructing the crossing at the time of the accident, that the County had not waived sovereign immunity, and that the trespass alleged did not contribute to the injury or damages. We reverse because the trial court in reaching these conclusions resolved factual issues which are not appropriate on a motion for summary judgment.

The purpose of a motion for summary judgment is to determine whether any genuine issues of material fact exist for resolution by the trier of fact. *A. & G. Aircraft Service, Inc. v. Drake*, 143 So.2d 703 (Fla. 2d DCA 1962). The initial burden is on the movant to demonstrate the nonexistence of any material fact. If genuine issues of fact exist, these issues may not be resolved in the summary proceeding. *Mutual of Omaha Ins. Co. v. Eakins*, 337 So.2d 418 (Fla. 2d DCA 1976).

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In the instant case, CSX argues there is a genuine issue concerning whether the County had begun construction of the railroad crossing when this incident occurred. This factual issue is material to the resolution of all counts of the amended complaint, particularly breach of contract since the insurance was to be obtained and maintained during construction of the railroad crossing. CSX presented evidence that there had been a general clearing of the area around the railroad tracks, including the removal of trees and shrubs. There was a trench dug along both sides of the track. From State Road 54, the ByPass was paved to approximately 72 feet from the railroad tracks. From the point where the pavement ended, man-made hardpan construction dirt was laid up to a few feet from the tracks.

The County, on the other hand, attempted to demonstrate via affidavits that construction on the railroad crossing had not begun. The affidavit of Hank Baldwin, an engineer for the County,

stated he was generally familiar with the project known as Zephyrhills ByPass East Phase I. He further stated that as of February 19, 1991, the project had not reached the point of construction on the railroad crossing. Glenn Morris, the project manager for the ByPass, stated in his affidavit that based on his examination of inspection reports, work had not begun on the railroad crossing before April 15, 1991.

CSX argues Baldwin's affidavit does not comply with the requirements of Florida Rule of Civil Procedure 1.510(e), which requires that an affidavit be made on personal knowledge of the affiant and affirmatively show the affiant is competent to testify to the matters in the affidavit. We agree. Baldwin merely recites a general familiarity with the ByPass project, but gives no basis for his ultimate conclusion that construction on the railroad crossing had not begun by February 19, 1991. Morris' affidavit suffers from the same and an additional defect. Morris does not say his conclusion that construction on the crossing had not begun is based on personal knowledge. He indicates it is based on examination of reports that are not attached to the affidavit. Thus, the affidavit is based on hearsay and is not sufficient to support summary judgment. *Zoda v. Hedden*, 596 So.2d 1225 (Fla. 2d DCA 1992); *Crosby v. Paxson Elec. Co.*, 534 So.2d 787 (Fla. 1st DCA 1988); *Topping v. Hotel George V*, 268 So.2d 388 (Fla. 2d DCA 1972).

The County has, therefore, failed to establish by competent evidence that there is no genuine issue of whether construction on the railroad crossing had begun.[fn1]

There also exists a factual issue of whether the County created a known dangerous condition which was not readily apparent to persons who could be injured. This factual question is material to the issue of whether the County has waived sovereign immunity. See *City of St. Petersburg v. Collom*, 419 So.2d 1082 (Fla. 1982); *Haspil v. State Dep't of Transp.*, 374 So.2d 633 (Fla. 3d DCA 1979). There was conflicting evidence of whether there were barricades and/or other warnings posted on the ByPass. This conflict should be resolved by the trier of fact.

Lastly, factual matters are in dispute on the issues of proximate cause and foreseeability. CSX argues there exists a genuine issue of fact concerning whether the trespass by the County, through its agents and employees, in removing the trees and shrubs, generally clearing the area around the tracks, and placing construction hardpan dirt in the area leading up to the tracks, was a proximate cause of the damages suffered by CSX. The County counters that the impaired driver's action was an intervening, unforeseeable cause of the injury to CSX. The issues of proximate cause, and foreseeability as it relates to proximate cause, are generally not appropriate for determination by summary judgment. *McCain v. Florida Power Corp.*, 593 So.2d 500 (Fla. 1992); *Leib v. City of Tampa*, 326 So.2d 52 (Fla. 2d DCA 1976). These are factual issues which must be resolved by the trier of fact. Summary judgment should not have been granted since these are genuine issues in dispute.

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Based on the foregoing, we reverse the final summary judgment entered in this cause and remand to the trial court for further

proceedings consistent with this opinion.

FRANK, A.C.J., and PARKER, J., concur.

[fn1] Even if the information contained in the affidavits is considered competent evidence, the evidence offered by CSX concerning the construction activity near the tracks is sufficient to raise a jury question, and that question should not be resolved on a motion for summary judgment.

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• Florida Case Law - HURRICANE BOATS v. CERTIFIED INDUS., 246 So.2d 174 (Fla.App. 3 Dist. 1971)

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Florida Case Law

HURRICANE BOATS v. CERTIFIED INDUS., 246 So.2d 174 (Fla.App. 3 Dist. 1971)
HURRICANE BOATS, INC., A FLORIDA CORPORATION, APPELLANT, v. CERTIFIED INDUSTRIAL FABRICATORS, INC., A DIVISION OF INSTRUMENTS SYSTEMS CORP., A I YORK CORPORATION, APPELLEE.
Nos. 70-679, 70-717.

District Court of Appeal of Florida, Third District.

March 30, 1971.

Appeal from the Civil Court for Record for Dade County, James H. Earnest, J.

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Feibelman, B ton and Alfred R. Camner, Miami, for appellee.

Before PEARSON, C.J., and CHARLES CARROLL and SWANN, JJ.

PER CURIAM.

The defendant, Hurricane Boats, Inc. has appealed from a summary final judgment and an amended summary final judgment in favor of the plaintiff below, appellee. These appeals have been consolidated for all appellate purposes.

Plaintiff filed an unsworn complaint alleging money due and owing from the defendant for goods sold and delivered and on an account stated. The defendant's unsworn answer denied each allegation of the complaint.

Plaintiff moved for summary judgment and attached an affidavit executed by its Vice President. The affidavit simply stated that affiant had read the attached complaint and that the allegations contained therein were true and correct to the best of his own personal knowledge and belief. The defendant filed its affidavit in opposition thereto and the trial court rendered summary final judgment for the plaintiff.

We reverse. Rule 1.510(e), R.C.P., 31 F.S.A., provides:

"Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show

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## Florida Case Law

IN RE FORFEITURE OF 1998 FORD PICKUP, 779 So.2d 450 (Fla.App. 2 Dist. 2000)

In re forfeiture of: 1998 Ford Pickup, Identification No. 1FTZX1767WNA34547

BOBBY E. WILLIAMS, Appellant, v. CAL HENDERSON, Sheriff of Hillsborough

County, Florida, Appellee.

No. 2DC0-472

District Court of Appeal of Florida, Second District.

Opinion filed October 13, 2000.

Appeal from the Circuit Court for Hillsborough County; Robert H. Bonanno, Judge.

Bobby E. Williams, pro se.

Christopher Sabella, Tampa, for Appellee.

DAVIS, Judge.

Bobby E. Williams challenges the final order declaring his 1998 Ford pickup truck forfeited as contraband under section **932.701**, Florida Statutes (1997). We reverse the forfeiture because it was based on a summary judgment that the trial court had entered in reliance on unopposed, but insufficient, affidavits pursuant to Florida Rule of Civil Procedure 1.510(e).

In its complaint for forfeiture, the Sheriff's Office alleged that, while sitting inside

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his truck, Williams exposed himself to two young girls, in violation of section **800.04**, Florida Statutes (1997), which proscribes lewd and lascivious acts in the presence of a child under sixteen. The Sheriff's Office subsequently moved for summary judgment, alleging the same facts and stating that those facts were supported by the affidavit of a Hillsborough County Sheriff's Office detective. The detective averred in that affidavit that he investigated a lewd and lascivious act on May 6, 1999, and was personally present at the time and place of the arrest and the seizure of the vehicle. The detective further averred that Williams was arrested and charged with two counts of lewd and lascivious acts in the presence of a child under sixteen. He then recited the same facts alleged in the initial complaint. In a separate document entitled, "Verification of Complaint for Forfeiture Affidavit," the detective averred that the facts alleged in the complaint were "true and correct based upon personal knowledge of information developed during the course of my investigation."

The detective's affidavits were insufficient under Florida Rule of Civil Procedure 1.510(e), which requires that all summary judgment affidavits be made on personal knowledge and affirmatively show that the affiant is competent to testify to the matters in the affidavit. See Zoda v. Hedden, **596 So.2d 1225** (Fla. 2d DCA 1992). The rule also requires the affidavit to set

forth facts that would be admissible in evidence. The detective's affidavits do not comply with any of these requirements.

First, despite the detective's averment that the facts in the complaint were true based on his personal knowledge, that simply could not be true. He was not an eyewitness to the offense. He did not arrive at the scene until after the acts had been completed. Therefore, the facts he recited as personal knowledge had to have come from the statements of the two victims, which makes those statements hearsay. See § **90.801**, Fla. Stat. (1997). Second, because the detective was not present when the acts occurred, he is not competent to testify to what did occur. Third, because the facts as stated constituted hearsay, and did not fall within any of the hearsay exceptions, they could not be introduced into evidence. See § **90.803**, Fla. Stat. (1997).

Since the trial court granted the motion for summary judgment and entered its final judgment of forfeiture based solely on the detective's incompetent and insufficient affidavit, we must conclude that the trial court entered summary judgment without the benefit of any facts. Accordingly, summary judgment was improper. See Holl v. Talcott, **191 So.2d 40** (Fla. 1966).

We acknowledge that the State is correct that Williams' acquittal or conviction for the underlying charge is irrelevant to a civil forfeiture action, see Vasquez v. City of Hialeah, **487 So.2d 72** (Fla. 3d DCA 1986), and that the standard of proof in criminal cases is far greater than in civil forfeiture actions, where the standard is clear and convincing evidence. See § **932.704**(8), Fla. Stat. (1997). However, the trial court in this case was not presented with clear and convincing evidence to support the forfeiture. In fact, the State presented no evidence to support the forfeiture.

Reversed and remanded for further proceedings.

THREADGILL, A.C.J., and FULMER, J., Concur.

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## Florida Case Law

HOWELL v. BEBB, 2D09-3664 (Fla.App. 2 Dist. 5-28-2010)

DAVID B. HOWELL and DAVE B. HOWELL, LLC, Appellants, v. ED BEBB,  
INC., Appellee.

Case No. 2D09-3664.

District Court of Appeal of Florida, Second District.

Opinion filed May 28, 2010.

Appeal from the Circuit Court for Polk County; Karla Foreman  
Wright, Judge.

Matthew J. Conigliaro, Annette Marie Lang, and Stephanie C.  
Zimmerman of Carlton Fields, P.A., St. Petersburg, for Appellants.

Thomas C. Saunders of Saunders Law Group, Bartow, for Appellee.

WHATLEY, Judge.

David B. Howell and Dave B. Howell, LLC  
(collectively referred to as Howell) filed this direct appeal of a  
final summary judgment to quiet title and for ejectment entered in  
favor of Ed Bebb, Inc. We conclude that Bebb did not establish  
that it was entitled to summary judgment at this stage in the  
pleadings and reverse.

**Page 2**

Bebb filed an amended complaint against Howell asserting counts to  
quiet title, take possession of real property, require specific  
performance, foreclose on a mortgage, and for ejectment. Howell  
filed a motion to dismiss, and while the motion was pending, Bebb  
filed a motion for summary judgment. After a hearing on Bebb's  
motion, the circuit court entered final summary judgment in favor of  
Bebb.

Generally, "[a] movant is entitled to summary judgment if the  
pleadings, depositions, answers to interrogatories, admissions,  
affidavits, and other materials as would be admissible in evidence  
on file show that there is no genuine issue as to any material fact  
and that the moving party is entitled to a judgment as a matter of  
law." Estate of Githens ex rel. Seaman v. Bon Secours-Maria  
Manor Nursing Care Ctr., Inc.,

928 So. 2d 1272, 1274 (Fla. 2d DCA 2006) (quoting  
Fla.R.Civ.P. 1.510(c)). But if "a plaintiff moves for summary  
judgment before the defendant has filed an answer, the burden is  
upon the plaintiff to make it appear to a certainty that no answer  
which the defendant might properly serve could present a genuine  
issue of fact." BAC Funding Consortium Inc. ISAOA/ATIMA v.  
Jean-Jacques, 28 So. 3d 936, 937-38 (Fla. 2d DCA 2010) (quoting  
Settecasi v. Bd. of Pub. Instruction of Pinellas County,  
156 So. 2d 652, 654 (Fla. 2d DCA 1963)). Thus, the standard to  
establish entitlement to summary judgment requires the plaintiff to

establish that "the defendant could not raise any genuine issues of material fact if the defendant were permitted to answer the complaint." Id. at 938.

The trial court in the present case appears to have used the wrong standard in ruling on Bebb's motion for summary judgment, as it asked Howell if he had filed any affidavits or anything that would create a material issue of fact. At the hearing

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on the motion for summary judgment, Howell noted issues of material fact that could be raised in an answer to the complaint. However, Bebb based its argument for summary judgment on the failure of Howell to file affidavits establishing genuine issues of material fact. On appeal, Bebb does not contend that it established to a certainty at the hearing that no answer which Howell might properly serve could present a genuine issue of fact.

Accordingly, it was improper to enter summary judgment in favor of Bebb at this stage in the pleadings, and we reverse the judgment and remand for further proceedings.

Reversed and remanded.

NORTHCUTT and LaROSE, JJ., Concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

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