

**IN THE DISTRICT COURT OF APPEAL FOR THE  
SECOND DISTRICT OF FLORIDA**

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**CASE NO: 2D11-2961**

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**WELLS FARGO BANK, N. A., TRUSTEE**

**Appellant,**

**v.**

**ARTHUR TOBOADA, J P MORGAN CHASE BANK, ET AL.**

**Appellee.**

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**ON APPEAL FROM THE 6<sup>TH</sup> JUDICIAL CIRCUIT  
OF FLORIDA, IN AND FOR PINELLAS COUNTY  
CASE NO: 2010-000148-CI**

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**INITIAL BRIEF OF APPELLANT**

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## **STATEMENT OF CASE AND FACTS**

On January 7, 2010, the Appellant filed a mortgage foreclosure suit against the Appellee in which it alternatively pleaded standing by stating that, “The Plaintiff is the owner and the holder of the Note and Mortgage or is the party entitled to enforce the subject Note consistent with Chapter 673 of the Florida Statutes.” (R.1-29; 2, §8.) The Appellant also attached a copy of the Note, which was indorsed to Option One Mortgage with a subsequent Allonge from Option One indorsed in blank, a copy of the Mortgage, and an Assignment of Mortgage from the original lender to the Plaintiff, which was executed in August, 2008, to the Complaint. (R. 1-29.) On January 21, 2010, the Appellant served the Appellee with the complaint. (R. 58-67.) On February 4, 2010, the Appellee filed a Motion for Extension of Time to serve a response, but failed to set the motion for hearing. (R. 69-70.) On March 26, 2010, the Appellant filed its Motion for Summary Judgment. (R. 88-90.)

On April 28, 2010, the Appellee filed its Motion to Dismiss and asserted that the Plaintiff could not be a holder and incorrectly stated that the Note was indorsed to Option One Mortgage Corporation without also addressing the Allonge from Option One Mortgage Corporation indorsed in blank. (R. 95-97.) In addition, the Appellee stated that the Plaintiff “admits” it lost the note, alleges that the lost note

count is not sufficient as the Appellant does not state the time and manner of such a loss, and, finally, asserted that the Appellant must plead with specificity that the acceleration condition precedent has been satisfied.<sup>1</sup> (R. 95-97.) The Appellee does not address alternative pleading except to the extent that it stated, “Plaintiff’s allegations are inconsistent with each other and cannot withstand a Motion to Dismiss.” (R. 95-97, §6)

A court reporter was not present at the hearing during which the lower court granted the Appellee’s motion to dismiss. On December 22, 2010, the court entered its order in which it provided 45 days to serve an amended complaint and ruled that the Appellant must “clarify whether it is the ‘holder,’ (sic) ‘non-holder in possession with the rights of the holder,’ (sic) or, if Plaintiff’s standing is based on something else, the specific basis of its standing.” (R. 224-225.) Further, the Court ordered that the Appellant verify the Complaint as true and correct with the explicit direction that it would be “...insufficient to aver it is true and correct ‘to the best’ of the affiant’s ‘information and belief.’” (R. 224-225.)

On February 4, 2011, within the 45 days provided by the court, the Appellant filed a Motion for Extension of Time to file the amended complaint, which was heard on April 27, 2011. (R. 226-227.) The Appellant filed its Notice

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<sup>1</sup> The Motion to Dismiss states that a copy of the default letter must be attached to the complaint and that the conditions set out in the mortgage must be alleged in the complaint, which is tantamount to alleging with specificity.

of Hearing, for April 27, 2011, of the Motion for Extension of Time on February 11, 2011 (R. 228-231.) In the interim, the Appellant filed its verified Amended Complaint, pursuant to the verbiage contained in Rule 1.110(b) rather than the language contained in the order, on April 18, 2011. (R. 232-256.)

On April 28, 2011, the Appellee filed its Motion to Dismiss the Amended Complaint based upon the verification language. (R. 257-259.) The trial court denied the Appellant's Motion for Extension of Time and dismissed the case. The trial court entered two orders dismissing the case. The first order, executed on May 13, 2011 with a copy "rendered" on May 17, 2011<sup>2</sup>, stated that there was an excessive amount of time between the deadline to file and the filing of the amended complaint. It further states that the verification language is insufficient and, therefore, "The Amended Complaint does not state a cause of action as drafted." (R. 262-263.) As noted in the transcript, the court determined that it would not make a ruling on the Appellee's motion to dismiss, but the determination that the Amended Complaint fails to state a cause of action for failure to follow the court's requirement that the verification not include the quoted language of the rule amendment, specifically, the inclusion that the affiant was verifying "to the best of my knowledge and belief" acts as a dismissal of the case.

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<sup>2</sup> The record shows that a "Copy Order of Dismissal OR17252 PG2363" was entered on May 17, 2011. (R. 262-263) The Appellant is uncertain whether the original order was filed with the clerk.

The second order, entered on May 20, 2011 and rendered on May 26, 2011, specifically states that, the Motion for Extension of Time is DENIED for failure of the Plaintiff to verify the complaint without reference to “knowledge and belief” and the action “...is dismissed without prejudice and without leave to amend.” (R. 275-277.) On June 13, 2011, the Appellant filed its Notice of Appeal.<sup>3</sup> (R. 279-282.)

The transcript of the April 27, 2011 hearing was filed on September 7, 2011. (R. 285-331.) Pertinent portions of the transcript are as follows:

MR. STOPA: Sure. She said she was going to appeal your ruling that the verification had to be true and correct, as opposed to true and correct on the affiant’s information and belief. She said she was going to appeal that. And they never did. Never did. Instead – instead they wait 116 days to file an amended complaint and the amended complaint plainly violates the court’s order requiring that the verification be true and correct, period.

So here we have two violations of the order. The first violation being serve it within 45 days and the second violation being the verification is plainly – plainly noncompliance with this Court’s order. If they wanted to –

THE COURT: Maybe they thought it wasn’t an appealable order and they wanted to wait until I –

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<sup>3</sup> The Appellant attached only the first order to its Notice of Appeal as it is uncertain as to whether the court continued to have jurisdiction of the matter and has included all orders so that this court has the benefit of the trial court’s full actions. The paramount issue remains the same regardless of the order as the Appellant seeks review of whether it was allowed to verify the complaint using language in the amended rule or whether the trial court’s order deprived it of the benefit of the more lenient language contained in the amended rule.

MR. STOPA: Well, and that may be. But that doesn't mean that you can – that doesn't mean you can disregard the – that doesn't mean they can just disregard the order. (R. 293-294.)

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THE COURT: Well, if the goal is to take it up, let's look at that possibility. Because I'm okay with that. I'm okay with the Second District telling me that my opinion is wrong. That's what I do for a living...

Now, so let's think about it. Who is going to be hurt if I were to do this? If I am to take a stand with what all the judges in the Sixth Circuit believe to be the case, is your client going to be hurt? And I'm looking at Mr. Stopa.

MR. STOPA: Well, I think this is the procedural way to get there, Judge. If you enter a final order of dismissal, even if it's a final order of dismissal without prejudice, the final order is what creates appellate jurisdiction to appeal that sort of issue. That's the only way we get there.

THE COURT: And is your client still in the property?

MR. STOPA: Yes. It's his Homestead (sic).

THE COURT: So I don't see it prejudicing Mr. Taboada, because he gets to stay there longer, maybe without paying his mortgage payment. Now, I don't know if this is a case where we've had the mortgage payments going to the registry for the court, but I doubt it. I don't see too many of these happening.

MS. COUTURE: That's not the case, Your Honor. (R. 295-296.)

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MS. COUTURE: Your Honor, and I would say that the E&E Electric Contractors, if you read it, it says the appellants responded to the motion to dismiss. So on August the 19<sup>th</sup>, 63 days after the expiration of the original 20-day period, the appellees moved for final judgement (sic) and dismissal of the case. The appellants in response to that filed their motion for leave to file and serve an amended complaint.

I did not wait until your time –your order. I was out of time of your order (sic) I have a motion for extension of time telling you that due to an array of bizarre circumstances that I, as an officer of court (sic), am telling you occurred, including that we moved –I had it in my hand. I was ready to file it and we moved. (R. 298-299.)

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And I've already apprised the Court that we do believe that Rule 1.110 allows us to do it, tells us, actually instructs us to use certain verbiage. And there's just a disagreement as to what the rule is.

I'm not being contumacious. I'm not being disrespectful to the Court. I'm saying this is the way that we interpret it. This is the way that we believe the Supreme Court Task Force came down on it. And this is why we think the rule is in effect.

You disagree, the Sixth disagrees, and we need an appellate court. (R. 300.)

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THE COURT: ...So I am going to dismiss this matter for failure to comply with the court order of December 22<sup>nd</sup>. And I will be – motion of extension of time to file the amended complaint, I guess I will go ahead and deny that. (R. 303.)

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**MS. COUTURE:** So just for clarification purposes, if it had been filed with the proper – with the –not the proper – but the language that you specified in the December 22<sup>nd</sup> order, then we would be in a different position?

**THE COURT:** Absolutely.

**MS. COUTURE:** You're trying to attach (sic) this so that we can take this up on appeal?

**THE COURT:** Absolutely.

**MS. COUTURE:** Okay.

**THE COURT:** To me that's the appealable point here. Because if I let it stand now - - let's take it the other way. If I granted the motion for extension for time and allowed that to stand, we would be coming right back again on Mr. Stopa's next motion to dismiss and we'd be having a hearing again on the exact same issue that we had in December. And I don't have hearing time now for about 60 days. So in June, six months later after we had the hearing, we'd be having another hearing on the exact same point. (emphasis added) (R. 304-305.)

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**THE COURT:..**

So anyway that's why I'm ruling this way. I'm denying the motion for extension of time. I think it was too long. But I'm also dismissing this complaint for failure to comply with the December 22, 2010 order. Because I believe that what we need is we need affiance (sic) asserting and verifying that the amended complaint or the complaint itself is true and correct. (R. 308.)

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**MS. COUTURE:** And, Your Honor, you touched on it. But Rule 1.110, that specifically says that if a pleading has to be verified, then it can - - it uses that language "to the best of my knowledge and belief."

Just for the Court, for the record, can you elucidate why you believe that that's not applicable in these types of actions, the foreclosure actions?

**THE COURT:** Yeah, I think the rule was specifically intended for foreclosure cases. And I think it was specifically intended that plaintiffs had to look - - should have to look at their cases. (R. 312.)

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**MS. COUTURE:** Right. But the rule says "to the best of my knowledge and belief," and that's where you and I are - -

**THE COURT:** It doesn't say that for all cases.

MS. COUTURE: Okay. So that's - -

THE COURT: So that's an exception. And I don't think mortgage foreclosures were the exception. (R. 313-314.)

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THE COURT: I can look it up on West Law. All right. Okay. Rule 1.110(b) Claims for Relief. When filing the action for a foreclosure of a mortgage on residential real property the complaint shall be verified. When verification of a document is required, the document filed shall include an oath, affirmation or the following statement: "Under penalty of perjury, I declare that I have read the foregoing, and the facts alleged therein are true and correct to the best of my knowledge and belief."

MS. COUTURE: Right. And that's what mine says and that's why I was asking for an elucidation from you as to why that would not be applicable in a foreclosure action. Because the standard seems to be different or the language is different. We have exactly quoted from Rule 1.110 in our amendments, in our amended complaint.

THE COURT: I guess we're going to need clarification from the Second District. I meant the judges of the Sixth Circuit, our opinion is that Rule 1.110 requires a verification on foreclosure actions on residential real property and we do not concur that it should be "to the best of my knowledge and belief." That's where all the problems have been created since the beginning of foreclosures.

MS. COUTURE: Right. So are you - - is it your position that Rule 1.110(b), the language is inapplicable for mortgage foreclosure actions?

THE COURT: I would say yes.

MS. COUTURE: Okay.

THE COURT: Because it says 'When verification of a document is required, the document filed shall include an oath, affirmation or the following statement.' I agree that I think that is

poorly worded. I think it should have said when filing an action for foreclosure of a mortgage on residential real property, the complaint shall be verified as follows, quote, 'Under penalty of perjury, I declare that I have read the foregoing and the facts alleged therein are true and correct,' period, end of quote.

Then I think it could have gone on to say 'When verification of a document is required, the document filed shall include an oath, affirmation or the following statement.' So that's my read of the rules and the intent of the Supreme Court.

MS. COUTURE: Okay. So you believe the Supreme Court did not intend for the language that's in the rule to be applied to complaint - - mortgage foreclosure complaints?

THE COURT: I agree, yes.

MS. COUTURE: And does it have anything – you hesitated on the word 'document.' Is that - -is that because you don't believe that a pleading is a document?

THE COURT: Well, I don't. I think they added that to the rule about the document and I don't think it applies to the mortgage foreclosure complaint. So I wish that they had specified there the specific verification required for mortgage foreclosure complaint (sic). I think that would have saved us a lot of time and trouble. Instead of clearing up the problem it muddied it up further. (R. 314-317.)

## **STANDARD OF REVIEW**

The standard of review for an order determining whether a complaint fails to state a cause of action is *de novo*. See *Meadows Cmty. Ass'n, Inc. v. Russell-Tutty*, 928 So. 2d 1276 (Fla. 2d DCA 2006). The standard of review of a trial court's order for denial of a motion for extension of time is abuse of discretion. See *Boudot v. Boudot*, 925 So. 2d 409 (Fla. 5<sup>th</sup> DCA 2006).

## SUMMARY OF ARGUMENT

The trial court erred by requiring the Appellant to verify its amended complaint without the inclusion of the quoted language “to the best of my knowledge and belief,” thus misconstruing the plain language of Fla.R.Civ.P. 1.110(b). The Appellant’s motion for extension of time to amend its complaint should have been granted as the Appellant filed its motion before the expiration of the time allotted by the court, the Appellant showed good grounds, and the Appellant sent its notice of hearing during the time allotted by the court. The court’s reason for denial is inextricably intertwined with its initial ruling that the amended complaint could not include the quoted verbiage in the amended rule. Therefore, the denial of the motion for extension was, in fact, a denial of a motion to amend due to non-compliance with the previous order prohibiting the Appellant from using the exact quote in the amended rule. Further, the trial court erred in entering an order which found that the amended complaint failed to state a cause of action as the transcript shows that no such finding was made.

## ARGUMENT

### **ISSUE ONE: WHETHER THE TRIAL COURT ERRED BY DISMISSING APPELLANT'S AMENDED MORTGAGE FORECLOSURE COMPLAINT WHICH INCLUDED THE SPECIFIC VERIFICATION LANGUAGE REQUIRED BY FLA.R.CIV.P.1.110(b)?**

The lower court reversibly erred by requiring Appellant to verify its Amended Complaint with language contrary to the required language set forth in Fla.R.Civ.P. 1.110(b) for verified mortgage foreclosure complaints. *In re Amendments*, 44 So. 3d at 555, 560 (Fla. 2010), added the following provision to Fla.Rule 1.110(b) as follows:

When filing an action for foreclosure of a mortgage on residential real property the complaint shall be verified. When verification of a document is required, the document filed shall include an oath, affirmative, or the following statement:

‘Under penalty of perjury, I declare that I have read the foregoing, and the facts alleged therein are true and correct to the best of my knowledge and belief.’

The Court explained the amendment to Fla.R.Civ.P. 1.110(b) as follows,

...rule 1.110(b) is amended to require verification of mortgage foreclosure complaints involving residential real property. The primary purposes of this amendment are (1) to provide incentive for the plaintiff to appropriately investigate and verify its ownership of the note or right to enforce the note and ensure that the allegations in the complaint are accurate; (2) to conserve judicial resources that are currently being wasted on inappropriately pleaded ‘lost note’ counts and inconsistent allegations; (3) to prevent the wasting of judicial resources and harm to defendants resulting from suits brought by

plaintiffs not entitled to enforce the note; and (4) to give trial courts greater authority to sanction plaintiffs who make false allegations.

In determining the meaning of a rule, the court is bound by the rules of statutory construction. *See Syndicate Properties, Inc. v. Hotel Floridian Co.*, 94 So. 899 (Fla. 1927). The *Syndicate* court stated the standard as follows, “This court is bound by the rules prescribed by it as much so as attorneys and it must construe them as statutes are construed.” *Id.* “The same principles of construction apply to court rules as apply to statutes.” *Gervais v. City of Melbourne*, 890 So. 2d 412 (Fla. 5<sup>th</sup> DCA 2004). *See also, Rowe v. State*, 394, So. 2d 1059 (Fla. 1<sup>st</sup> DCA 1981)(“Where the language to be construed is unambiguous, it must be accorded its plain and ordinary meaning. *See, e.g., Carson v. Miller*, 370 So. 2d 10 (Fla. 1979); *Reino v. State*, 352 So. 2d 853 (Fla. 1977).”) “If a statute or rule is plain and unambiguous, it must be enforced according to its plain meaning.” *Fla. Dept. of Revenue v. Fla. Mun. Power Agency*, 789 So. 2d 320 (Fla. 2001).

Florida’s verification statute is located in Chapter 92. Specifically, Fla. Stat. § 92.595, states:

(1) When it is authorized or required by law, by rule of an administrative agency, or **by rule** or order of court that a document be verified by a person, the verification may be accomplished in the following manner:

(a) Under oath or affirmation taken or administered before an officer authorized under s. 92.50 to administer oaths; or

(b) By the signing of the written declaration prescribed in subsection (2).

(2) A written declaration means the following statement: **'Under penalties of perjury, I declare that I have read the foregoing [document] and that the facts stated in it are true,'** followed by the signature of the person making the declaration, **except when a verification on information or belief is permitted by law, in which case the words 'to the best of my knowledge and belief' may be added.** The written declaration shall be printed or typed at the end of or immediately below the document being verified and above the signature of the person making the declaration. (emphasis added)

Thus, the Supreme Court rendered its decision amending Rule 1.110(b) on February 11, 2010, and took the verification language directly from the statute. As the statute is not ambiguous, a trial court must apply its plain meaning. The amendment specifically referenced mortgage foreclosures as follows, "By administrative order on March 27, 2009, the Task Force on Residential Mortgage Foreclosure Cases (Task Force) was 'established to recommend to the Supreme Court policies, procedures, strategies, and methods for easing the backlog of pending residential mortgage foreclosure cases while protecting the rights of parties...The Task Force was also specifically asked to 'examine existing court rules and propose new rules or rule changes that will facilitate early, equitable resolution of residential mortgage foreclosure cases.'" *In re Amendments*, 44 So. 3d at 555, 556.

Therefore, the entire amendment relates to mortgage foreclosure actions and the verification language in the amended rule, encased in quotation marks, is the language the Supreme Court chose to require in mortgage foreclosure complaints. The Supreme Court opted to require plaintiffs in mortgage foreclosure actions to utilize Fla. Stat. §92.525(2) with the inclusion of “to the best of my knowledge and belief” verbiage. Contrary to the conclusion reached by the lower court, the Supreme Court’s directive is not “poorly worded” and, therefore, the trial court should not have construed the rule as the plain meaning is clear.

In the instant case, the trial court specifically stated that it would have granted the motion for extension of time and allowed the amended complaint to stand if the Appellant had followed the incorrect verification standard required by the dismissal order. (R. 304-305.) Therefore, the denial of the motion for extension of time was tied to the initial imposition of an incorrect verification. As such, the trial court reversibly erred by misconstruing the verification rule and by requiring a higher standard of knowledge than specified in the rule.

**ISSUE TWO: WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE APPELLANT'S MOTION FOR EXTENSION OF TIME TO AMEND ITS COMPLAINT, WHICH WAS FILED AND SET FOR HEARING DURING THE ORIGINAL TIME ALLOTTED BY THE COURT IN ITS ORDER OF DISMISSAL?**

A court may allow an extension of the time allowed by a rule or order of court. Such an extension is within the court's discretion. Fla.R.Civ.P. 1.090(b). The standard for such an extension is excusable neglect. *See, e.g., Boudot v. Boudot*, 925 So. 2d 409 (Fla. 5<sup>th</sup> DCA 2006). Since there is no precise definition for excusable neglect, the cases should be decided on a case-by-case basis. *Id.* at 415-416. The *Boudot* court stated,

In *Carter*, we concluded the same standard should be used to determine excusable neglect under rule 1.090(b) as is used to determine excusable neglect under rule 1.540. We then looked to cases under the comparable federal rules for guidance and cited *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993), as a leading federal case on the application of the excusable neglect standard.

In *Pioneer Investment Services*, the Supreme Court held that excusable neglect contemplates that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control. The determination of whether the failure to abide by a specified time limit constitutes excusable neglect is in essence an equitable one which should take into account all of the relevant circumstances, including prejudice to the other party, the reason for the delay, the duration of the delay, and whether the movant acted in good faith. *Id.*

As noted, the Appellant's counsel requested additional time before the original time to file the amended complaint had expired. The motion was based upon illness of counsel and her staff, and the hearing was scheduled for the first available time with the notice of hearing immediately served. During the hearing, the counsel further explained that the amended complaint was received but then lost during an office move. (R. 287.) Therefore, using the standard set out in *Pioneer Investment*, the motion should have been allowed as the court found there was no prejudice to the other party as he would be allowed to remain in the house without paying his mortgage, (R. 296), the reason for delay was a combination of illness and excusable neglect and the delay was not excessive. Further, Appellant's Motion for Extension of Time was made in good faith and the lower court did not find otherwise. This is especially true where a hearing was not even required per Fla.R.Civ.P. Rule 1.090(b)(1). and the lower court could have ruled on the motion at any time "with or without notice." See Fla.R.Civ.P. Rule 1.090(b)(1).

Of particular importance are the court's own contradictory statements and orders in which it states that the motion would have been granted had the Appellant complied with its order and verified the complaint without the language provided in the rule. (R. 304-305.) This statement was reiterated by the court during the hearing and later in the court's May 20, 2011 order in which it explicitly

stated the motion for extension was denied due to the failure to comply with the court's order. (R. 275-277.) While the court also stated that the time was too long and executed an order to that effect in its May 13, 2011 order, (R. 262-263), the fact is that the court vacillated during the hearing, entered two contradictory orders and made no findings as to the reason for the delay or whether it was made in good faith.

As such, of the four factors to be determined by the court in *Pioneer Investments, supra*, the court found one in favor of the Appellant (no prejudice to the opposing party) and one in favor of the Appellee (duration of time) and ultimately tied the ruling to the Appellant's failure to verify the amended complaint pursuant to the previous order, a ruling to which the Appellant also assigns error.


Therefore, the court's ruling on the motion is an abuse of discretion and should be reversed.

## CONCLUSION

The trial court's order denying the Appellant's Motion for Extension of Time to amend its complaint should be reversed and the Appellant's amended complaint should be allowed to proceed. A the verification complied with Rule 1.110(b).


**CERTIFICATE OF FONT COMPLIANCE**

I HEREBY CERTIFY that the font used in this brief is the Times New Roman 14-point font and that the brief complies with the font requirements of Rule 9.2210(a)(2).

  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States Mail to Arthur Taboada, c/o Mark P. Stopa, Esq., 2202 N. Westshore Blvd., Ste 200, Tampa, FL 33607

  
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