IN THE SUPREME COURT OF FLORIDA

CAROLANN D. KOZEL,
Appellant

v.

D. STEVEN OSTENDORF, D.P.M.
Appellee

Case No. 80,380

Florida Bar No. 0547026

ON APPEAL FROM THE SECOND DISTRICT
COURT OF APPEAL

APPELLANT'S INITIAL BRIEF
ON THE MERITS

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Appellant, Carolann D. Kozel ("Kozel"), by her undersigned counsel, hereby files her initial brief in accordance with Fla.R.App.P. 9.210.

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STATEMENT OF ISSUES PRESENTED

1. Whether the trial court erred in dismissing the plaintiff's case with prejudice where there was no willful conduct?

STATEMENT OF THE CASE AND OF THE FACTS

(1) Nature of Case, Course of Proceedings and Disposition In The Court Below

This Court by order dated March 10, 1993 responded to Appellant's (petitioner's) Brief on Jurisdiction for this discretionary review of the Second District Court of Appeals' decision in Kozel v. Ostendorf, 603 So.2d 602 (Fla. 2nd DCA 1992) and directed the parties to file their briefs. The Second District Court of Appeals had affirmed the Circuit Court of Lee County's dismissal with prejudice of appellant Kozel's complaint against appellee Ostendorf as a sanction.

Appellant's appeal to the Second District Court of Appeal contended, inter alia, that the trial court had abused its discretion in dismissing her complaint with prejudice as a sanction under the facts of the case. A strong dissent in the Second District Court of Appeals, Kozel v. Ostendorf, 603 So.2d 602, 603-606 (Fla. 2nd DCA 1992), agreed with appellant and suggested in a well reasoned opinion that clarification of the applicable legal standards for determining "abuse of discretion" and the

appropriateness of the extreme sanction of dismissal with prejudice was needed.

Appellant petitioned this Court to exercise its discretionary review jurisdiction to clarify the applicable legal standards for dismissal with prejudice as a sanction and to resolve the conflict developing among the different district courts of appeal on the issues involved.

Appellant contends on this appeal that this Court should now reverse the decision of the Second District Court of Appeals and direct that this case be remanded to the trial court for further proceedings.

(2) Statement of Facts

Appellant, by counsel, on July 25, 1989 commenced a medical malpractice action against D. Steven Ostendorf, D.P.M. ("Ostendorf"), appellee, in the Circuit Court of Lee County. Record, Item 1, Pages 1-4. On January 12, 1990, the trial court entered an order dismissing appellant's complaint, but granting appellant leave to file an amended complaint within twenty days. Record, Item 5, Pages 9. Appellant, by counsel, filed her amended complaint on July 23, 1990. Record, Item 6, Pages 10-14. Appellee [defendant in the trial court] then filed a further motion to dismiss urging that appellant's amended complaint still did not adequately specify his alleged negligence, and because the amended complaint had not been timely filed. Record, Item 7, Pages 15-16. Appellee did not request a sanction or a dismissal with prejudice in his motion to dismiss.

Appellant's counsel had delayed filing the amended complaint because appellant was undergoing further medical procedures which

were expected to affect the allegations in the amended complaint. Record, Item 9, Pages 19-20. Appellant's counsel believed that she had received oral consent from appellee's counsel to delay filing the amended complaint which she at all times intended to file on behalf of appellant so that appellant's case could be heard on the merits. Record, Item 9, Pages 19-20 and Item 11, Pages 23-28. Appellant's counsel, however, did not move the trial court for a stay of the proceedings but did file a motion for leave to file amended complaint. Record, Item 9, Pages 19-20.

In dismissing appellant's Complaint with prejudice, the trial court made no finding that appellant's counsel's disobedience with the trial court's order to file an amended complaint within twenty days was a willful, deliberate or contumacious refusal to obey the trial court's order. Record, Item 10, Pages 21-22. The trial court also made no finding that appellant was personally or culpably involved in the delay in filing of the amended complaint. Record, Item 10, Pges 21-22. The trial court also made no finding that appellant's counsel had ever before been sanctioned in any case for conduct of this type or had ever before been sanctioned for any conduct in this case. Record, Item 10, Pages 21-22. The trial court also made no finding that appellee had been in any manner prejudiced by the delay on the part of appellant's counsel in filing the amended complaint. Record, Item 10, Pages 21-22. During oral argument before the Second District Court of Appeals, counsel for appellee was unable to suggest any significant prejudice suffered by appellee as a result of the delay in filing of the amended complaint. 602 So.2d at 605.

SUMMARY OF ARGUMENT

A. The Court Abused its Discretion in Dismissing Plaintiff's Complaint With Prejudice Without a Finding of Willfull Disobeyance of a Court Order.

A trial court which imposes the extreme sanction of dismissal with prejudice of a party's claim without an express finding based upon the facts that conduct constituting a willful or deliberate refusal to obey an order justifies such extreme sanction against the party abuses its discretion.

ARGUMENT

I.

THE TRIAL COURT ABUSED ITS DISCRETION IN THIS CASE BY IMPOSING THE EXTREME SANCTION OF DISMISSING APPELLANT'S CLAIM WITH PREJUDICE WITHOUT ANY FACTS TO SUPPORT A CONCLUSION OR ANY FINDING THAT CONDUCT CONSTITUTING A WILLFUL OR DELIBERATE REFUSAL TO OBEY AN ORDER OF THE COURT HAD OCCURRED OR JUSTIFIED SUCH AN EXTREME SANCTION AGAINST APPELLANT.

Trial courts require broad authority to impose appropriate sanctions in their discretion against counsel and/or parties for violations of various rules or orders of court based upon the facts in particular cases. Beasley v. Girten, 61 So.2d 179 (Fla. 1952), Clay v. City of Margate, 546 So.2d 434 (Fla. 4th DCA 1989). Entry of a default or dismissal of a party's claim with prejudice are types of extreme sanctions which may be warranted based upon a careful evaluation of the facts by trial courts in extraordinary cases.

Issues concerning the circumstances in which these types of extreme sanctions may be appropriate have arisen in various contexts, including under Fla.R.Civ.P. 1.200 (Pretrial

Procedures)[1], 1.380 (Failure to Make Discovery)[2] and 1.420(b) (Involuntary Dismissal)[3]. The trial courts and the District Courts of Appeals have reached inconsistent results on occasion, sometimes due to the application of inconsistent legal standards in determining what factors are necessary for a proper exercise of discretion or to determine whether an abuse of discretion has occurred in issuing such extreme sanctions. The specific issue in this case arises from a dismissal under Fla.R.Civ.P. 1.420(b). Because of the extreme nature of dismissal with prejudice or default as a sanction, common and uniform rules should be applied regardless of the court rule under which the sanction is imposed. In Commonwealth Fed. Sav. & Loan Assn. v. Tubero, 569 So.2d 1271

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[1] Cases involving Fla.R.Civ.P. 1.200 (Pretrial Procedures) or other pretrial or appearance matters, include: Beasley v. Girten, 61 So.2d 179 (Fla. 1952); Kelley v. Schmidt, 18 Fla. L. Week D293 (5th DCA, Jan. 15, 1993), 1993 WL 5298 (Fla.App. 5 Dist.); Crystal Lake Golf Course, Inc. v. Kalin, 252 So.2d 379 (Fla. 4th DCA 1971); Hart v. Weaver, 364 So.2d 524 (Fla. 2d DCA 1978); Del Duca v. Anthony, 587 So.2d 1306 (Fla. 1991), affm'g Anthony v. Schmitt, 557 So.2d 656 (Fla. 2nd DCA 1990); Goldman v. Tabor, 239 So.2d 529 (Fla. 2nd DCA 1970); Lifeguard Corp. v. U.S. Home Corp., 429 So.2d 94 (Fla. 2nd DCA 1983); Wilson v. Woodward, 602 So.2d 547 (Fla. 2nd DCA 1992); Insua v. World Wide Air, Inc., 582 So.2d 102 (Fla. 2nd DCA 1991); and Carazo v. Status Shipping Ltd., 17 Fla. L. Week D2715 (2nd DCA, Dec. 4, 1992), 1992 WL 355372 (Fla.App. 2 Dist.).

[2] Cases involving Fla.R.Civ.P. 1.380 (Failure to Make Discovery) or other aspects of discovery include: Commonwealth Fed. Sav. & Loan Assn. v. Tubero, 569 So.2d 1271 (Fla. 1990); Swindle v. Reid, 242 So.2d 751 (Fla 4th DCA 1971); Ramos v. Sanchez, 375 So.2d 51 (Fla. 2nd DCA 1979); and Turner v. Anderson, 376 So.2d 899 (Fla. 2nd DCA 1979).

[3] Cases involving Fla.R.Civ.P. 1.420(b) (Involuntary Dismissal) include: Clay v. City of Margate, 546 So.2d 434 (Fla. 4th DCA 1989) and Freiheit v. Tamarac Lakes North Association, 18 Fla. L. Week D468 (4th DCA, Feb. 10, 1993), 1993 WL 30615 (Fla.App. 4 Dist.).

(Fla. 1990), this Court held in reviewing a trial judge's exercise of discretion in ordering dismissal or default for failure to comply with discovery obligations:

> . . . The standard by which such orders shall be reviewed is whether there was an abuse of discretion. If reasonable persons could differ as to the propriety of the action taken, there can be no finding of an abuse of discretion. Canakaris v. Canakaris, 382 So.2d 1197 (Fla.1980). Yet, it is for the very reason that the trial judge is granted so much discretion to impose this severe sanction that we have determined that the subject order should contain an explicit finding of willful noncompliance.
>
> Except where mandated by statute or rule, we are loath to require trial judges to make specific findings of fact in support of their rulings. We have done so, however, in the case of orders which find spouses in contempt for willful nonpayment of alimony, Bowen v. Bowen, 471 So.2d 1274 (Fla.1985), and the sanction of dismissal or default could be viewed as substantially comparable. **By insisting upon a finding of willfulness, there will be the added assurance that the trial judge has made a conscious determination that the noncompliance was more than mere neglect or inadvertence.** . . . We hasten to add that no "magic words" are required but rather only a finding that the conduct upon which the order is based was equivalent to willfulness or deliberate disregard. (Emphasis Added.)

569 So.2d 1273. Appellant perceives is no reason why the holding in Tubero should be limited only to extreme sanctions (i.e. dismissal with prejudice or default) in the context of pretrial discovery.

The Fifth District Court of Appeals has already explicitly extended the holding in Tubero to a situation arising in the pretrial order context. Kelley v. Schmidt, 18 Fla. L. Week D293 (5th DCA, Jan. 15, 1993), 1993 WL 5298 (Fla.App. 5 Dist.).

At the outset we observe that trial courts have a broad range of sanctions to enforce pretrial compliance and that a district court may not overturn a trial court's decision imposing sanctions absent an abuse of discretion. First Republic Corp. v. Hayes, 431 So.2d 624 (Fla. 3d DCA), rev. denied, 441 So.2d 632 (Fla.1983). One of the sanctions available for failure to comply with pretrial orders is the striking of pleadings. Fla.R.Civ.P. 1.200(c). However, the striking of a party's pleadings resulting in either dismissal or a default judgment is the most severe sanction. It should be used sparingly and reserved to those instances where the conduct is flagrant, willful or persistent. (citations omitted.)

The Florida Supreme Court's recent requirement of an express written finding of willfulness in any order striking a party's pleadings which results in a dismissal or a default judgment, and the lack of such finding in the instant case, mandates a reversal. Commonwealth Federal Savings & Loan Ass'n v. Tubero, 569 So.2d 1271 (Fla.1990). Although we are mindful of the supreme court's admonition in Tubero that no "magic words" are required, the trial court's order in this case is devoid of any finding of willfulness. Tubero, 569 So.2d at 1273. The order recited the specific failures of appellants' counsel to comply with its pretrial order. It declared that the attorney had offered "no justifiable excuse" for his defaults even though he offered explanations for his dereliction, albeit insufficient. The court concluded that counsel "exhibited a continuing and repeated failure to comply" with the pretrial order."

* * * * *

"When a party fails to comply with a pretrial order, the authority to sanction is not unbridled; the sanction imposed must be commensurate with the offense. Insua v. World Wide Air, Inc., 582 So.2d 102 (Fla. 2d DCA 1991). We note that numerous, less onerous sanctions were available to the trial judge. Counsel agreed to the acceptance of appellee's witness list, his proposed jury instructions, and his exhibit list. These sanctions would have negated any prejudice to the appellee and allowed the parties

> their day in court. Traditionally, contempt has been the sanction used to punish counsel. Rather than using the scalpel, the trial judge has chosen the atomic bomb. We align ourselves with those rulings which hold that: The court unquestionably has power to discipline counsel for refusal or failure to meet the requirements of [Florida Rule of Civil Procedure 1.200]. Such refusal may warrant a citation for contempt or a lesser degree of punishment, but it is our view that the major punishment for such delicts should be imposed on counsel rather than on the litigant. Beasley v. Girten, 61 So.2d 179, 180 (Fla.1952); Crystal Lake Golf Course, Inc. v. Kalin, 252 So.2d 379 (Fla. 4th DCA 1971); Goldman v. Tabor, 239 So.2d 529 (Fla. 2d DCA 1970).

18 Fla. L. Week D293 (5th DCA, Jan. 15, 1993), 1993 WL 5298 (Fla.App. 5 Dist.)

As already noted, the Circuit Court of Lee County in this case made no finding that appellant or appellant's counsel had willfully or deliberately refused to obey the court's order to file the amended complaint within twenty days in issuing the sanction of dismissing appellant's complaint with prejudice. The absence of such a finding to justify the severe sanction is an abuse of discretion. Clay v. City of Margate, 546 So.2d 434 (Fla. 4th DCA 1989)

In Swindle v. Reid, 242 So.2d 751 (Fla 4th DCA 1971), the Fourth District Court of Appeals found an abuse of discretion (in a pretrial discovery context) when the trial court had made no such finding and the record did not **conclusively** reveal a willful or deliberate refusal to obey an order:

> Since the trial court did not expressly find, and the record does not conclusively reveal, that the plaintiff's failure to produce was a refusal to obey, we hold that

> the court abused its discretion in dismissing the complaint with prejudice.

242 So.2d at 753.

The recent decision in Freiheit v. Tamarac Lakes North Association, 18 Fla. L. Week D468 (4th DCA, Feb. 10, 1993), 1993 WL 30615 (Fla.App. 4 Dist.) by that same court appears to extend that rule requiring an express finding of :

> We cannot clearly discern from the record (and the court did not expressly find) that Ms. Kleinman's absences from the trial, with their consequent disruption of the court's schedule, were willful or with deliberate disrespect for the court. The trial court did expressly find that there was no fault personally on the part of appellant. It is, therefore, certainly clear that the court, in dismissing appellant's case with prejudice, did so as a sanction for the conduct of appellant's trial counsel. While Ms. Kleinman's conduct, the full explanation of which is not before us, might well have justified appropriate censure or sanctions imposed upon Ms. Kleinman, dismissal of appellant's case because of conduct on the part of his trial counsel is too severe a sanction to visit upon appellant who himself has not been guilty of any willful or flagrant disregard for the court's authority. Beasley v. Girten, 61 So.2d 179 (Fla.1952); First Union Nat'l Bank of Fla. v. Hartle, 579 So.2d 295 (Fla. 4th DCA 1991); World on Wheels of Miami, Inc. v. International Auto Motors, Inc., 569 So.2d 836 (Fla. 3d DCA 1990) and Aller v. Editorial Planeta, S.A., 389 So.2d 321 (Fla.3d 1980).

18 Fla. L. Week D468 (4th DCA, Feb. 10, 1993).

The Second District Court of Appeals dissent in this case below urged the adoption of at least a five factor test to be used by the trial courts in determining whether a complaint should be dismissed with prejudice for presumed attorney misconduct:

> 1) whether the attorney's disobedience was willful, deliberate or contumacious, as compared to an act of neglect or inexperience; 2) whether the attorney has failed to learn from prior sanctions; 3) whether the client was personally involved in the act of disobedience; 4) whether the delay prejudiced the defendant through undue expense, loss of evidence or in some other fashion; and 5) whether the delay created significant problems for judicial administration.

603 So.2d at 605. (The dissent noted that none of these factors were present to support a dismissal with prejudice in this case. Id.) The dissent further urged that a complaint be dismissed with prejudice as a sanction only if the trial court determined that a lesser punishment would fail to achieve a just result in light of these factors. Id.

This analysis is completely consistent with the teaching of this Court in Beasley v. Girten, 61 So.2d 179 (Fla. 1952) as applicable to this case in which attorney conduct presumed to be sanctionable is involved:

> The court unquestionably has power to discipline counsel for refusal or failure to meet the requirements of the rule. Such refusal may warrant a citation for contempt or a lesser degree of punishment, but it is our view that the major punishment for such delicts should ordinarily be imposed on counsel rather than on the litigant. Dismissal 'with prejudice' in effect disposes of the case, not for any dereliction on the part of the litigant, but on the part of his counsel. We are not unmindful of the rule that counsel is the litigant's agent and that his acts are the acts of the principal, but since the rule is primarily for the governance of counsel, dismissal 'with prejudice' would in effect punish the litigant instead of his counsel. Although persistent refusal to attend

> might, in the interest of justice, require a dismissal without prejudice, we think for the reasons given that such dismissal upon the first infraction is too severe.

61 So.2d 180-181. The notion that the extreme sanction of dismissal with prejudice or default should employed only in extreme circumstance is a recurring theme in other cases which have addressed this issue in a thoughtful manner. Clay v. City of Margate, 546 So.2d 434 (Fla. 4th DCA 1989); Kelley v. Schmidt, 18 Fla. L. Week D293 (5th DCA, Jan. 15, 1993), 1993 WL 5298 (Fla.App. 5 Dist.); Freiheit v. Tamarac Lakes North Association, 18 Fla. L. Week D468 (4th DCA, Feb. 10, 1993), 1993 WL 30615 (Fla.App. 4 Dist.).

The Second District Court of Appeals dissent in this case below offered some further practical observations on the need for a trial court to make certain that the extreme sanction of dismissal is utilized only in truly extraordinary cases:

> The practical outcome of a dismissal with prejudice as a sanction should be squarely confronted. When a trial court dismisses a plaintiff's complaint with prejudice because of the neglect of plaintiff's counsel, one of two results is achieved. Either the plaintiff never gets a day in court and the merits of the cause are never tested, or the plaintiff gets a day in court against her former attorney. If the plaintiff never gets her day in court, she is punished for conduct she did not cause or even encourage. If a malpractice lawsuit is filed, it is more complex and difficult than the underlying lawsuit for both the client and the court. The original defendant's conduct is still on trial. Requiring an attorney to pay for a subsequent malpractice lawsuit and any

> judgment rendered therein, especially in the absence of contemptuous conduct by the attorney, is a severe sanction for an act of delay or simple neglect. Neither of these results seems acceptable except in circumstances warranting an extreme sanction.

603 So.2d at 605-606. (The dissent further noted that nothing was present in the facts or had been found by the trial court to justify the extreme sanction of dismissal with prejudice. Id.) Fla.R.Civ.P. 1.010 instructs that the civil rules are to be construed to secure a just, speedy and inexpensive determination of every action. The above noted observations by the Second District Court of Appeals dissent make it clear that the extreme sanction of dismissal with prejudice imposed by the trial court is in conflict with the objectives of Fla.R.Civ.P. 1.010.

This Court should now reverse the decision of the Second District Court of Appeals in this case and direct that this case be remanded to the Circuit Court of Lee County for further proceedings. Because none of these factors are present in this case to support a dismissal with prejudice as an appropriate sanction by the trial court, and because the trial court made no finding (and indeed could not have made a finding) that any sanctionable conduct by Kozel's counsel constituted a willful or deliberate refusal to obey an order of that court, the trial court abused it discretion in imposing the extreme sanction of dismissing Kozel's amended complaint with prejudice.

CONCLUSION

The Court should issue its mandate vacating the decision of the Second District Court of Appeals and the dismissal with prejudice by the Circuit Court of Lee County of appellant's amended complaint and direct that the case be remanded to Circuit Court of Lee County for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Appellant's Initial Brief was mailed by first class mail, postage prepaid to: Gerald W. Pierce, Henderson, Franklin, Starnes & Holt, P.A., Fort Meyers, Florida by sending same by U.S. mail this 28th day of May 1993.

_____
Certifying Attorney