

SUPREME COURT OF FLORIDA

CAROLANN D. KOZEL,
Appellant

v.

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

Case No. 80,380

APPELLANT'S REPLY BRIEF

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Appellant, Carolann D. Kozel ("Kozel"), by her undersigned counsel, hereby files her Reply Brief in accordance with Fla.R.App.P. 9.210. As will be shown, the "Brief of Respondent on Merits" filed by Appellee does not address the points raised by Appellant in her Initial Brief. As a result, only a very abbreviated reply is necessary or appropriate herein.

SUMMARY OF POINTS OF ARGUMENT

1. Appellee's Brief does not address whether a trial court abuses its discretion in dismissing an action with prejudice as a extreme sanction for non-compliance with a time limit order if the trial court does not first make an express finding of willfulness relating to the circumstances of such non-compliance.

2. Appellee's contention that it is impossible ever for a party (or counsel) to violate a trial court's order dismissing a complaint with leave to amend to file an amended complaint within a specified time, and therefore, a trial court should never have to inquire into the circumstances of the non-compliance with the time limit or to determine whether such non-compliance was willful is clever, but disingenuous and should be rejected.

APPELLEE'S BRIEF COMPLETELY SIDESTEPS THE CONFLICTS IN THE DECISIONS CITED IN APPELLANT'S BRIEF AS TO WHETHER A FINDING OF WILLFULNESS IS NECESSARY TO JUSTIFY THE EXTREME SANCTION OF DISMISSAL WITH PREJUDICE BY PRESENTING THE ARGUMENT SIMPLY THAT THE TRIAL COURT'S EXERCISE OF ITS DISCRETION SHOULD BE AFFIRMED

Appellee's Brief on the Merits does not address the analysis presented in Appellant's Initial Brief relating to the developments in the case law concerning whether a finding of willfulness is needed to justify the extreme sanction of dismissal, but instead, urges that the trial court's exercise of its discretion in this case should be simply affirmed. (The trial court found no willfulness in any non compliance which may have occurred.) By using this approach, appellee has completely sidestepped the points urged by Petitioner (appellant) in her Brief on Jurisdiction as developed more fully by Appellant in her Initial Brief. As a result, Appellee's Brief is not helpful to the resolution of the issues presented on this discretionary appeal. The arguments advanced by Appellee do not address whether the trial court abused its discretion by failing to apply a proper legal standard by making a finding of willfulness (if possible) before issuing the extreme sanction of dismissal with prejudice.

APPELLEE'S CONTENTION THAT A PARTY CAN NEVER VIOLATE A TRIAL COURT'S ORDER DISMISSING A COMPLAINT WITH LEAVE TO FILE AN AMENDED COMPLAINT WITHIN A SPECIFIED TIME IS A CLEVER BUT DISINGENUOUS ARGUMENT WHICH IS LACKING IN MERIT

Appellee's contention that it is impossible ever for a party (or counsel) to violate a trial court's order dismissing a complaint with leave to amend to file an amended complaint within a specified time should be rejected.

As is clear from the record in this case, the trial court below entered its initial order dismissing plaintiff's

(appellant's) complaint, but granting leave to file an amended complaint within a certain further period of time. Record, Item 5, Page 9. At the time of the initial dismissal, it was obvious to all concerned that plaintiff intended to file a amended complaint so that the action could be pursued against the defendant as the plaintiff, by her counsel, ultimately did do.

The trial court's initial order of dismissal granted plaintiff *automatic* leave to file her amended complaint within twenty days, but did not state that plaintiff would not be allowed to file an amended complaint ever after that twenty day period or that the action would be dismissed with prejudice if plaintiff did not file her amended complaint within that twenty day period. Record, Item 5, Page 9. Some time after the twenty day time limit for automatic approval of filing of an amended complaint had run, plaintiff filed her amended complaint (Record, Item 6, Page 10-14) and then a motion for leave to file her amended complaint (Record, Item 9, Page 19-20) after defendant unexpectedly objected to timeliness. The trial court then dismissed plaintiff's action with prejudice as a sanction. Record, Item 10, Page 21-22.

The record is undisputed that plaintiff's (appellant's) counsel believed in good faith that opposing counsel had agreed to a requested extension of the time for filing of an amended complaint which could be made in better form (due to better definition of the plaintiff's injury) if additional time was allowed for filing the amended complaint and that no objection to additional time for filing would be made by defendant's counsel. The additional time (beyond the initial twenty days) which passed

before plaintiff filed her amended complaint and motion for leave to file her amended complaint was not prejudicial to the defendant (appellant), nor was plaintiff or her counsel in any manner disrespectful of the trial court or its order in delaying the filing of the amended complaint. As noted, the trial court's initial dismissal order did not require plaintiff to file her amended complaint, if at all, within the twenty day period, but rather granted automatic leave to do so. That order also did not state that plaintiff action would be dismissed with prejudice if plaintiff did not file her amended complaint within twenty days.

The trial court should not have dismissed with prejudice as an extreme sanction under these circumstances which are completely lacking in willfulness on the part of plaintiff or her counsel. Instead, the trial court should have first determined the circumstances of the non-compliance with the time limit set by the trial court if, indeed, there was non-compliance as the trial court apparently perceived there to be. The trial court should then have further determined whether there was any willfulness associated with such non-compliance if the trial court wished to consider the extreme sanction of dismissal with prejudice rather than a lesser sanction, if indeed, any sanction at all was appropriate. Because of the complete lack of any willfulness in any non-compliance, the trial court should not have dismissed with prejudice as the extreme sanction. By doing so, the trial court abused its discretion.

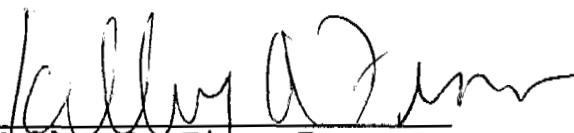
In this case it is plain that the trial court imposed the extreme sanction against plaintiff of dismissal with prejudice as a result of the trial court's determination of plaintiff's (non-

willful) non-compliance with the time limit specified in the trial court's initial dismissal order which granted automatic leave to file an amended complaint within twenty days. Appellee's contention that a trial court should never have to inquire into the circumstances of the non-compliance with a time limit order or to determine whether such non-compliance is willful or contumacious before imposing the extreme sanction of dismissal with prejudice should be rejected for the reasons set forth in Appellant's Initial Brief.

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 the 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 Reply Brief was mailed by first class mail, postage prepaid to: Gerald W. Pierce, Esq., Henderson, Franklin, Starnes & Holt, P.A., P.O. Box 280, Fort Myers, Florida 33902-0280, counsel for appellee, this 30th day of June, 1993.

