IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-681

. . . .

JEANNE E. PAUL,
Petitioner,

vs.

JEAN-CLAUDE PAUL,
Respondent.

. . . .

RESPONDENT'S ANSWER BRIEF ON THE MERITS

ON AN INTER-DISTRICT CONFLICT CERTIFIED BY THE
DISTRICT COURT OF APPEAL, THIRD DISTRICT

. . . .

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STATEMENT OF CASE AND FACTS

The relevant facts and procedural history of this case are set forth in the Third District's opinion, *Paul v. Paul*, 807 So. 2d 191, 192-194 (Fla. 3d DCA 2002).

SUMMARY OF ARGUMENT

Due to confusion in his law office following a previous withdrawal, counsel for the Husband missed the calendar call, at which the court fixed the date for the final hearing. Unfortunately, the Wife's counsel did not serve notice of the final hearing until one or two days before the hearing, and the Husband's counsel did not receive the order until the day after the resulting *ex parte* hearing. The subsequent judgment awarded the parties' sole asset (their house) entirely to the Wife. The trial court's order denying the Husband's motion for relief from that judgment was an improper and excessive sanction for the failure of the Husband's counsel to attend calendar call.

The Third District correctly held that a party does not waive its right to receive service of a court's order setting a matter for trial when the party's counsel misses a calendar call. Even *defaulted* parties are entitled to such notice, and the Husband was not in default. This Court should approve the Third District's decision.

ARGUMENT

THE FAILURE TO ATTEND A CALENDAR CALL DOES NOT JUSTIFY TAKING AWAY A PARTY'S RIGHT TO KNOW THE DATE A COURT SETS FOR TRIAL.

This case hinges on the meaning of Florida Rule of Civil Procedure 1.440—specifically, the rule's discrete and express requirements of (1) service of notice that an action is "at issue and *ready to be set* for trial," and (2) "an order *fixing a date* for trial," which must be served on even defaulted parties.

[1] According to the petitioner, a party is entitled to receive notice that an action is at issue, but forfeits the right to receive the court order fixing the actual date for trial if the party misses a calendar call. The text and purpose of the rule offer no basis for such a draconian sanction, especially under the facts of this case.

Rule 1.440 provides in pertinent part:

> **(a) When at Issue.** An action is at issue after any motions directed to the last pleading served have been disposed of or, if no such motions are served, 20 days after service of the last pleading. . . .
>
> **(b) Notice for Trial.** Thereafter any party may file and serve a notice that the action is at issue and ready to be set for trial. . . .
>
> **(c) Setting for Trial.** If the court finds the action ready to be set for trial, it shall enter *an order fixing a date for trial*. Trial shall be set not less than 30 days from the service of the *notice for trial*. By giving the same notice the court *may* set an action for trial. In actions in which the damages are not liquidated, *the order setting an action for trial shall be served on parties who*

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[1] All italic emphasis in this brief has been added by the respondent.

are in default in accordance with rule 1.080(a).

Fla. R. Civ. P. 1.440(a)-(c). Thus, the rule provides that a party may serve notice that a case is ready to be set for trial once the case is "at issue." If the case is at issue, the trial court must then "enter an order *fixing a date* for trial." The trial court is to set the date of trial so that it is at least 30 days after the *notice*, though not necessarily 30 days after the order.

A court is permitted to give notice *sua sponte* that a case is at issue and simultaneously set the action for trial. In such a combined notice/order scenario, the rule facially would require that the court set the trial date at least 30 days after the notice and also fix the date of trial. In practice, courts often give notice that trial is at issue with case management orders that fix dates for *calendar calls*—and multiple weeks of potential trial dates—but then do not fix the actual date for trial until calendar call.

In this divorce case, the matter was at issue and the judge issued a notice requiring the parties to attend a calendar call for trial (final hearing) on January 8, 2001. *Paul*, 807 So. 2d at 192-93. Due to confusion in his law office following a previous withdrawal, the Husband's trial counsel did not attend the calendar call, during which the court entered an order fixing January 18, 2001 as the date for final hearing. *Id.* at 193. The Wife's counsel certified that he served the order fixing the trial date by U.S. Mail the day after calendar call, but did not actually mail the order until one or two days before final hearing. *Id.*

The Husband and his counsel did not receive the order until the day after the hearing. *Id.* After receiving the court's judgment, the Husband moved for rehearing and to set aside the judgment under Rule 1.540. *Id.*

The real issue before the Court is whether an order fixing a date for a calendar call, and giving multiple weeks during which a final hearing may be held, satisfies the Rule 1.440(c)'s express requirement of an order fixing an actual date for trial. The Wife seeks to cast the issue as whether the Husband is entitled to "additional notice" after notice of calendar call. That is correct, as far as it goes, but the Wife's argument (which emphasizes the "additional") incorrectly suggests that the additional notice—which Rule 1.440(c) and due process mandate—is something special. That suggestion ignores the rule's express requirement of a living, breathing order fixing a date for trial, while seeking to justify an *ex parte* final hearing awarding all assets to the Wife as a sanction for missing calendar call.

[2] The facts of this case do not give reason for such a result.

In reversing the trial court's order denying the Husband's motion for relief from judgment under Rule 1.540, the Third District explained:

> Once we find that the calendar call notice was properly sent to

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[2] Of course, even a *defaulted* party is entitled to receive a copy of the order setting the date for trial. Fla. R. Civ. P. 1.440(c).

> counsel, we must decide whether it was necessary to provide additional notice to Mr. Paul of the date of the final hearing. The fourth district, in *Watson v. Watson,* 683 So.2d 534 (Fla. 4th DCA 1996), held that notice of the calendar call fulfilled the requirements of Florida Rule of Civil Procedure 1.440(c). We cannot agree that an attorney can attend a calendar call, be given a date and time for trial, then wait until the day before to mail notice to the adversary. Mrs. Paul's attorney had ample time to notify opposing counsel, yet apparently through some clerical error, delayed notifying him for more than a week.
>
> We agree with *Watson* that the purpose of a calendar call is to consider possible conflicts and to advise the parties more specifically when the case will actually be heard. By not attending, an attorney would waive any potential conflicts in schedule. Counsel has a professional obligation to appear at the calendar call when ordered to do so. The court has the power to sanction counsel who fails to appear, but we can hardly visit upon the client the sins of counsel.

807 So. 2d at 193-194. The Third District's decision is consistent with the written requirements of Rule 1.440(c). The Fourth District's contrary conclusion in *Watson* removes the rule's express requirement of an order "fixing a date" and improperly "visit[s] upon the client the sins of counsel."

As the district court found, at the *ex parte* final hearing the Husband's "only asset, the marital home, was awarded to the wife, and he was never given the opportunity to be heard on the matter." 807 So. 2d at 194. The Wife's arguments to this Court addressing the purported merits of the trial judge's order—based upon a final hearing in which the Husband could not

participate—only serve to magnify the need for a final hearing in which the Husband may participate.

CONCLUSION

The Court should affirm the Third District's decision and disapprove the Fourth District's decision in *Watson v. Watson*, 683 So. 2d 534 (Fla. 4th DCA 1996), to the extent *Watson* holds that an order fixing a date for calendar call satisfies Rule 1.440(c)'s requirement of an order fixing an actual date for trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I sent a copy of this answer brief by U.S. Mail to James C. Blecke, Esq., Deutsch & Blumberg, P.A. New World Tower, Suite 2802, 100 North Biscayne Boulevard, Miami, FL 33132, and Peter Adrian, Esq., Legal Aid Society of Dade County, 123 N.W. 1st Avenue, Miami, FL 33128, on May 24, 2002.

CERTIFICATE OF COMPLIANCE

This brief was prepared in Times New Roman 14-point font.

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