SUPREME COURT OF FLORIDA

OMAR DAVID HUSSAMY, M.D.; OMAR DAVID HUSSAMY, M.D., P.A.; and COASTAL ORTHOPEDIC CENTER,

Petitioners,

vs.

BEATRICE ROSE,

Respondent.

CASE NO.: SC03-1399

Lower Tribunal No.: 4D01-2856

INITIAL BRIEF OF PETITIONERS OMAR DAVID HUSSAMY, M.D.; OMAR D. HUSSAMY, M.D., P.A.; and COASTAL ORTHOPEDIC CENTER

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PRELIMINARY STATEMENT

Throughout this Brief, cites to the Record on Appeal will be designated (R). Cites to the trial transcript will be designated as (T). Respondent, Appellant and Plaintiff below, Beatrice Rose, will be referred to throughout this Brief as Plaintiff. Her trial counsel, Donald Tobkin, Esq., will be referred to as Mr. Tobkin in order to be consistent with the decision of the Fourth District Court Opinion below. Petitioners, Appellees and Defendants below, Charles M. Fischman, M.D., and Omar David Hussamy, M.D., will be referred to respectively as Dr. Fischman and Dr. Hussamy. Dr. Fischman and Dr. Hussamy will be referred to jointly as the Defendants. The Defendants' respective professional associations will not be referred to separately.

The Final Judgment struck the Plaintiff's witnesses and directed a verdict in favor of the Defendants. For purposes of this appeal and to be consistent with prior case law, the result in this case will sometimes be referred to as a dismissal.

STATEMENT OF THE CASE AND FACTS

This matter is before the Court on a Certified Question of Great Importance from the Fourth District Court of Appeal. A conformed copy of the Fourth DCA's Opinion is included in the Appendix to this Brief. That Opinion provides a summary of the case and facts which will be relied upon by Dr. Hussamy for purposes of this Brief.

Dr. Hussamy wishes to emphasize the following:

1. In the Final Judgment, the trial judge emphasized the difficulty of describing the extent of Mr. Tobkin's misconduct throughout the prosecution of this case. The misconduct began at the onset of the case and continued unabated through and including the sixth day of trial, at which time the trial court struck the Plaintiff's pleadings and ordered directed verdicts for the Defendants. A bare reading of the record, even in its entirety, cannot accurately convey the full extent and effect of Mr. Tobkin's misconduct.

2. Judge Warner's concurring opinion highlights Plaintiff's failure to obey court orders, attend a summary jury trial, and answer supplemental interrogatories. Additionally, the concurring opinion refers to an excerpt of Plaintiff's deposition, in which Mr. Tobkin and defense counsel engage in a dynamic argument in the presence of the Plaintiff.

SUMMARY OF ARGUMENT

In review of a trial court's imposition of sanctions, the standard of review is whether the trial court abused its discretion. The Fourth District Court, in its opinion below, found that in the absence of record evidence of client involvement in Mr. Tobkin's misconduct, the imposition of the sanction of dismissal was necessarily an abuse of discretion. This Court's opinion in Kozel v. Ostendorf, however, provides six factors for a trial court to consider in determining whether there is a lesser sanction than dismissal which should be imposed. In doing so, this Court did not identify any single factor as dispositive, but allowed for the trial courts to rely on their firsthand knowledge of events and weigh each of the factors equally in determining whether there is an alternative sanction to dismissal.

In this case, the trial court clearly considered the six Kozel factors and found all to weigh in favor of dismissal. Unlike most cases in which attorney misconduct is the subject of sanctions prior to trial, the misconduct in this case resulted in the trial court's inability to provide the Defendants with a fair trial. Left with an obvious need to end the trial, the trial court had only two options. The first option, granting Defendants' motions for directed verdicts, would sanction the Plaintiff and her attorney and save the Defendants innocent of wrongdoing from further abuse. The second option, ordering a mistrial, would sanction Plaintiff's counsel but would also result in

a continued and incompensable harm to the Defendants. Using great discretion, the trial court determined that under the peculiar and egregious circumstances of this case, dismissal in the form of directed verdicts was the only viable and just alternative.

The Fourth District Court, in remanding this case, also relied on a lack of record evidence that the Plaintiff had knowledge of her attorney's misconduct. The absence of record evidence should weigh in favor of and not against dismissal. First, the Plaintiff voluntarily retained Mr. Tobkin and had him prosecute her claim, with continued misconduct, for two years prior to trial and throughout the six days of trial. Mr. Tobkin acted as Plaintiff's attorney and agent. Thus, Plaintiff should be imputed with having some knowledge of Mr. Tobkin's acts.

Second, both the Plaintiff and her attorney know the extent of Plaintiff's knowledge or complicity in Mr. Tobkin's misconduct. The fact that Mr. Tobkin remains her attorney of record during this appeal, and the fact that she has never presented any evidence or testimony claiming a lack of knowledge, should be imputed against Plaintiff and not against Defendants. The Defendants have no means of obtaining such evidence, but Plaintiff has every opportunity to present it. A client's silence should not shield that client from the consequences of her attorney's misconduct. Certainly, that silence should not work in favor of the Plaintiff and to the detriment to the Defendants who did no wrong and have no means of determining

whether the Plaintiff had knowledge of the egregious misconduct.

Finally, should this Court determine that Plaintiff's knowledge of Mr. Tobkin's misconduct is the dispositive factor, to be consistent with prior case law and to be fair to the Defendants, this case should be remanded to the trial court for an evidentiary hearing to determine the extent of Plaintiff's knowledge or involvement. Again, the Plaintiff's silence should not protect her from the consequences of Mr. Tobkin's misconduct while subjecting the Defendants to very significant and incompensable consequences.

Accordingly, the decision of the Fourth District Court of Appeal should be quashed and the Final Judgment of the trial court should be affirmed. In the alternative, if this Court finds that client knowledge or involvement is itself dispositive, remand this case to the trial court for an evidentiary hearing on that issue.

ARGUMENT

The Fourth District Court of Appeal certified the following as a question of great importance:

> **MAY A TRIAL COURT DISMISS A CIVIL ACTION AS THE RESULT OF A PLAINTIFF'S ATTORNEY'S MISCONDUCT DURING THE COURSE OF THE LITIGATION WHERE A CONSIDERATION OF ALL OF THE KOZEL FACTORS POINT TO DISMISSAL EXCEPT THAT THERE IS NO EVIDENCE THAT THE CLIENT WAS PERSONALLY INVOLVED IN THE ACT OF DISOBEDIENCE?**

The question should be answered in the affirmative. The opinion of the Fourth District Court of Appeal should be quashed, and the Final Judgment of the trial court should be affirmed.

I. A THOROUGH CONSIDERATION OF THE SIX KOZEL FACTORS, AS APPLIED TO PLAINTIFF'S ATTORNEY'S MISCONDUCT, WEIGHS IN FAVOR OF DISMISSAL.

As the trial court did in its Final Judgment, the District Court's Opinion turns on the review and application of the six factors set forth by this Court in Kozel v. Ostendorf, 629 So.2d 817 (Fla. 1993), relevant to "determining whether dismissal with prejudice is warranted." Id. at 818. Both the trial court and the District Court of Appeal agreed that five of the six factors weighed heavily in favor of dismissal.[1]

[1]The five factors in favor of dismissal were: Mr. Tobkin's misconduct was willful, deliberate and contumacious; Mr. Tobkin had been previously sanctioned;

However, with regards to the third factor identified by the Court in Kozel, whether the client was personally involved in the act of disobedience, the trial judge found in favor of dismissal where the District Court found against dismissal.

The District Court's conclusion was based on two considerations. First it interprets Kozel's third factor, client involvement, to be a super factor which must be present in every case before dismissal can be ordered as a sanction. Second, the District Court found that there was no record evidence that the Plaintiff was aware of or involved in the misconduct. The Petitioners respectfully disagree. First, it does not appear that this Court in Kozel intended for any single factor to be dispositive. Second, the lack of record evidence should weigh against the Plaintiff in favor of the dismissal of this case.

A. No single dispositive factor exists among the six-factor framework created by the Florida Supreme Court in Kozel**.**

In reversing the trial court's Final Judgment, the Fourth District Court specifically relied on its earlier decision in Schlitt v. Currier, 763 So.2d 491 (4th DCA 2000). In Schlitt, plaintiff's counsel repeatedly failed to comply with orders which

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Mr. Tobkin's conduct caused prejudice to the Defendants; Mr. Tobkin offered no reasonable justification for noncompliance; and, the delay created by the misconduct created significant problems of judicial administration.

compelled timely compliance with discovery requests. To no avail, monetary sanctions were entered against plaintiff's counsel. When Schlitt's counsel continued to ignore court orders, the trial court struck Schlitt's Complaint and entered judgment in favor of the defendant. Schlitt obtained new counsel and moved to set aside the sanctions. Additionally, he filed an affidavit claiming to not have knowledge of the misconduct of his counsel.

The Fourth District Court in Schlitt, interpreted Kozel as "mandating reversal of such extreme sanctions as an abuse of discretion where the actions were the fault of the attorney and not the party." Id. at 493. However, in Kozel, this Court does not identify any of the six factors as individually dispositive. In fact, this Court stated that "a fine, public reprimand, or contempt order *may* often be the appropriate sanction to impose on an attorney in those situations where the attorney, and not the client, is responsible for the error." Kozel at 818. (Emphasis supplied.) This Court did not state, as the Fourth District Court in Schlitt misinterprets, that reversal is mandatory in situations where a sanction dismissing a case is based solely on the actions of the attorney. Instead, Kozel clearly intended for the trial court to consider the six factors equally in determining whether dismissal is an appropriate sanction. "Upon consideration of these factors, if a sanction less severe than dismissal with prejudice appears to be a viable alternative, the trial court should employ such an

alternative." Kozel at 818. Conversely, if upon consideration of the six factors, there appears to be no viable alternative to dismissal, the trial court should be allowed to employ such an alternative. In the present case, the trial court did expressly consider the factors set out by Kozel, and concluded that the only fair sanction in this case was dismissal in the form of a directed verdict.

Only in very unusual and egregious cases will a dismissal be the only viable sanction for attorney misconduct. The goal is to ensure that parties obtain a timely and fair trial on the merits. When attorneys are neglectful of pleadings, engage in discovery abuses or even wilfully fail to comply with pretrial court orders, as was the case in Kozel, Schlitt, and in other cases cited therein, the trial court is usually able to fashion a sanction that remedies the wrongs and realigns the case for a fair trial. Unlike Kozel, Schlitt, and the other cases cited therein, this case involved attorney misconduct throughout the pretrial stage, but more importantly, misconduct during the actual trial. The misconduct occurred in the presence and under the observation of the trial judge. The trial court recognized, on the sixth day of trial, that "The totality of Plaintiff's continuous, intentional and egregious actions prevented Defendants from the possibility of receiving a fair trial and presenting their defense." Final Judgment (R-3109). Plaintiff's misconduct left the trial judge with no choice but to end the trial. To end the trial, the judge could either issue directed verdicts,

as requested by the Defendants, or order a mistrial, as the court perceived to be Plaintiff's desire.

> The Court is also convinced that Plaintiff would like nothing better than a declaration of mistrial in this case, even if it were accompanied with some sanctions. She would be given a 'second bite of the apple' and the ability to correct all previous mistakes. Defendants complied with the orders of this Court and Plaintiff did not. It would be unduly prejudicial to put Defendants through this again. Final Judgment (R-3111)

The District Court's remand of this case to the trial court for consideration of other appropriate sanctions short of dismissal, is tantamount to a declaration of mistrial. A remedy specifically found by the trial court to be unjust to Defendants innocent of wrongdoing. Although Mr. Tobkin would certainly be sanctioned pursuant to the District Court's remand, the Defendants will also be sanctioned, in effect, by the need to attend a retrial. Having been denied a fair and timely adjudication of the case at the first trial, the Defendants would again be required to leave their homes and their medical practices to attend another lengthy and publicly known trial. As with the first trial, they will suffer financially and emotionally. Defendants will be subjected to unwanted public attention years after they last provided medical care to the Plaintiff. As a result of Mr. Tobkin's, the Plaintiff's chosen representative, intentional engagement in continuous and contumacious conduct, Defendants' staffs will also suffer from their absence and their patients will

suffer from the staff's lack of availability and attention. The trial court properly used its discretion when it determined that dismissal, in the form of directed verdicts, was the only just sanction on the sixth day of trial. The trial court's decision was entirely consistent with this Court's opinion in Kozel.

B. **A lack of record evidence regarding Plaintiff's involvement in the misconduct weighs in favor of dismissal.**

The Fourth District Court stated: "The record on appeal, however, does not support a finding that Rose herself participated in the misconduct or that she was aware in any real sense of the nature or extent of her attorney's misdoing..." Rose, Appendix, page 5. The District Court therefore concludes that Kozel's third factor, the client's personal involvement in the act of disobedience, does not support dismissal in this case. To the contrary, any lack of record evidence should weigh in favor of dismissal.

1. **In the absence of affirmative evidence from the Plaintiff that she did not have knowledge of or involvement in Mr. Tobkin's disobedience, a presumption should be made in favor of dismissal.**

Plaintiff retained Mr. Tobkin to prosecute this action on her behalf. The Complaint was filed in 1997. The record reflects a great deal of discovery prior to trial in August of 1999. The record further reflects, as found by the Fourth District, that there was continuous misconduct on the part of Mr. Tobkin throughout the

pretrial discovery and during the six days of trial in 1999. Circumstantial evidence, as mentioned briefly by Judge Warner in his concurring opinion, would suggest that the Plaintiff had an opportunity to know of such misconduct. Plaintiff was of course present at her deposition when Mr. Tobkin changed his position and so misstated the situation that he was accused of being a liar in her presence. That deposition occurred on May 28, 1998, long before the majority of the egregious misconduct occurred in this case. Yet the District Court appears to presume that Plaintiff never suspected, investigated, nor knew of the misconduct by her chosen counsel. Circumstantial evidence suggests she should have.

Even if the Plaintiff did not investigate, knowledge should be imputed to her. A client voluntarily chooses their attorney to be their representative, and the client cannot:

> ...avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation in which a party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'

Link v. Wabash R. Co., 370 U.S. 626, 633-34 (quoting Smith v. Ayer, 101 U.S. 320, 326 (25 L.Ed. 955 1980)). Additionally, "The right to rely on a representation is closely bound up with the duty of the representee to use some measure of precaution to safeguard his own interest." Applefield v. Commercial Standard Insurance

Company, 176 So.2d 366, 377 (Fla. 2d DCA 1965). In fact, clients in a variety of circumstances have been held accountable for the acts and omissions of their counsel. See, Link v. Wabash, supra. (the dismissal of petitioner's claim because of counsel's failure to attend a pretrial conference was not an abuse of discretion); Pioneer Investment Services Company v. Brunswick Associated Limited Partnership, 507 U.S. 380, 396 (1993) (a client may be held accountable for their attorney's failure to comply with the court-ordered bar date regarding a bankruptcy proceeding); Applefield v. Commercial Standard Insurance Company, supra (attorney's knowledge of liens and encumbrances on title to real property may be imputed to client where attorney, as agent, acts in the interest of the client principal); U.S. v. Boyle, 469 U.S. 241, 252 (1985) (client-taxpayer may not be excused from late filing where reliance on the attorney's advice cannot substitute with compliance of an unambiguous statute).

Public policy should encourage, rather than discourage, a client's involvement in the prosecution of their claim. A client who chooses an attorney to pursue a legal action should have some obligation to monitor that attorney's activities during the course of two years of discovery, a summary jury trial, and six days of trial. Failure to do so should be at the peril of the client, and not the Defendants . To hold otherwise, as the Fourth District Court would have this Court do, would serve only to shield the wilfully inattentive client from the consequences of the agent's misconduct.

The Kozel opinion, as written, allows for the possibility that there could be a case in which the misconduct is so egregious that even in the absence of the client's knowledge or involvement, fairness demands the extreme sanction of dismissal. The trial court, in the exercise of its discretion, recognizing that his options were limited on the sixth day of trial, found this case to be appropriate for the extreme sanction of dismissal. In fact, the trial court in its Final Judgment repeatedly referred to the Plaintiff and Plaintiff's counsel as having been engaged in the misconduct. The trial court, with firsthand knowledge of the proceedings, clearly attributed the attorney's misconduct to the Plaintiff's. That finding should not be disturbed on appeal.

2. **The trial court's exercise of discretion, in granting the directed verdicts, should not be disturbed under the circumstances of this case**.

It is well established that a trial court has discretion to enter sanctions for failure to comply with procedural rules or court orders. Farish v. Lum's, Inc., 267 So.2d 325 (Fla. 1972); Mercer v. Raine, 443 So.2d 944 (Fla. 1983). That discretion is broad enough to include dismissal of actions, although the severest sanction of dismissal "should be reserved for those aggravating circumstances in which a lesser sanction would fail to achieve a just result." Kozel at 818. The trial court below expressly considered lesser sanctions, but concluded that under the aggravating circumstances of this case, a lesser sanction would not achieve a just

result.

This Court has recognized the importance of the trial court's discretion in the imposition of appropriate sanctions. In Farish, this Court stated:

> The exercise of discretion by a trial judge who sees the parties first hand and is more fully informed of the situation is essential to the just and proper application of procedural rules. In the absence of facts showing an abuse of that discretion, the trial court's decision excusing or refusing to excuse, noncompliance with rules... must be affirmed... It is the duty of the trial court, and not the appellate courts, to make that determination. Farish at 327-328.

The trial court below experienced first hand the continuous contumacious conduct of Mr. Tobkin during trial. The trial court considered the factors set forth in Kozel as guidelines for the imposition of sanctions and concluded that the striking of pleadings and the granting of Defendants' motions for directed verdicts to be appropriate. That determination was not an abuse of discretion and should be affirmed.

3. **The Court should require for Plaintiff to demonstrate a lack of knowledge or involvement in her attorney-agent's disobedience.**

Defendants are aware of only two people who assuredly know whether the Plaintiff was involved in Mr. Tobkin's continuous misconduct. They are Mr. Tobkin and the Plaintiff herself. When the plaintiff in the Schlitt case had his Complaint stricken as a result of his attorney's misconduct, that plaintiff retained new counsel and filed an affidavit disavowing any knowledge of the attorney's misconduct.

In the present case, the Plaintiff has taken absolutely no action consistent with the shock that should accompany the granting of Defendants' requests for directed verdicts on the sixth day of trial, the entry of the Final Judgment based on her attorney's misconduct, and the opinion of the Fourth District Court finding five of the six Kozel factors to be present. The District Court's opinion expressly states that Plaintiff's counsel engaged in intentional and egregious misconduct. Nevertheless, as this Brief is drafted, Mr. Tobkin remains the attorney of record for Plaintiff.

Unlike the plaintiff in Schlitt, the Plaintiff has not filed an affidavit or presented any other evidence or testimony concerning her knowledge or involvement in Mr. Tobkin's misconduct. Defendants have had no opportunity or means to determine the Plaintiff's knowledge. To the extent that the Fourth District Court relies on a lack of record evidence to support a reversal of the Final Judgment and remand for a lesser sanction, that lack of record evidence should actually weigh in favor of dismissal. The extreme misconduct of Plaintiff's counsel in this case makes Plaintiff responsible for coming forward with evidence, and thus Plaintiff should not be permitted to benefit from her failure to do so.

4. **Justice requires at a minimum an evidentiary hearing on the Plaintiff's involvement**.

Interestingly, the Fourth District Court below finds a lack of record

evidence and then remands this case with instructions that a lesser sanction than dismissal be imposed. However, in Schlitt, when the plaintiff retained new counsel and filed an affidavit disavowing knowledge of the attorney's misconduct, the Fourth District found a fact issue and remanded with instructions that the trial court conduct an evidentiary hearing on the question of Schlitt's notice or knowledge of his attorney's conduct. If a question was present in Schlitt, where the plaintiff had retained new counsel and filed an affidavit attesting to his lack of knowledge, certainly a question of fact exists in this case in which the Plaintiff has failed to take any action to disavow knowledge or complicity in Mr. Tobkin's misconduct. It is Petitioners' position that the Kozel factors still favor the sanction of dismissal, even if Plaintiff was unaware of the egregious and continuous nature of Mr. Tobkin's misconduct. But if this Court finds that the third Kozel factor, client involvement, is a singularly dispositive factor, then Petitioners should at least be entitled to an evidentiary hearing to determine that factor.

CONCLUSION

In light of the above, this Court should quash the decision of the Fourth District Court of Appeal and affirm the Final Judgment of the trial court, or, if this Court finds that client knowledge or involvement is itself dispositive, remand this case to the trial court for an evidentiary hearing on that issue.

Respectfully submitted,

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Robert D. Henry FBN: 342165

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by mail delivery this _____ day of September, 2003, to **RICHARD A. BARNETT, ESQ.**, 121 South 61st Terrace, Hollywood, Florida 33023 - appellate counsel for Beatrice Rose; **DONALD A. TOBKIN, ESQ.**, Post Office Box 220990, Hollywood, Florida 33022 - *counsel for Beatrice Rose*; **JENNIFER CARROLL, ESQ.**, 700 Village Square Crossing, Suite 101, Palm Beach Gardens, Florida 33410 - appellate counsel for Fischman; and **LEWIS W. MURPHY, ESQ.**, Post Office Box 3406, Vero Beach, Florida 32964-3406 - counsel for Fischman.

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DOCUMENT CERTIFICATION

I FURTHER CERTIFY that this document comports with the

requirements of this Court in that this document has been prepared with the Times New Roman 14 type style and all margins are at least one inch, and on bond paper measuring 8 1/2 x 11 inches.

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