IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 03-1400
L.T. CASE NO. 4D01-2856

CHARLES M. FISCHMAN, M.D.,
FISCHMAN AND BORGMEIER, M.D., P.A.,

Petitioners,

vs.

BEATRICE ROSE,

Respondent.

PETITIONERS' INITIAL BRIEF

Lewis W. Murphy, Jr., Esquire
Florida Bar Number: 0909467
MOSS, HENDERSON, BLANTON, LANIER, KRETSCHMER & MURPHY, P.A.
Post Office Box 3406
Vero Beach, Florida 32964-3406
(561) 231-1900
[Trial Counsel]

Jennifer S. Carroll, Esquire
Florida Bar Number: 512796
LAW OFFICES OF JENNIFER S. CARROLL, P.A.
700 Village Square Crossing, Suite 101
Palm Beach Gardens, Florida 33410
(561) 478-2102
[Appellate Counsel]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Cont'd) Page(s)

Other Authorities

PREFACE

Petitioners, Charles M. Fischman, M.D., Fischman and Borgmeier, M.D., P.A., were defendants/appellees below, and will be referred to as petitioners, defendants, or Dr. Fischman and/or his P.A. Respondent, Beatrice Rose, was the plaintiff below and will be referred to in this brief as respondent, plaintiff, or Ms. Rose.

The following references will be used in this brief:

[R.]	Record on Appeal
[T.]	Trial Transcripts
[ST.]	Supplemental Transcript -- Pretrial Hearing Transcript of August 20, 1999, attached as an appendix to Appellee's Brief in the Fourth District

STATEMENT OF THE CASE AND FACTS

On August 11, 1997, Ms. Rose filed a complaint for medical malpractice against nine defendants, including Dr. Fischman and his P.A. [R.1-63] Only Drs. Fischman and Hussamy and their P.A.s remained as defendants at the time of trial.

The case was first before the Honorable Charles Smith. During this period of time, the court granted various protective orders for defendants after plaintiff unilaterally set depositions, often with inadequate notice and prior to timely responding to discovery requests. [R.193-194, 198-200, 209-210, 309-310, 391-393]

Shortly after this, four of the defendants moved for protective orders after plaintiff served notice that she was adding a motion to a hearing already specially set by defendants; plaintiff had not inquired as to whether defendants would agree to this. [R.419-427, 430-435, 439-441] Additionally, plaintiff served a subpoena on Dr. Fischman less than 3 days prior to the specially set hearing, requiring him to appear at this as an "evidentiary hearing," although it had been scheduled by defendants as a non-evidentiary hearing. [R.419-427] Judge Smith entered protective orders as to the four defendants on February 19, 1998, and this time added sanctions:

> 2. Additionally, the Court has imposed sanctions upon Donald A. Tobkin, M.D., Esquire, in favor of the Defendants, CHARLES M. FISCHMAN, M.D., OMAR DAVID HUSSAMY, M.D., SEBASTIAN RIVER MEDICAL CENTER, and HAROLD JOSEPH

> CORDNER, M.D., in an amount to be determined at a later date.

[R.476-477]

On March 2, 1998, Judge Smith struck plaintiff's claim for punitive damages. Prior to filing this claim, plaintiff had not met the requisite conditions precedent set forth in section 768.72, Florida Statutes. [S21-522]

On March 18, 1998, Judge Smith struck plaintiff's premature motion for attorney's fees; noted that "Plaintiff has barely complied with the presuit screening requirements found in Chapter 766" as to one defendant; ruled that if plaintiff was claiming vicarious liability as to one defendant, she had to allege a separate count and ultimate facts; noted that plaintiff had alleged "exactly the same" deviations and departures as to each defendant, and that "[t]he court deplores this shotgun approach as to each Defendant . . . ." [R.672-677]

On April 3, 1998, Judge Smith entered an order that plaintiff was to comply with interrogatories and requests to produce as to one of the defendants. [R.734-735] On April 22, 1998, Judge Smith ordered plaintiff to comply with co-defendant Dr. Hussamy's November 18 request to produce and interrogatories. The court gave plaintiff ten days to respond. [R.827-828]

Defendant Dr. Fischman and another defendant objected when plaintiff noticed the case for trial; the case was not at issue due to pending matters. [R.842-845, 864-868] On May 15, 1998, these motions were granted. [R.963-964] The court relieved all parties from complying with its previously issued order setting the trial and directing pretrial procedures [*see* R.849-852] -- an order the court had entered based upon plaintiff's noticing the case for trial. [R.963-964] The court further ordered that this time all counsel had to appear at a case management conference prior to the court entering another order setting trial. [R.964]

Meanwhile, on May 11, 1998, Dr. Fischman moved to compel better answers and responses to discovery requests, alleging that plaintiff had responded with an incomplete "boilerplate reply" directed to all the defendants, and that plaintiff was alleging that she did not have to comply with civil procedure rules requiring verified answers to interrogatories. [R.939-943] On May 27, 1998, *nunc pro tunc* May 22, 1998, the court granted Dr. Fischman's motion. It required that plaintiff provide "Verified Answers (sworn under oath)" and warned that any further failure of plaintiff to comply with court orders could result in sanctions. [R.1067-1068]

On May 22, 1998 -- "pursuant to this court's order dated April 22, 1998" -- Judge Smith entered an order granting Dr. Hussamy's motion to compel better

answers to interrogatories which had been served on November 18, 1997. [R.1027-1028] The court again warned plaintiff:

> 3. Any future failure on behalf of Plaintiff to comply with the provisions of this Court's Order(s) result in sanctions of this action.

[R.1028]

On June 22, 1998, Judge Smith, *sua sponte*, entered an order requiring a court reporter at every hearing. [R.1161-1162] On August 3, 1998, the court granted Dr. Fischman's motion to compel answers to interrogatories that had been "served by Court Order on June 5, 1998." [R.1271-1272] The June order had required plaintiff to respond to additional interrogatories within 30 days. [R.1163-1164] Dr. Fischman filed a motion to compel when plaintiff did not object or respond to the court-ordered interrogatories. [R.1246-1254]

Judge Smith recused himself from the case on September 7, 1998, after he became a patient of co-defendant Dr. Hussamy. [R.1458] By February 18, 1999, "all current Circuit Judges in Indian River County" had recused themselves from the case; it was reassigned to Judge Kenney, the administrative judge, pending rotation of another judge into the civil division of the county. [R.1583] Judge Kenney entered his order setting jury trial and pre-trial procedures on May 14, 1999. [R.1637-1641]

Shortly before trial, various motions were filed for protective orders and sanctions. On July 23, 1999, Dr. Fischman filed a motion for sanctions for deposition abuses. [R.1869-1894] Dr. Fischman alleged that during the depositions of plaintiff's experts Drs. Coburn and Mitchell, plaintiff repeatedly made speaking objections, and argumentative and inflammatory comments to frustrate the taking of the depositions. [R.1870] In addition, although the depositions were noticed *duces tecum*, neither expert brought his chart. [R.1881] Dr. Fischman incorporated the relevant portions of the transcript to his motion, and subsequently filed the depositions with the court. [R.1921-1922]

On August 13, 1999, Dr. Fischman filed his second motion for sanctions for deposition abuses. [R.2352-2365] He alleged that during the deposition of Dr. Hussamy, one of plaintiff's treating physicians, plaintiff attempted to threaten and intimidate Hussamy by suggesting that he should not testify about plaintiff's care and treatment, as doing so could result in "whatever peril might come of it." [R.2353] Plaintiff also stated, "If you talk about Beatrice Rose in any way without a subpoena for today's deposition, you're doing so at your own peril; one more time." [R.2353] Additionally, plaintiff told Dr. Hussamy, a devout Muslim, that he could talk about anything else: "You can talk about the Shah, I don't care, it's all right." [R.2354] During an emergency hearing, the court allowed the deposition to proceed and

expressly reserved awarding fees and costs. [R.2354] In his motion, Dr. Fischman stated that Dr. Hussamy was offended by the comments, had requested that plaintiff's counsel be sanctioned, and was willing to testify regarding counsel's conduct. [R.2354-2355] The motion also detailed plaintiff's attempted intimidation of Dr. Fischman during his deposition. [R.2355] Dr. Fischman subsequently filed the Hussamy deposition with the court. [R.2413-2414]

Meanwhile, on August 6, 1999, the court denied plaintiff's motion for turnover and/or sanctions. The court stated that either defendants had complied with the prior requirements of the court or "Plaintiff's understanding of the court's rulings do not comport with what the Court actually ruled." [R.2424-2425]

On August 10, 1999, the court granted more motions for protective orders for the defendants. [R.2421-2423] It found that plaintiff had requested what might possibly constitute privileged information just two weeks before trial, and that plaintiff had conceded that the issues had been raised early in the case:

> this actually constitutes a discovery expedition on short notice without leave of court as to information which could and should have been sought a long time ago, rather than two weeks before a specially set trial. It simply is unreasonable and unfair to expect Defendant's counsel and this Court to, on a practicable basis, put aside all other cases to address production requests of documents at this late stage of the case. At this point, Plaintiff should be

> prepared for this specially set trial, which in fact, was set at her insistence due to her age.

[R.2422-2423] Additionally, the court again expressly reserved jurisdiction to consider sanctions against plaintiff. [R.2423]

On August 23, 1999, Vivian Washington, a possible witness, moved for a protective order. Plaintiff served her with a subpoena, but her sister had just died. Ms. Washington had left messages on plaintiff's counsel's answering machine, but counsel did not return the calls. [R.2482-2483]

A pretrial conference was held August 20, 1999 [*see* ST.], at which time plaintiff's counsel made various remarks. He referred to defendant Dr. Fischman: "[T]his guy is a bastard. He's a prick. He really is Judge." [ST.10] Plaintiff stated that Dr. Fischman "anally retained records . . . . Another one of his character flaws." [ST.22] As to a particular witness, plaintiff stated that the witness was "going to be here whether the sheriff has to bring him in or not," [ST.22] and that "they [defendants] paid him to shut him up . . . ." [ST.24] The court sustained an objection when plaintiff stated, "Would you like to hear the truth now, Judge?" [ST.32]

During argument, defense counsel objected to plaintiff mischaracterizing depositions without referencing pages or lines in the transcripts, making unverified and inaccurate arguments, and attempting to amend to assert an intentional tort and

punitives with no proffer or evidentiary basis. [ST.11-13] The court ruled that there was not a sufficient record for plaintiff's motion to amend. [ST.28]

During the hearing, plaintiff's counsel supplied the court with case law he relied upon, but provided none to defense counsel -- instead stating that he had only one copy, "Wee hours of the morning, that's the best I could do." [ST.48-49]

During the hearing, the court conducted a teleconference with an attorney who had moved for a protective order after plaintiff Rose attempted to take his client's deposition and have his client come to court the first day of trial. [ST.65-66] It was the attorney's understanding that his client was not a witness in the case. [ST.65-66] Plaintiff's counsel stated that the subpoena had included a note to call him to arrange a convenient time at trial. [ST.67] The attorney stated that his subpoena did not say anything about contacting plaintiff's counsel, but only to appear for trial at 9:30 a.m. [ST.68] The court agreed with the attorney, "I don't see that standard language that Mr. Tobkin referred to on this subpoena so I would be concerned also." [ST.69]

During the teleconference, plaintiff Rose maintained that this particular witness had been disclosed on her July 30, 1999 witness list. [ST.67] Dr. Fischman maintained that he had never seen this list. [ST.66] Later, the court stated that it had not received the new list either; it reserved ruling as to undue prejudice. [ST.195, 204]

At the hearing, plaintiff's counsel stated that plaintiff would be in a body brace and a wheel chair at trial. [ST.71] Because her treating doctor had just stated in deposition that plaintiff was doing well with a walker, the court ruled that it would not allow her to be seen in a wheelchair in front of the jury. [ST.72-73]

Plaintiff raised the issue that she had never gotten a copy of defendant Dr. Fischman's insurance policy. [ST.92] Defense counsel stated that he had provided this, and would file defendant's previous response to request to produce, which gave plaintiff her second copy of the policy. [ST.92] Defense counsel asked the court to then consider statements made by plaintiff's counsel to the court, as an officer of the court, as being grossly inaccurate. [ST.93] The court told defense counsel to bring the policy and it would once again reserve as to sanctions. [ST.94]

Dr. Fischman raised the issue that again he had been unable to obtain verified interrogatories from plaintiff. [ST.110] He argued that the interrogatories were incomplete, under attorney Tobkin's hand, unsigned, and violated a prior court order; there was an August 11, 1999 motion to compel verified answers to update interrogatories. [ST.110] He also argued that attorney Tobkin had suggested in a letter to the court that plaintiff did not have a duty to sign these. [ST.112] Plaintiff's attorney admitted that the court order was for compliance by July 30, 1999. [ST.112] He stated that the answers were not typed because his wife, who did his typing, was

"out of state and under the influence of some heavy pain relievers for some major surgery," and he was taking care of his little children. [ST.114] The court ordered that the interrogatories be answered under oath by plaintiff and hand delivered to defendants on Monday morning. [ST.117] The court once again reserved consideration as to costs and other sanctions. [ST.118] It also stated that, following the trial, it would rule on defendant's motions for sanctions due to deposition abuse. [ST.118]

There was extensive argument as to the videotaped depositions of plaintiff's experts, including Dr. Coburn, whose deposition was some 8-9 hours long. [ST.158-163] In order to prepare for cross-examination, defense asked to be informed of precisely what portions of the videos plaintiff was going to publish to the jury, particularly as plaintiff's counsel had unilaterally edited the videotapes. [ST.158-159, 161] The court stated that it always required prior disclosure as to what portions of depositions would be used, and that these portions, plus any witnesses to be called, be disclosed the day prior to when they were going to be used. [ST.160-161] The court ordered that this information be "disclosed ahead of time, a day at a time" because it also needed to rule on any objections. [ST.162]

Defense objected that it had not seen plaintiff's new witness list until just that day [ST.181], and that plaintiff had agreed to bring all of her exhibits to the hearing but

had failed to do so. [ST.182-183] Plaintiff's counsel stated that he was "innocent of the charges." [ST.184] When questioned by the court, counsel stated that he had agreed to bring the exhibits, but that defendants had received the medical records in 1998 and he would bring in other bills through record custodians. [ST.188-189] He did not bring the picture of plaintiff listed because "[i]t's a Polaroid." [ST.189] Although listed as exhibits, there actually were no "photographs, videotapes, and audiotapes of the plaintiff," because "that's what the witness list says but it's a word processor-type thing. It's not an actual thing." [ST.189-190] The court ruled that plaintiff would be limited as to the documents:

> So if the plaintiff proposes to put in some kind of documents that the defendants do not have, then the Court is not going to allow them in. It's just that simple. You all promised to bring them here. You should have done that. It really bothers me that you didn't do that and then all of a sudden come up and say, well, you already have them. That's not what the deal was and you've admitted that and I'm concerned about that.

[ST.203]

On Monday, August 23, 1999, the first day of the specially set trial, plaintiff made comments that defense counsel was "thrust[ing] McCarthyism around . . . ." [T.104] Defense informed the court that plaintiff still had not produced the

photograph identified by plaintiff as evidence and discussed at the pretrial hearing. [T.213]

On Tuesday, following opening arguments, defendants moved for a mistrial based on plaintiff's opening being argumentative and addressing issues still pending with motions in limine, despite the court's reminder not to do so. [T.486-488] The court reserved ruling as to a mistrial, and expressed concern over the pending motions in limine "and there was a specific instruction not to address those issues that are pending." [T.492] Later that day the court expressed its displeasure over comments made by plaintiff's counsel, and again threatened sanctions:

> MR.TOBKIN: I don't have a bitch with Mr. Henry.
>
> THE COURT: You don't have a what, sir?
>
> MR. TOBKIN: I don't have a dispute . . . .
>
> THE COURT: Mr. Tobkin, let me remind you, I heard some of what I consider to be offensive words Friday around here. I just heard another one. I just want you to control yourself. Otherwise as I indicated Friday someone is going to be walking out of here with less money in their pocket no matter who wins.

[T.577]

Following a dispute over what edited videotape deposition testimony plaintiff would be utilizing, the court ruled that by 8:00 that night plaintiff was to disclose the

deposition testimony she intended to use the next day. [T.579-584] On Wednesday morning, defense counsel argued that plaintiff's attorney had been late with any disclosures. [T.623-633] The court ruled that one of the depositions would not be allowed that day, and that defense counsel could go over the disclosure as to the second deposition during the lunch period. [T.633]

Later on Wednesday, plaintiff referred to one of the former co-defendants as "a carpetbagger"; the objection was sustained. [T.809-810] At the end of the day, there was additional argument as to the edited videotaped depositions. [T.862-868] When plaintiff's counsel was questioned by the court as to his providing defense with copies of his proposed page and line designations, counsel indicated that he had no more copies to provide. [T.863] The court ordered counsel, "When I leave, Mr. Tobkin, take this down, make a copy and give it to [defense counsel]." [T.864, 867] The court again raised the issue of sanctions:

> If there is further problems [sic], I am going to impose sanctions after. I have reserved on all sanctions. I am going to hit somebody with sanctions, some people with sanctions, I'm sure of that. But I want to see what happens here. I want you to get those copies before the library closes, Mr. Tobkin.

[T.873]

By the middle of the day Thursday, the court expressed concerns over the length of this specially set trial. [T.1062] The courtroom and jury had been scheduled for 7-10 days, the time estimated. [T.1062] The court stated:

> [W]e are still at the conclusion of the week almost, on direct examination of the first substantive witness. We have not gotten cross of either of the defense or redirect. We have not gotten to the other defendant in this case. We have not gotten to any of the experts in this case.
> . . . .
>
> I do have to agree, Mr. Tobkin, that your examination of Dr. Hussamy has been a lot of -- it has to do with sparring over collateral matters and jostling about your various medical knowledge, some vary [sic] marginally relevant matters, and this morning a lot of repetitious matters.

[T.1062-1063, 1074-1075]

That day the court also warned plaintiff:

> Mr. Tobkin, I did note you looking at that jury again, and whenever you were asking a question that you thought you were making a point, you were looking right at them. I don't want to see that. I don't want to declare a mistrial either because I don't think it's fair to anyone, but if I have to it's going to be expensive.

[T.1076]

Later that day, the court admonished plaintiff about problems as to plaintiff's presentation of the evidence: "Mr. Tobkin, I have warned you before to show them copies of documents before you show them to a witness." [T.1244]

At the end of the day on Thursday, the subject of edited videotaped depositions again arose. [T.1256] When asked about his plan for Friday, plaintiff's counsel responded that he wanted to play the video deposition of Dr. Coburn. After hearing that the edited video was 5 hours long, the court stated:

> [I]f what Mr. Murphy [defense counsel] told me is true, Mr. Tobkin, if that's the way you edited, you switched around the presentation of the testimony, I sure hope you have an extra one and access to a videographer because if they want to add in something you edited out, number one, and I allow it, you have going to have to get it back in.
>
> But, number two, if, in fact you've switched around the presentation of the questioning to somehow make it appear as if it's one continuous series of questions coming from these attorneys, when, in fact, it's a direct and then a redirect, I am not going to allow that. . . .

[T.1257-1258]

Friday began with the court reporter advising that her office had told her to leave. [T.1272] She told the court that her agency had instructed her to leave because she had not received payment from plaintiff. [T.1273,1280] The reporter stated that her employer had asked to speak to Mr. Tobkin that morning, and that she had given Mr. Tobkin an 800 telephone number, but he had refused to call. She then received her instructions to leave. [T.1276] She stated that her employer had apparently been

trying to reach Mr. Tobkin's office all week, but there was no communication. [T.1281] The court ordered Mr. Tobkin to call and resolve the problem. [T.1281]

Later in the day the court sustained a defense objection when plaintiff attempted to elicit evidence regarding medical bills that plaintiff had failed to disclose pursuant to the court's prior order. [T.1495-1498] At the end of the day, the subject of edited videotaped depositions again arose, and plaintiff indicated that on Monday she would put on the video of Dr. Coburn. [T.1635] The court ordered the parties to meet on Sunday to review the videos of experts Coburn and Schneck to see what could be agreed upon. [T.1637-1639, 1644] Plaintiff's counsel expressly agreed to follow the court's order. [T.1640]

On Monday, counsel indicated that they had been unable to reach an agreement on the video portions to be played. [T.1654] Mr. Tobkin had initially arrived at the Sunday meeting without the videos. [T.1655] Because of the extensive editing done to the tapes, nothing had been resolved. [T.1655-1657] In addition, plaintiff had just that morning changed what she intended to present to the jury that day as to Dr. Coburn's deposition, adding pages 309 through 346. [T.1672-1673] Plaintiff also for the first time proposed to play -- that day -- particular portions of the edited video deposition of another doctor, previous co-defendant Dr. Cordner. [T.1665-1667] Following extensive argument on the videos [T.1654-1690], the court stated that it

would think about this while the jury was brought in. [T.1690] At this point plaintiff's counsel disclosed that he expected to bring the plaintiff in to testify that afternoon. [T.1691] In addition, he intended to bring another witness, Dr. Borgmeier, that day, although one defense counsel did not know of this until just that morning. [T.1691-1692, 1777-1778]

Later, plaintiff called for the belatedly disclosed video testimony of Dr. Cordner. [T.1772] The court requested that the jury be removed. [T.1772] Defense expressed concerns over not having plaintiff's disclosure as to Cordner until that morning, and the court expressed concerns to why the proposed testimony would start with an answer. [T.1773-1775, 1781] While the certified copies of the deposition began on page 66, the original copy began on page 5. [T.1776-1777] Defense again voiced concerns about plaintiff calling witnesses who had not been timely disclosed. [T.1777-1778]

The court expressed: "I'll be frank with you, I don't know what to do; I just don't. I never had this problem before. Thirteen years, I haven't had this problem." [T.1782] At this point defendants moved for a directed verdict based on consistent violations of the court's rulings. [T.1782]

There was extensive argument on the issue. [T.1783-1814] The trial court stated that the disputes in this case had "been just uncommonly difficult," and "I think

these [violations] have been consistent and egregious violations of this Court's pretrial and even post-trial orders." [T.1814-1815]

> It's more than the testimony of surprise and fact. It's unduly prejudicial on these depositions and other items because the defendants have not been given the proper and adequate opportunity to prepare their case throughout the course of the trial. The Court feels that even though in this particular instance the request being made [directed verdict] is probably not the most extreme measure the court could take in this case, the Court's also got to balance both sides here, and in my view this egregious violation of this Court's orders has unduly prejudiced the [defendants] in this case to such and [sic] extent I don't think they can get a fair trial in this particular instance.
>
> A mistrial will do nothing but to play into the hands of the plaintiff. It is not going to resolve it. Other sanctions will not resolve it in terms of sanctions against the plaintiff's attorney.
>
> Accordingly, I think that the most proper thing is to strike the plaintiff's pleadings, strike further witnesses, and grant the motion for a directed verdict.

[T.1814-1816]

Final judgment was entered on July 3, 2001. [R.3106-3112].

Plaintiff then appealed to the Fourth District Court of Appeal.

The Fourth DCA Appeal

Defendant's position in the Fourth District Court of Appeal was that the trial court did not abuse its discretion by striking Plaintiff's pleadings and entering a directed verdict. Under the circumstances of this case, and considering the Kozel factors, the trial court appropriately entered this sanction. Defendant also believes that the dictates of this Court's decision in Kozel v. Ostendorf, 629 So. 2d 817, 818 (Fla. 1993), have been met. *See* Appellee's Answer Brief, Case No. 4D01-2856, at pp. 27-39.

The Fourth District agreed that the conduct in this case was willful, deliberate, contumacious, and certainly justified sanctions. The Fourth District believed that all the Kozel factors had been met - "except that there is no evidence that the client was personally involved in the act of disobedience." The court believed it had no choice but to reverse, inasmuch as it had interpreted one of Kozel's guidelines to be an "indispensable foundation for dismissal." As stated in the Fourth District's opinion:

> Here, review of the record and the trial court's detailed order demonstrates that all of the factors discussed in *Kozel*, except for one, weigh heavily in favor of dismissal. Tobkin's disobedience was willful, deliberate and contumacious (factor 1); Tobkin had been previously sanctioned (factor 2); Tobkin's conduct caused prejudice to the opposing side through undue expense (factor 4); Tobkin offered no reasonable justification for non-

compliance (factor 5); and the delay created significant problems of judicial administration (factor 6).

* * *

Thus, a consideration of *Kozel*'s factor 3, whether the client was personally involved in the act of disobedience, does not support dismissal. Given our supreme court's express purpose in *Kozel* not to promote a policy of dismissing cases because of lawyer disobedience without the client's involvement, the inclusion of that factor within the court's six-part test appears to establish an indispensable foundation for dismissal.

* * *

Accordingly, having found no evidence of client knowledge or involvement in the attorney misconduct, we reverse the dismissal and remand so that the trial court may consider other appropriate sanctions.

Yet, we recognize that, in *Kozel*, the attorney malfeasance was more in the nature of neglect than disobedience. Here, the trial court found that the attorney's misconduct was "willful, deliberate and contemptuous." Further, the trial judge painstakingly described the prejudice resulting to the opposing side and outlined why any sanction short of dismissal would not be a viable alternative. These distinctions cause this court to question whether *Kozel*'s express desire to discourage the dismissal of lawsuits absent client involvement in the misconduct sanctioned would extend to the circumstances here. Accordingly, we certify the following question to the Florida Supreme Court:

> MAY A TRIAL COURT DISMISS A CIVIL ACTION AS THE RESULT OF THE

> 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?

In a concurring opinion, however, Judge Warner raised the following concerns:

> Moreover, *Kozel* listed six factors for the court to consider in determining the sanction to be applied, of which client involvement was only one factor. 629 So. 2d at 818. *Schlitt* has turned *Kozel* into a five factor test plus one super factor as a condition precedent to the consideration of the other factors.
>
> * * *
>
> Given his level of disobedience, the court could not expect the attorney's conduct to improve at a second trial. Moreover, the use of an alternative sanction, such as a mistrial with an assessment of attorney's fees and costs against the plaintiff and her attorney as a condition for resetting the trial, probably would be tantamount to dismissal with prejudice as a sanction, unless either client or the lawyer had the ability to pay what would obviously be a very substantial award.
>
> * * *
>
> Were it not for *Schlitt*, I would affirm the trial court's ruling. *Kozel* does not command that a case may never be dismissed for attorney misconduct without client participation being shown. 629 So. 2d at 818. Client

> participation may be one factor, but the trial court needs the discretion in egregious cases as this one to utilize the ultimate sanction of dismissal, even where the client does not actually participate in the misconduct. The United States Supreme Court has itself authorized such a result. [Cites to Pioneer Investment Serv. Co. v. Brunswick Assoc. Ltd. Partnership, 507 U.S. 380, 396-397 (1993).]
>
> * * *
>
> Here, the gross misconduct of the attorney permeated the entire case, culminating at trial. . . . Faced with this exceptionally contumacious conduct at trial and direct disobedience to several trial rulings, I think the court acted well within its discretion in dismissing this case with prejudice. . . .
>
> The client cannot claim ignorance and then get another opportunity. She hired this attorney and then allowed him to obstruct and obfuscate for over three years. She must take some responsibility to inform herself of her affairs, including this suit. If she in fact suffers as a result of her attorney's egregious behavior, it is a result of her own choice to hire him and then remain uninformed and apparently uninterested in the manner in which he represented her.

SUMMARY OF ARGUMENT

The certified question should be answered in the affirmative: under the circumstances of this case, the trial court should be able to dismiss a civil action based

on a consideration of all of the Kozel factors even if there is no direct evidence that the client was personally involved in the act of disobedience.

First, no one Kozel factor is dispositive. Rather, the trial court is to consider all six Kozel factors as forming a 'meaningful set of guidelines' to be used 'to assist the trial court in determining whether dismissal with prejudice is warranted . . . .' Kozel, 629 So.2d at 818.

Second, in this case, unlike Schlitt, the client never filed an affidavit that she was without knowledge. Still, two and a half years after a directed verdict was entered, she is represented by the same attorney. Because no affidavit has ever been produced by this plaintiff, a presumption of knowledge arises. The law is well-established that the attorney-client relationship is a principal-agent relationship. Actions and knowledge of the agent constitute actions and knowledge of the principal. See cases cited *infra*.

Third, a trial court has tremendous discretion when imposing sanctions, and the trial court's exercise of that discretion will not be disturbed absent a clear showing of abuse. In this case, the sanctions were appropriately entered pursuant to the guidelines set forth in the supreme court case of Kozel v. Ostendorf, 629 So. 2d 817 (Fla. 1993).

Accordingly, the certified question should be answered in the affirmative, and the trial court's original order striking the plaintiff's pleadings and granting the motion for directed verdict should be affirmed.

CERTIFIED QUESTION

MAY A TRIAL COURT DISMISS A CIVIL ACTION AS THE RESULT OF THE 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?

ARGUMENT

1. No one Kozel factor is dispositive.

In Kozel, the court adopted six factors to *aid* trial courts with "a meaningful set of guidelines to assist them in their task of sanctioning parties and attorneys for acts of malfeasance and disobedience."

The six guidelines in Kozel are:

1) whether the attorney's disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience;

2) whether the attorney has been previously sanctioned;

3) whether the client was personally involved in the act of disobedience;

> 4) whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion;
>
> 5) whether the attorney offered reasonable justification for noncompliance; and
>
> 6) whether the delay created significant problems of judicial administration.

Kozel, 629 So. 2d at 818.

No one factor is dispositive. Rather, the trial court is to consider all six factors as forming "a meaningful set of guidelines" to be used "[t]o assist the trial court in determining whether dismissal with prejudice is warranted . . . ." Kozel, 629 So. 2d at 818.

As Judge Warner recognized in her concurring opinion in the Fourth District's opinion:

> *Kozel* does not command that a case may never be dismissed for attorney misconduct without client participation being shown. 629 So.2d at 818. Client participation may be one factor, but the trial court needs the discretion in egregious cases as this one to utilize the ultimate sanction of dismissal, even though the client does not actually participate in misconduct.
>
> * * *
>
> Here, the gross misconduct of the attorney permeated the entire case, culminating at trial . . . faced with this exceptionally contumacious conduct at trial and direct

> disobedience to several trial rulings, I think the Court acted well within its discretion in dismissing this case with prejudice . . . .

2. *Client's Involvement.*

Further, Plaintiff elected to continue with her counsel, regardless of the record replete with an actual sanction, repeated warnings of sanctions, and a directed verdict based on egregious violations of court orders. The trial court, which was in the best position to make such a determination, stated that "this case presents a unique combination of a party (Ms. Rose) and her attorney (Mr. Tobkin) continuing a course of willful, deliberate and contemptuous misconduct, without any reasonable justification or excuse." [R.3109]

Ms. Rose, who does not have or require a legal guardian, was and is legally competent to hire an attorney, bring this case, and pursue an appeal. Moreover, plaintiff's counsel had enough confidence in her mental capacity that he intended to place her on the witness stand, under oath.

Schlitt v. Currier, 763 So. 2d 491 (Fla. 4th DCA 2000), is not applicable to the present circumstances. In Schlitt, the plaintiff was relieved from the sanction of dismissal because he did not dispute that his attorney's conduct was inexcusable, he obtained new counsel, and he "filed an affidavit attesting to his lack of knowledge as to the various orders compelling discovery and imposing sanctions." Id. at 492. Here

plaintiff Rose was fully aware of her attorney's misconduct, as evidenced by her certain knowledge of the directed verdict in the midst of trial and the subsequent order detailing the egregious violations of court orders, the various sanction threats, and the orders that issued. Plaintiff has elected to remain with her counsel despite his misconduct. Unlike the plaintiff in Schlitt, Plaintiff Rose has never expressed concerns over her counsel's actions, and she has never professed "complete ignorance" of his actions.

As recognized by Judge Warner in her concurring opinion:

> The client cannot claim ignorance and then get another opportunity. She hired this attorney and then allowed him to obstruct and obfuscate for over three years. She must take some responsibility to inform herself of her affairs, including this suit. If she in fact suffers as a result of her attorney's egregious behavior, it is a result of her own choice to hire him and then remain uninformed and apparently uninterested in the manner in which he represented her.

In this case, the client Ms. Rose never filed an affidavit that she is without knowledge, unlike the client in the Schlitt case. Still, two and a half years after directed verdict was entered, she is represented by the same attorney. Because no affidavit has ever been produced by this Plaintiff, a presumption of knowledge arises. The law is well established that the attorney-client relationship is a principal-agent relationship. Actions and knowledge of the agent constitute actions and knowledge of the principal.

See Revotal Corporation, 391 So. 2d 308 (Fla. 4th DCA 1980); Richard Bertram, Inc. v. Sterling Bank & Trust, 820 So. 963, 965 (Fla. 4th DCA 2002) ("It is well-settled that an attorney serves as an agent for his clients. As such, the attorney's acts are the acts of the principal, the client . . ."); Johnson v. Estate of Fraedrich, 472 So.2d 1266 (Fla. 1st DCA 1985) ("an act done by an agent on behalf of the principal within the scope of the agency is not the act of the agent but of the person by whose direction it is done"); Boros v. Carter, 537 So.2d 1134 (Fla. 3d DCA 1989) (attorney serves as agent for his client; attorney's acts are the acts of his principal, the client). *See also* Florida Rule of Judicial Administration 2.060(l), which provides:

> (l) **Attorney as Agent of Client**. In all matters concerning the prosecution or defense of any proceeding in the court, the attorney of record shall be the agent of the client, and any notice by or to the attorney or act by the attorney in the proceeding shall be accepted as the act of or notice to the client.

3. *The Trial Court did not Abuse its Discretion by Striking Plaintiff's Pleadings and Entering a Directed Verdict.*

A trial court's entry of sanctions is reviewed under an abuse of discretion standard. Commonwealth Fed. Sav. & Loan Assoc. v. Tubero, 569 So. 2d 1271, 1273 (Fla. 1990). The exercise of this discretion, even as to those sanctions most severe, will not be disturbed absent a "*clear showing of abuse*." Gomez v. Pujols, 546 So. 2d 734, 735 (Fla. 3d DCA 1989) (emphasis supplied).

For years the Supreme Court of Florida has articulated:

> 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 the rules . . . must be affirmed. . . . It is the duty of the trial court, not the appellate courts, to make that determination.
>
> Thus, to justify reversal, it would have to be shown on appeal that the trial court *clearly erred* in its interpretation of the facts and its judgment, and not merely that the court, or another fact-finder, might have made a different factual determination.

Mercer v. Raine, 443 So. 2d 944, 945-946 (Fla. 1983) (emphasis supplied) (quoting Farish v. Lum's, Inc., 267 So. 2d 325, 327-328 (Fla. 1972)); *see also* Tubero, 569 So. 2d at 1273 (reaffirming Mercer and stating, "If reasonable persons could differ as to the propriety of the action taken, there can be no finding of an abuse of discretion.").

Florida's often-cited case of Canakaris further states:

> Judicial discretion is defined as:
>
> > The power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court.

* * *

> Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.

Canakaris v. Canakaris, 382 So. 2d 1197, 1202-1203 (Fla. 1980) (quoting BOUVIER'S LAW DICTIONARY & CONCISE ENCYCLOPEDIA 804 (8th ed. 1914) and Delno v. Market St. Ry., 124 F.2d 965, 967 (9th Cir. 1942)).

In this case, the trial court did not abuse its discretion. Again, as recognized by Judge Warner in her concurring opinion:

> Client participation may be one factor, but the trial court needs the discretion in egregious cases as this one to utilize the ultimate sanction of dismissal, even where the client does not actually participate in the misconduct. The United States Supreme Court has itself authorized such a result. In Pioneer Investment Serv. Co. v. Brunswick Assoc. Ltd. Partnership, 507 U.S. 380, 396-397 (1993), the Court said:
>
> > [W]e have held that clients must be held accountable for the acts and omissions of their attorneys. In Link v. Wabash R. Co., 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962), we held that a client may be made to suffer the consequence of dismissal of its lawsuit because of its attorney's failure to

> attend a scheduled pretrial conference. In so concluding, we found "no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client." Id., at 633, 82 S.Ct., at 1390. To the contrary, the Court wrote:
>
> "Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now 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 each 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.'" Id., at 633-634, 82 S.Ct., at 1390 (quoting Smith v. Ayer, 101 U.S. 320, 326, 25 L.Ed. 955 (1880)).
>
> * * *
>
> Here, the gross misconduct of the attorney permeated the entire case, culminating at trial. . . . Faced with this exceptionally contumacious conduct at trial and direct disobedience to several trial rulings, I think the court acted well within its discretion in dismissing this case with prejudice. . . .

CONCLUSION

Wherefore, for the foregoing reasons, the certified question should be answered in the affirmative: A trial court can dismiss a civil action as the result of the Plaintiff's attorney's misconduct during the course of the litigation where a consideration of all

of the Kozel factors point to dismissal even if there is no evidence that the client was personally involved in the act of disobedience.

The Fourth District's decision should be quashed, and the trial court's original order striking the Plaintiff's pleadings, and granting the motion for directed verdict, should be affirmed.

_____

Jennifer S. Carroll, Esquire
Florida Bar Number: 512796
LAW OFFICES OF JENNIFER S. CARROLL, P.A.
700 Village Square Crossing, Suite 101
Palm Beach Gardens, Florida 33410
(561) 478-2102 [Telephone]
(561) 478-2143 [Facsimile]

Attorneys for **Petitioners**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Lewis W. Murphy, Jr., Esquire, Moss, Henderson, Blanton, Lanier, Kretschmer & Murphy, P.A., Trial Attorneys for Dr. Fischman and Fischman and Borgmeier, M.D., P.A.,

Post Office Box 3406, Vero Beach, Florida 32964-3406, Robert D. Henry, Esquire, Attorney for Dr. Hussamy and his P.A., Post Office Box 4922, Orlando, Florida 32802-4922, Richard A. Barnett, Esquire, Richard A. Barnett, P.A., Attorney for Plaintiff, 121 South 61st Terrace, Hollywood, Florida 33023, and to Donald A. Tobkin, Esquire, Attorney for Plaintiff, Post Office Box 220990, Hollywood, Florida 33022, by mail, this _____ day of September, 2003.

_____
Jennifer S. Carroll

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font standards, i.e., Times New Roman 14-point font, as set forth in Florida Rule of Appellate Procedure 9.210.

_____
Jennifer S. Carroll