IN THE SUPREME COURT OF FLORIDA

CASE NO: SC03-1670

STACEY ROBINSON and ROBERT ROBINSON,

Petitioners,

vs.

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,

Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

ON REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL
CASE NOS.: 4D01-4894, 4D02-977

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PREFACE

Petitioners, STACY ROBINSON and ROBERT ROBINSON will be referred to as ROBINSON in this brief. Respondent,, will be referred to respectively as NATIONWIDE in this brief.

References to the Record will appear as follows:

(R. ___)[1]

References to the Petitioner's Appendix will appear as follows:

(A.____)

References to the Respondent's Appendix will appear as follows:

(AA.___)

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[1] There are actually four (4) separate Records on Appeal generated by the Clerk's office in this case. These Records have been consolidated for Record purposes in Fourth District Case No. 02-1346. For purposes of this Appeal, the Record prepared in Case No. 4D01-4556 will be referred to as (RI.___) The Record prepared in Case No. 4D01-4894 will be referred to as (RII.____) The Record prepared in Case No. 4D02-1346 will be referred to as (RIII.____) and the Record prepared in this case, Case No. 4D02-977 will be referred to as (RIV____).

STATEMENT OF THE CASE AND FACTS

This Petition for Review is from a decision of the Fourth District Court of Appeal correctly determining that the Plaintiff/Petitioners' STACEY and ROBERT ROBINSON'S Proposals for Settlement were void from the inception as untimely and finding that the trial court's order awarding fees under the untimely proposal as a discovery sanction was reversible error.

The underlying case began as an ordinary underinsured motorist case brought by the Appellees STACEY and ROBERT ROBINSON (ROBINSON) against tortfeasor SIDNEY ZUCKERMAN (ZUCKERMAN) and the ROBINSON'S uninsured/underinsured motorist carrier NATIONWIDE MUTUAL FIRE INSURANCE COMPANY (NATIONWIDE). After the jury returned a verdict for the ROBINSONS' compensatory damages against ZUCKERMAN and NATIONWIDE for $243,900.00, the parties filed numerous post-trial motions.[2] The ROBINSONS also moved for an award of attorneys' fees from NATIONWIDE pursuant to two

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[2] The jury also awarded the ROBINSONS $250,000.00 in punitive damages against ZUCKERMAN, finding that he was driving under the influence. (RI.603) ZUCKERMAN'S motion for remittitur was denied but on appeal, the Fourth District ordered a new trial. See, Zuckerman v. Robinson, 846 So. 2d 1257 (Fla. 4th DCA 2003). The Fourth District certified the case to this Court for review, but this Court has declined to review it. Robinson v. Zuckerman, 2004 LEXIS 83 (Fla. Jan. 21, 2004).

separate Demands for Judgment. (RI.647-648, 658-666) At the initial hearing on the numerous motions and repeatedly thereafter, NATIONWIDE requested that the trial court first consider entitlement arguments on whether the Demands were untimely and otherwise invalid because they were joint proposals that were not apportioned between the two offerors. (RIV.45-47, RI.806-807, Appellant's Appendix B) The Trial Court refused to bifurcate consideration of entitlement and amount of attorneys' fees and permitted the ROBINSONS to conduct post-trial discovery relevant to the attorneys' fee issue. (RI.844-845)

This ruling resulted in months of post-trial discovery disputes, as the ROBINSONS embarked upon extensive discovery that NATIONWIDE contended was irrelevant to the specific issues on entitlement to attorneys' fees and the reasonable amount thereof. The ROBINSONS, through their counsel Diego Asencio, served NATIONWIDE with numerous irrelevant Requests for Production[3] (RI.809-

[3] For example, although this case did not deal with Personal Injury Protection benefits, the First Request to Produce included requests for copies of all orders or judgments of dismissals in PIP actions anywhere in Florida on which NATIONWIDE has in the last two years prevailed or suit has been dismissed and copies of any and all judgments in all cases on which NATIONWIDE has been ordered to pay attorneys' fees and costs in the last two years for PIP suits anywhere in Florida. (RI.809-811,AA.2) The Second Request to Produce requested all documents containing any information showing the date which NATIONWIDE or any of its agent learned that the ROBINSONS had filed suit, including adjuster log notes, service logs, memoranda and phone messages.

822, 812-814) and Requests for Admission (RIII.471-482), virtually none of which dealt with NATIONWIDE'S argument that the Demands for Judgment were untimely or the amount of NATIONWIDE'S own attorneys' fees. (AA.1-5) The ROBINSONS also set NATIONWIDE'S adjuster Gary St. Arnauld for over 8 hours of video deposition. (RIII.201-400, 627-796, 797-991, AA.6-7)

NATIONWIDE repeatedly objected to much of the discovery, on the grounds that the discovery was premature until the ROBINSONS' entitlement to fees was determined, was irrelevant to the issue of the timeliness or legality of the Demands for Judgment and was harassing. (RI.806-814) NATIONWIDE'S motions for protective order were denied without comment by the Trial Court, who refused to place any restrictions at all on the scope of the ROBINSONS discovery.[4] (RI.844-

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(RI.812-814, AA.5) It was only after NATIONWIDE move to compel the posting of a bond for the cost of this discovery that the ROBINSONS withdrew these requests.

[4] NATIONWIDE filed a Petition for Writ of Certiorari to the Fourth District after the Trial Judge denied its Motion for Protective Order as to the ROBINSONS' Requests for Production, some of which called for the production of privileged information. The appellate court ordered a Response to the Petition from the ROBINSONS, who contended that the Trial Court's mere denial of the motion did not compel NATIONWIDE to produce the documents and that NATIONWIDE was still free to file a privilege log and have the court conduct an in camera inspection. Accordingly, the Court dismissed the Petition, specifying that the dismissal was based on this representation and indicating that the dismissal was not on the merits. Thereafter, NATIONWIDE filed its privilege log. (RI.923-925)

845) While NATIONWIDE'S privilege objections remained pending, the ROBINSONS conducted the first deposition of Gary St. Arnauld. (RIII.201-400) At that deposition, NATIONWIDE'S counsel Howard Holden advised St. Arnauld not to review documents in his claims file in order to answer Mr. Asencio's questions on the grounds that to do so would potentially waive NATIONWIDE'S privileges relative to the claims file. (RI.944-952, 957-964) The ROBINSONS and NATIONWIDE filed cross-motions for sanctions arising out of counsel's conduct at the deposition.[5] (RI.944-952, 1002-1057) The trial judge granted the ROBINSONS' Motion and ordered NATIONWIDE to pay Mr. Asencio's attorneys fees for his attendance at the deposition. (RI.1065-1066, 1247-1250) The Court did not consider NATIONWIDE'S motion for sanctions or its Motion for Protective Order seeking an order from the court limiting the ROBINSONS' scope of inquiry at St. Arnauld's deposition.

With the exception of a single Request for a medical expert's report, the ROBINSONS never pursued an in camera inspection of the remaining documents deemed by NATIONWIDE to be privileged. (RI.1064A, 1143-1159)

The ROBINSONS moved to compel production of non-privileged documents, but never set the motion for hearing. (RI.918-921) Instead, the ROBINSONS' counsel Diego Asencio appeared before the Trial Court on an ex parte basis and obtained an order compelling NATIONWIDE'S production of these documents "forthwith". (RI.977) See, infra, pp. 7.

[5] See, infra, pp. 31-36 for the specific instances of misconduct cited by NATIONWIDE in its Motion for Sanctions and for Protective Order.

The ROBINSONS reset Gary St. Arnauld for an "expanded" deposition requiring that NATIONWIDE'S representative testify regarding the "handling" of the ROBINSONS' uninsured motorist, PIP and property damage claims, even though this case had nothing to do with PIP or property damage . (RI.963, AA.6-7) NATIONWIDE once again moved for protective order asserting that the ROBINSONS were subjecting NATIONWIDE to irrelevant and immaterial discovery for the purpose of harassment and in an effort to conduct a fishing expedition in preparation for a bad faith case. (RI.957-964, R.II.42-48) NATIONWIDE asserted that the only remaining issue in the case was attorneys' fees and costs and there were no issues pending regarding NATIONWIDE'S "handling" of the ROBINSONS' claims. (RII.42-48) Once again, the trial judge denied NATIONWIDE'S motion for protective order. (RIV.13)

Thereafter, NATIONWIDE moved to recuse the Judge. (RI.986-993, 1182-1193) That motion was denied. (RI.1201-1202) At the time of the Motion, NATIONWIDE had pending a Motion to Compel Posting of Bond, filed for the purpose of compelling the ROBINSONS to post a bond for the cost of the extensive discovery requested. (RI.1199, RII.71-72) In anticipation of filing a Petition for Writ of Prohibition on the following business day, NATIONWIDE formally canceled the

hearing and filed a Notice of Withdrawal of the Motion to ensure that it was not heard before it could file the Petition and while the Petition was pending. (RI.1199, RII.71-72) NATIONWIDE notified Mr. Asencio that it was canceling the hearing and withdrawing the motion. (RII.71, 72) After business hours, Mr. Asencio faxed NATIONWIDE'S counsel a letter advising that he would be attending the hearing at 8:45 a.m. the following business day irrespective of the fact that NATIONWIDE had withdrawn the only motion set for hearing. (RII.74)

Mr. Asencio attended the hearing on NATIONWIDE'S withdrawn motion and did not advise the Court that NATIONWIDE had withdrawn the motion but instead, simply advised the Court that NATIONWIDE refused to attend the hearing. (RII.75-76, A.2) Despite the fact that no motion to compel was set for hearing, Mr. Asencio obtained an order compelling NATIONWIDE to produce all non-privileged documents requested "forthwith". (RI.1198)

When NATIONWIDE did not comply with the order, Mr. Asencio filed a "Motion for Severe Sanctions" for violating the order and sought to have NATIONWIDE'S opposition to the ROBINSONS' entitlement to fees "stricken" and/or monetary sanctions of $1000 per day levied against NATIONWIDE. (R1.1203-1204, RII.39-41, RIV88-97) NATIONWIDE'S counsel asserted to both

Mr. Asencio and the Trial Court that since the order was obtained on an ex parte basis and in the absence of any pending motion, it considered the order was null and void. (RII.75-76) After a hearing, during which NATIONWIDE brought to the Court's attention that the order allegedly violated by the carrier was obtained without due process, the Trial Court found that NATIONWIDE'S conduct in discovery justified an order striking its arguments in opposition to the ROBINSONS' motion for attorneys' fees and entered an attorneys' fee order granting the ROBINSONS $445,535.01 in attorneys' fees and costs by default. (RIV.137-155, 165)

In response to Mr. Asencio's Motion for Sanctions, NATIONWIDE took issue with Mr. Asencio's rendition of NATIONWIDE'S discovery conduct and specifically refuted each allegation of discovery abuse. (RII.4-30, 49-76, AA.33-43) Specifically, NATIONWIDE brought to the court's attention that the order on which the ROBINSONS' Motion was predicated was obtained at an ex parte hearing on a non-existent motion. (RII.4-30, 49-76) In addition, NATIONWIDE argued that the ROBINSONS had not even alleged, much less proven, that they suffered any prejudice in fact as a result of these alleged discovery abuses because the only issues on entitlement weres whether the proposals were timely and whether they were other invalid under the rules of civil procedure. (RII.4-30, 49-76) NATIONWIDE argued

that it could have had no evidence in its possession refuting the ROBINSONS' counsel's certificate of service because, even if it had an envelope, which it did not, the postmark would not, as a matter of law, rebut that Certificate. Moreover, NATIONWIDE argued, there was no authority for striking NATIONWIDE'S opposition to the ROBINSONS' Motion for Attorneys' Fees because Rule 1.380, which permits the court to strike pleadings, does not permit a court to strike filings other than pleadings and motions are not defined as "pleadings" as a matter of law. (RII.4-30, 49-76)

After a hearing, during which NATIONWIDE **once again** argued to the trial court that the sole order allegedly violated was obtained improperly and was void for lack of due process. Further, NATIONWIDE contended that there was no legal authority supporting the ROBINSONS' request that the Court strike its opposition to their fee claim, the Trial Court found that NATIONWIDE'S conduct in discovery justified an order striking its arguments in opposition to the ROBINSONS' motion for attorneys' fees. (RIV.137-155, 165, A.2)

The fee award was based on the ROBINSONS' first proposal for settlement, which was served on NATIONWIDE in November 27, 1997, less than 90

days after NATIONWIDE was served with the Complaint. (RI.15).[6] An evidentiary hearing was held on the amount of attorneys' fees to be awarded pursuant to the Demand for Judgment. At that hearing, the Court considered both parties' attorneys' fee records as well as the Deposition of Gary St. Arnauld.

At the evidentiary hearing, Mr. Asencio objected to any questioning regarding entitlement on the grounds that it was outside the scope of his direct testimony, and NATIONWIDE'S counsel explained that it was the ROBINSONS' burden of proof to establish that they filed a valid and timely Demand for Judgment even though the Court struck NATIONWIDE'S papers in opposition to the Motion for Fees. (AA.22-27)

After the hearing, the trial court requested that both parties submit proposed orders on the attorneys' fees application, which they did. NATIONWIDE specifically objected on the basis that many of the "Findings of Fact" included in Mr. Asencio's proposed order were "facts" that were not of record and/or were not

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[6] A second proposal, for $100,000 was served on the carrier on December 3, 1999, less than 45 days before the date set for trial. (RI.647-648, 846-849) Since the final judgment rendered against NATIONWIDE was for approximately $105,000, well below the amount necessary to trigger entitlement to fees under the second Demand, only the first Demand is at issue in this case.

addressed at the hearing on fees.[7] (AA.47-48) NATIONWIDE sent the Trial Judge a copy of the hearing transcript and advised the Court that "it would be legally improper to make findings of fact on evidence that was not presented to the court at the attorneys' fee hearing." (AA.48)

On receipt of these proposed orders, the Court executed the Order prepared by the ROBINSONS and did not alter any of the factual findings contained therein. (RIV.137-155) The Court reduced the order to judgment form on February 28, 2002. (RIV.165) This Final Judgment was timely appealed by NATIONWIDE on March 12, 2002. (RIV.168-170)

On appeal, the Fourth District reversed the fee judgment on the grounds that the trial court had the authority to sanction NATIONWIDE for discovery

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[7] Among those "Findings of Fact" were statements like "[o]bviously, the case could not be settled pre-suit directly because of NATIONWIDE'S very stingy offers," ; "[t]hat May 15th offer was conditioned on THE ROBINSONS giving NATIONWIDE a complete release and dismissal with prejudice when NATIONWIDE knew THE ROBINSONS had spent $30,000 on costs" ; "Moreover, NATIONWIDE'S attorney Howard Holden, had been previously verbally advised on April 26, 2001 that NATIONWIDE would be obligated to pay costs in excess of its limits. This obligation to pay costs was totally ignored by NATIONWIDE. NATIONWIDE never asked for any evidence of the costs THE ROBINSONS incurred. NATIONWIDE never asked for an estimate of fees. Clearly, NATIONWIDE left THE ROBINSONS no choice but to proceed to trial." (RIV.143-144)
The order contains numerous other "factual findings" that are unsupported by record reference and were not addressed at the hearing. (RIV.137-155)

violations. The Court also found that since the trial court was in a better position than the appellate court to determine the merits of **NATIONWIDE'S** motion for sanctions against the ROBINSONS, the trial court's implicit denial of that motion would not be disturbed on appeal. The appellate court further held that "[w]hile Florida Rule of Civil Procedure 1.380 permits the striking of "pleadings" as a discovery sanction in certain instances, it does not allow a defense to be stricken so as to validate and breathe new life into a void claim." Id. at 890. The Court found that since the Certificate of Service on the Demand for Judgment compared with the Return of Service indicated that the Demand was served too early, it was void from its inception and could not become valid thereafter. As a result, the Court determined that an award of attorneys' fees under Florida Statute 768.79 was not a viable sanction for NATIONWIDE'S post-trial discovery violations and reversed the fee judgment and remanded the cause to the trial court for consideration of an alternative appropriate sanction.

The ROBINSONS have sought this Court's review based on their contention that the Fourth District's opinion in this case conflicts with several decisions of other courts, and this Court, on three separate points of law.

SUMMARY OF ARGUMENT

Preliminarily, this Court has no jurisdiction to consider this case because none of the issues raised in the Petitioner's Brief involve an "express and direct" conflict vesting this Court with certiorari jurisdiction. The Petitioners' argument that Kuvin v. Keller Ladders, Inc., 797 So. 2d 611 (Fla. 3rd DCA 2001) conflicts with the Fourth District's decision in this case is incorrect because Kuvin is not only factually distinguishable, but has also effectively been overruled by subsequent case law from this court.

On their second point on appeal, the Petitioners argue that the Fourth District's opinion conflicts with other District Court opinions on the issue of whether a Certificate of Service creates a rebuttable presumption that the document was, in fact, served on the date set forth in the Certificate. Once again, there is no conflict between this case and any other because, in this case, it is the party who certified the service date who is disavowing his own certificate and because this case also interprets the effect of the certificate of service in the context of determining timeliness under Florida Rule of Civil Procedure 1.442, a Rule that must be strictly construed. As such, there is no direct conflict requiring resolution by this Court.

On their third point on appeal, the ROBINSONS contend that the Fourth

District's opinion is contrary to this Court's decision in Mercer v. Raine, 443 So. 2d 944 (Fla. 1983). However, Mercer is factually distinguishable from this case and does not compel an affirmance of the Fourth District's opinion, which was based on an entirely different factual and legal scenario.

In the event this Court determines that it will maintain jurisdiction, the ROBINSONS have failed to demonstrate any basis for this Court to quash the opinion of the Fourth District on the issue of their entitlement to attorney's fees. The Demand for Judgment at issue was indisputably untimely and defective and as such, it was void from its inception.

Nothing in the Record demonstrates that NATIONWIDE'S alleged discovery violations precluded the ROBINSONS from demonstrating the timeliness or the validity of their Demand for Judgment. Their own certificate of service was prima facie proof that the Demand was not timely served and on its face, and the Demand was also invalid because it was a joint proposal that was not apportioned between the offering plaintiffs. In addition, all of the evidence before the trial court established that contrary to the ROBINSONS' counsel's suggestions, the Demand could not have been served on a date later than that certified because the Demand was faxed to NATIONWIDE'S counsel on the certified date. Since the ROBINSONS'

counsel faxed that document, he knew or certainly should have known that, contrary to his contentions the document was, in fact, served on date specified in the Certificate. Therefore, NATIONWIDE'S alleged discovery misconduct did not preclude the ROBINSONS from proving timely service and they suffered no prejudice from NATIONWIDE'S asserted discovery misconduct.

Since there was no prejudice suffered by the ROBINSONS, the trial court's order striking NATIONWIDE'S opposition to the Demand for Judgment, effectively sanctioning NATIONWIDE in the amount of $450,000.00, was entirely unauthorized and unjustified. While Florida Rule of Civil Procedure 1.380 provides that a court may, in extreme circumstances, sanction a party by striking its "pleadings", opposition to a fee request is not a "pleading" that can be stricken. While the Rules also contemplate that a party may be sanctioned by an attorneys' fee award, that award must be based on the reasonable expenses caused by a party's failure to obey a court order. The Fourth District's finding that the trial court's order sanctioning NATIONWIDE would be affirmed, but that the specific sanction would be reversed, is entirely consistent with the Rule and existing case law. There is no case in Florida that has approved of an award of attorneys fees on the **entire** case as a post-trial discovery sanction. This is especially true where, as here, at the time of the

sanction, there are no existing viable grounds authorizing any fee award. Since the Demand for Judgment was void, it simply did not exist at the time the trial court sanctioned NATIONWIDE and, if it did not exist, it could not establish a basis for a fee award on the case as a whole.

Moreover, the ROBINSONS' own discovery tactics were the primary cause of their asserted "prejudice". There was literally no basis for post-trial discovery on the ROBINSONS' entitlement to attorneys' fees, because that issue was entirely legal in nature. Nevertheless, the ROBINSONS' counsel embarked on a scheme to overwhelm NATIONWIDE with irrelevant and voluminous discovery requests having nothing whatsoever to do with the attorneys' fee issue. When NATIONWIDE understandably balked at having to produce thousands of documents that were completely irrelevant to anything pending before the trial court, the ROBINSONS utilized NATIONWIDE'S objections to convince the trial court that the insurer was unreasonably refusing to comply with its requests. In fact, NATIONWIDE never refused to produce a single document relevant to the precise issue of the ROBINSONS' entitlement to fees under the Demand for Judgment or the amount of those fees. In the event that this Court considers this case and finds that sanctions were appropriately awarded against NATIONWIDE , it is respectfully

suggested that the Court should also find that the ROBINSONS conduct was likewise sanctionable and remand the issue back to the trial court for a hearing on the appropriate sanction to be awarded.

Finally, if this Court maintains jurisdiction to consider this case, it may consider issues other than those upon which its jurisdiction was based. NATIONWIDE submits that the Fourth District erred in finding a waiver of its right to appeal the assessment of pre-judgment interest. This Court issued its opinion in Amarace v. Stallings after the trial court entered final judgment, but while the case was on appeal. At the trial court level, NATIONWIDE'S counsel conceded, as he should, that the then- prevailing Fourth District law authorized an assessment of prejudgment interest on personal injury verdicts. The appellate court's finding that, by doing so, NATIONWIDE waived its right to raise the issue on appeal, is contrary to a party's obligation to present the trial court with the correct law. To require a party to advise the trial court of the correct law and then urge the court to ignore that law would be an exercise in futility, since the trial court is obliged to follow precedent which, in this case and at that time, mandated an assessment of pre-judgment interest. This Court should find that the preservation of error rule does not require a party to argue the wrong law to the trial court and that NATIONWIDE did not waive its right to appeal

the trial court's assessment of prejudgment interest.

POINTS ON APPEAL

I. This Court has no jurisdiction to consider this case because none of the issues raised by the Petitioner involve an "express and direct" conflict that could vest this Court with jurisdiction to consider the case.

II. Assuming that there could have been a conflict between the Fourth District's opinion in this case and the Third District's opinion in Kuvin v. Keller Ladders, Inc., recent case law from this Court establishing that the Offer of Judgment statute must be strictly construed mandates that the Fourth District's finding that the Demands were invalid be affirmed because the Demand was untimely and otherwise defective in failing to apportion the offer between the two offerors.

III. The Fourth District's opinion in this case on the issue of whether the Certificate of Service creates the conclusive presumption that it was served on the date set forth in the certificate, does not raise a conflict with other District Courts and, even if it does, the evidence in this case supports the District Court's conclusion that the Demand for Judgment was, in fact, served on the certified date and the decision must be affirmed on that basis.

IV. The Fourth District's holding that the Trial Court erred in striking NATIONWIDE'S opposition to the ROBINSONS' fee motion is consistent with all of the case law on discovery sanctions, which holds that while pleadings may, in egregious instances, be stricken, filings which are not pleadings may not be stricken especially where, to do so, would vest an

invalid fee claim with validity.

POINTS ON APPEAL

V. Even assuming that this Court has jurisdiction to consider this case based on a purported conflict, the Court should nevertheless decline to disturb the Fourth District's ruling in this case because the sanction in question arose as a result of the Plaintiff's own discovery abuses and the Fourth District could have, and should have, reversed the Trial Court's denial of sanctions against the ROBINSONS and their counsel.

VI. The Fourth District erred in determining that NATIONWIDE had waived its right to contend that pre-judgment interest was not recoverable in light of the fact that, at the time the award was entered, the governing law in the Fourth District was to the contrary.

ARGUMENT

I. This Court has no jurisdiction to consider this case because none of the issues raised by the Petitioner involve an "express and direct" conflict that could vest this Court with jurisdiction to consider the case.

The ROBINSONS first argue that the Fourth District's opinion in this case expressly and directly conflicts with Kuvin v. Keller Ladders, Inc., 797 So. 2d 611 (Fla. 3d DCA 2001), which, they imply, stands for the proposition that violations of the time requirements set forth in Florida Rule of Civil Procedure 1.442(b) may be deemed "harmless technical violations". Kuvin, however, is not only clearly distinguishable by virtue of the fact that the offer in that case was made by a **defendant** to a **plaintiff**, but has also been called into question by this Court's recent pronouncements in both Sarkis v. Allstate Ins. Co., 28 Fla. L. Weekly 740 (Fla., Oct. 2, 2003) and Willis Shaw Express, Inc. v. Hilyer Sod, Inc., 849 So. 2d 276 (Fla. 2003).

While opposing counsel correctly notes that neither of these cases addressed untimely Proposals for Settlement, both are nevertheless dispositive of the issues in this case because in both of these cases, this Court clearly and unequivocally held that Florida Statute 768.79 and Rule 1.442 must be strictly construed because the statute and rule are in derogation of common law. Thus, the

Third District's finding that a violation of the statute can be deemed "harmless and technical" is no longer good law (if it ever was) by virtue of this Court's subsequent opinions implicitly holding that there is no such thing as a "harmless and technical" violation. For that reason, any asserted "conflict" between Kuvin and this case has already been resolved by this Court and there is simply no reason for this Court to issue yet another opinion to the effect that the Rule and the Statute mean what they say. There is no "express and direct" conflict that vests this Court with jurisdiction. See, Florida Star v. B.J.F., 530 So. 2d 286 (Fla. 1988).

As to their second Point on Appeal, the ROBINSONS argue that the Fourth District's opinion conflicts with other District Court opinions finding that a Certificate of Service creates a rebuttable presumption that a document was served on the date set forth in the Certificate. They assert that the Fourth District's decision to determine the timeliness of the service of a Proposal for Settlement with reference to the date set forth on the Certificate of Service conflicts with several decisions of other District Courts of Appeal holding that a Certificate of Service is prima facie proof of service on the date set forth in the Certificate but that proof may be rebutted. See, Abrams v. Paul, 453 So. 2d 826 (Fla. 1st DCA 1983); Scutieri v. Miller, 584 So. 2d 15 9Fla. 3d DCA 1991); Jones v. State, 785 So. 2d

561 (Fla. 2d DCA 2001).

The appellate court's decision in this case does not conflict with the aforementioned authority for the simple reason that, in this case, it is the party whose counsel certified the date of service who now seeks to disavow his **own** certificate of service. In **all** of the other cases cited by the ROBINSONS, it was the **recipient** of the served document who sought to question the true date of service. This case is also distinguishable from those cited because it involves the interpretation of the time limitations set forth in Florida Rule of Civil Procedure 1.442 which is strictly construed and none of the cited cases involve the interpretation this rule. Thus, there is no "express and direct" conflict which would vest this Court with jurisdiction to review this case.

On their third point on appeal, the ROBINSONS contend, on page 17 of their Brief, that the Fourth District held "that a trial court cannot strike a defendant's pleadings and defenses for misconduct under Fla. R. Civ. P. 1.380 without first examining the plaintiff's claim to make sure it is not void." Contrary to this assertion, the District Court **actually** held that, "[w]hile Florida Rule of Civil Procedure 1.380 permits the striking of 'pleadings' as a discovery sanction in certain instances, it does not allow a defense to be stricken so as to validate and

breathe new life into a void claim". Simply put, the Court determined that since an untimely demand was void from its inception, it did not exist at the time of default. If it does not exist at the time of default, the default could not subject a party to paying the nonexistent claim. Cf., North American Accident Ins. Co. v. Moreland, 53 So. 635 (Fla. 1910)("judgment by default entitles the plaintiff to the relief for which a proper predicate has been laid in the declaration."). Neither Mercer v. Raine, 443 So. 2d 944 (Fla. 1983) nor any other case in the State of Florida holds to the contrary. Thus, this ground, like the others argued by the ROBINSONS, does not demonstrate the requisite "express and direct" conflict to establish this Court's jurisdiction to consider this case. This Court should decline to exercise its limited certiorari jurisdiction.

II. Assuming that there could have been a conflict between the Fourth District's opinion in this case and the Third District's opinion in Kuvin v. Keller Ladders, Inc., recent case law from this Court establishing that the Offer of Judgment statute must be strictly construed mandates that the Fourth District's finding that the Demands were invalid be affirmed because the Demand was untimely and otherwise defective in failing to apportion the offer between the two offerors.

In the present case, the Demand for Judgment was jointly served by both Plaintiffs and was served by fax to NATIONWIDE'S counsel within 90 days

of service of process. These facts are not in dispute and as a result, it is likewise indisputable that the Demands were in clear violation of Florida Rule of Civil Procedure 1.442, which requires that joint demands be apportioned and further provides that no Demand for Judgment may be served within 90 days of Service of Process.

As set forth above, this Court has recently issued two opinions, Sarkis, 28 Fla. L. Weekly 740 and Willis Shaw, 849 So. 2d 276, both of which stand for the proposition that the Proposal for Settlement statute and rule must be strictly construed as written. In urging this Court to find that their failure to comply with the time requirements set forth in Rule 1.442 is a "harmless, technical violation" not affecting the validity of their Proposal, the ROBINSONS are essentially urging this Court to ignore its own precedent. After Sarkis and Willis Shaw, it is clear that there is no such thing as a "harmless technical" violation of Rule 1.442 and that if it is found that either party has violated the procedural requirements of the Rule, the offer is invalidated. Kuvin predated both of these cases and was effectively overruled by this Court when it issued those opinions. Therefore, there is not only no conflict among the District Courts of Appeal on this point, but the prevailing law of this Court is consistent with the Fourth District's

finding that the untimely Demand for Judgment was invalid.

Even if this Court could find that the untimeliness of the Demand was a "harmless violation" as asserted by the ROBINSONS, the Demand is nevertheless invalid because it was made jointly by both Plaintiff and the joint demand was not apportioned as required by Rule 1.442(c)(3). In Willis Shaw, 849 So. 2d at 279, this Court held that "under the plain language of rule 1.442(c)(3), an offer from multiple Plaintiffs must apportion the offer among the Plaintiffs." Since the ROBINSONS' Demand did not comply with this Rule and this Court has now held that noncompliance will invalidate the Demand, this Court must affirm the Fourth District's decision finding the Demand void from its inception, irrespective of whether it finds that the Demand was timely.

III. Even if The Fourth District's opinion in this case on the issue of whether the Certificate of Service creates the conclusive presumption that it was served on the date set forth in the certificate is in conflict with other decisions, the evidence in this case supports the District Court's conclusion that the Demand for Judgment was, in fact, served on the certified date and the decision must be affirmed on that basis.

As set forth above, we do not believe that the District Court's opinion in this case is in conflict with any other court on the legal effect of a certificate of service. However, if this Court will consider this case, the merits of this issue

compel affirmance of the District Court's opinion.

The ROBINSONS have actually raised several different arguments as to why their Proposal should be deemed timely. The have variously argued that 1) the Certificate of Service contains the wrong date of service, and/or 2) that the Proposal may have been served early, but it was received by NATIONWIDE after 90 days had expired and/or 3) that since NATIONWIDE had "constructive knowledge" of the existence of the lawsuit before it was actually served with process, the 90 day requirement should be measured from the date of its knowledge, rather than the date they were served with process, as expressly provided in Rule 1.442. However, in their Initial Brief at pages 9-10, the ROBINSONS' counsel appears to have settled on the argument that NATIONWIDE could have actually received the Demand for Judgment after 90 days had elapsed and attempted to hide that fact by way of its noncompliance with the discovery.[8] In furtherance of this argument, at the trial court level, the ROBINSONS requested that NATIONWIDE produce the envelope in which the Proposal was served, so that the ROBINSONS could "prove" by the postmark

[8] By doing so, the ROBINSONS ignore the fact that Rule 1.442 measures timeliness by the service date and not by the date the document was received as well as the fact that it was faxed, as well as mailed, to counsel of record on the date of service.

that their **own** Counsel's Certificate of Service contained the wrong date.[9] However, the Proposal for Settlement was served on NATIONWIDE'S **counsel**, and not NATIONWIDE itself, and it was faxed to counsel **on the same day that it was certified as served.** The Proposal was thereafter faxed by NATIONWIDE'S counsel to its adjuster on the same day counsel received by fax. (AA.10) These facts were not only proven at Gary St. Arnauld's deposition, but were also proven by the fact that both the ROBINSONS' and NATIONWIDE'S counsel billed for the document on the date that the ROBINSONS' counsel certified that it was served and those bills were produced to the ROBINSONS before they obtained their sanctions. (AA.10) Hence, there never was a **legitimate** question as to the date of service and no amount of discovery on the party of the ROBINSONS could have refuted their own Certificate of Service.[10] Thus, the evidence in this

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[9] NATIONWIDE repeatedly argued, to no avail, that even if there was a postmarked envelope, the Certificate of Service was prima facie proof that the document was mailed on the date certified and a different date on the postmark would not have rebutted this proof. Mr. Martinez of Miami, Inc. v. Ponce De Leon Federal Savings & Loan Assoc.,, 558 So. 2d 153 (Fla. 3rd DCA 1990). In any event, since Rule 1.080(b) provides that service of a faxed document occurs when transmission is complete, whether the same document may have been mailed and received by mail on a different day is irrelevant.

[10] The ROBINSONS seek to downplay the evidence establishing that the document was, in fact, served on the certified date by arguing, on page 14 of their Brief, that, "it does not explain NATIONWIDE'S refusal to comply with multiple

case conclusively established that the service date specified in the ROBINSONS' Certificate was correct and therefore, the Fourth District's finding that service was untimely must likewise be affirmed.

IV. The Fourth District's holding that the Trial Court erred in striking NATIONWIDE'S opposition to the ROBINSONS' fee motion is consistent with all of the case law on discovery sanctions, which holds that while pleadings may, in egregious instances, be stricken, filings which are not pleadings may not be stricken especially where, to do so, would vest an invalid fee claim with validity.

Florida Rule of Civil Procedure 1.380 permits discovery sanctions, including the striking of "pleadings". Fla. R. Civ. P., 1.380. Motions are not "pleadings" as contemplated by this Rule. See, Bradford Motor Cars, Inc. v. Frem, 511 So. 2d 1120 (Fla. 4th DCA 1987)(response to request for admission is not a "pleading" which can be stricken as a sanction for discovery violations); Coca Cola Bottling Co. v. Clark, 299 So. 2d 78, 82 (Fla. 1st DCA 1974)("[p]leadings are the allegations made by the parties to a suit for the purpose

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court orders to provide discovery." Not only did NATIONWIDE never "refuse to comply with multiple court orders", but it demonstrates that the ROBINSONS literally suffered no prejudice as a result of NATIONWIDE'S alleged discovery violations. Absent any evidence of prejudice, the trial court clearly abused its discretion in sanctioning NATIONWIDE in the amount of $445,000.00 for alleged **post-trial** non-compliance.

of presenting the issues to be tried and determined"). Thus, although the appellate court did not specify this as a basis for its decision, the Fourth District could have correctly found that Rule 1.380 did not vest the trial court with authority to strike NATIONWIDE'S opposition to the fee motion because it was not a "pleading" and the appellate court's decision could be affirmed on that basis. Dade County School Board v. Radio Station WQBA, 731 So. 2d 638 (Fla. 1999).

Not only is there no legal authority supporting the trial court's order striking NATIONWIDE'S opposition to the ROBINSONS' fee application, but the order is also erroneous in that it sanctioned NATIONWIDE by requiring it to pay attorneys' fees well in excess of those that may have been expended as a result of the alleged post-verdict discovery violations. The only means of sanctioning a party for alleged discovery abuses is pursuant to Florida Rule of Civil Procedure 1.380 and that Rule contemplates as a possible sanction that the offending party shall "pay the **reasonable expenses caused by [the failure to obey a court order]**, which may include attorneys' fees". Id. Since the trial court permitted the ROBINSONS to collect the **entirety** of their attorneys' fees from the date of the first untimely offer, which was years before the alleged discovery violations, the Court's ruling exceeds the scope of the sanctions permitted by the Rule. Cf.,

Tripp Construction, Inc. v. Verde, 789 So. 2d 1173 (Fla. 3rd DCA 2001)(where court awarded attorneys' fees for more than the expenses incurred in proving a matter denied in requests for admission, court exceeded parameters of Rule 1.380(c) and fee order would be reversed).

Contrary to the ROBINSONS' argument, Mercer v. Raine, 443 So. 2d 944 (Fla. 1983) does not compel a different result and the appellate court's affirmance of the trial court's sanction order is entirely consistent with that case.[11] In Mercer, this Court simply held that a trial court has broad discretion in sanctioning parties before it and that its exercise of that discretion will not be disturbed absent a finding that the court abused that discretion. This Court then reviewed the record before it to determine whether the trial court erred in fashioning the sanction that it did in that particular case and found, on that record, that the court was within its discretion in striking the defendant's answer, a "pleading".

Here, the Fourth District followed Mercer when it found that the trial court did not abuse its discretion in sanctioning NATIONWIDE, but found that the court erred as a matter of law in striking its opposition to the ROBINSONS' void

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[11] Of course, by making this argument, we are not conceding that the trial court correctly found that sanctions were appropriate and in fact, we continue to argue that they were not appropriate on this record.

Demand for Judgment. The Fourth District correctly found that although Florida Rule of Civil Procedure 1.380 authorizes a trial court to strike "pleadings", i.e., a Complaint or Answer, there is nothing in the Rule that would permit the trial court to revive a void fee claim. As was set forth above, although the appellate court did not find that opposition to a Demand for Judgment was not a "pleading" that could be stricken under the Rule, it certainly could have. Similarly, the ROBINSONS' fee claim was not a "designated claim or defense" as that term is used in Rule 1.380(b)(2)(B). Instead, the appellate court found that, for other reasons, the striking of the opposition was not a sanction authorized by Rule 1.380. **In fact, there is no case in Florida that has held that a trial court has the discretion to grant an attorneys' fee based on a Demand for Judgment by default.** Since Mercer only dealt with a sanction that was specifically listed as a permissible sanction under Rule 1.380 and this case does not, Mercer does not compel a different conclusion here. While a trial court has certain discretion in fashioning appropriate remedies, that discretion is limited by the remedies listed in Rule 1.380 and where, as here, the trial court imposes an unauthorized remedy, that is not a matter of its discretion; it is a legal error that a reviewing court may review on a de novo basis.

Even if the trial court's decision to impose a sanction under the facts of this case was within its discretion, there is no question that, even under Mercer the trial court abused that discretion here. The law is well established that with respect to discovery violations, the punishment must fit the crime. See, Precision Tune Auto Care, Inc. v. Radcliffe, 804 So. 2d 1287 (Fla. 4th DCA 2002). In the present case, the ROBINSONS claim that "NATIONWIDE'S stonewalling tactics were calculated to deprive the Plaintiffs of having any chance to prove timely service of their proposal for settlement." Initial Brief, p. 18. Not only does the Record not support this contention because it is obvious that NATIONWIDE only ever had in its possession irrefutable proof that service was **not** timely, but the ROBINSONS knew, or certainly should have known, when and how **they** served their own Demand. [12] Thus, this is not a situation where a party was stymied in its discovery because the opposing party had information in its exclusive possession that was necessary to the discovering party's case. In fact, the best evidence refuting their own Certificate of Service would have been the ROBINSONS' counsel's testimony that they did not serve the Demand on the date that he certified he did but

[12] In point of fact, the **only** court order ever even arguably violated by NATIONWIDE was a single order compelling production "forthwith", which was obtained by the ROBINSONS' counsel, without a motion and without notice of a hearing.

in all of the months that this issue was pending, neither of the Plaintiffs' counsel filed an affidavit or made any direct representation to the trial court disclaiming their own certificate of service and instead, simply implied (without any evidence) that NATIONWIDE had something in its possession that would have called the service date into question. NATIONWIDE **never** refused to produce any information in its possession relative to the timeliness of the ROBINSONS' demand. It simply objected to the production of other information that was completely irrelevant to the specific issue that remained pending, i.e., the attorneys' fees. Since NATIONWIDE clearly did not and never could have had the evidence disproving the service date (because that date was, in fact, correct), the ROBINSONS never proved the requisite prejudice that would justify such an extreme sanction. See, Beck's Transfer, Inc. v. Peairs, 532 So. 2d 1136 (Fla. 4th DCA 1988)(where requesting party never proved that requested documents existed, the record did not support trial court's determination that the defendants willfully and deliberated disregarded trial court's orders for production). Absent evidence of some real and not imagined prejudice arising from alleged discovery sanctions, the trial court's order was correctly reversed.

<u>V. Even assuming that this Court has jurisdiction to consider this case based on a purported conflict, the Court should nevertheless decline to disturb the Fourth District's ruling in this case because the sanction in question arose as a result of the Plaintiff's own discovery abuses and the Fourth District could have, and should have, reversed the Trial Court's denial of sanctions against the ROBINSONS and their counsel.</u>

The trial court granted the ROBINSONS' motions for sanctions against NATIONWIDE for alleged discovery abuses and refused to even consider NATIONWIDE'S Motions for Sanctions against Mr. Asencio. In doing so, the Court ignored the undeniable fact that the ROBINSONS subjected NATIONWIDE to outrageous discovery designed solely as a fishing expedition to gain information that they could use in a subsequent bad faith claim. Should this Court find that it has jurisdiction to consider this case, it should also find that the Fourth District erred in deferring to the trial court's "implicit" denial of NATIONWIDE'S sanction motion not only because the trial court simply refused to consider the motion and never technically denied it, but also because the motion demonstrated that the ROBINSONS' counsel engaged in abusive and harassing discovery tactics which, more than anything, contributed to their failure to obtain the nonexistent evidence they claim they so sorely needed. In other words, it is impossible to view this case

fairly in a vacuum without taking into account the ROBINSONS' own actions during this discovery process. If those actions are reviewed under the same prism as NATIONWIDE'S actions, it is obvious that the trial court abused its discretion in sanctioning NATIONWIDE as it did and in refusing to even consider sanctioning the ROBINSONS.

The record in this case is chock full of evidence of the ROBINSONS' abuse of process. Given that NATIONWIDE'S objection to the their claim for fees was grounded solely on legal, and not factual, bases, there was literally no reason for post-trial discovery unless and until the trial court considered those entitlement issues. See, In re Estate of Ransburg, 608 So. 2d 49 (Fla. 2d DCA 1992)(under normal circumstances, discovery concerning the amount of attorneys' fees should be deferred until the trial court has determined entitlement).[13] NATIONWIDE did everything in its power to have the court consider the legal issues raised as to the invalidity of the Demand for Judgment without the need for discovery and, when that was unsuccessful, to obtain an order limiting the

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[13] This is especially true because Florida law permits an award of attorneys' fees to the moving party for litigating entitlement, but does not permit an award of fees for litigating amount. See, State Farm Fire & Casualty Co. v. Palma, 629 So. 2d 830 (Fla. 1993). The trial court's refusal to bifurcate the issues of entitlement and amount can result in an abuse of the attorneys' fee process for the purpose of maximizing the amount of fees awarded post-trial.

attorneys' fee discovery to only those issues actually relevant to the remaining issues. Instead, the ROBINSONS' counsel objected to bifurcating the issue and insisted on serving discovery for thousands of pages of documents having literally nothing to do with the ROBINSONS' entitlement to attorneys' fees. When NATIONWIDE understandably balked at the expense and invasiveness entailed in producing those documents, the ROBINSONS' counsel utilized NATIONWIDE'S unwillingness, and legitimate and timely objections to producing mountains of discovery well outside the scope of permissible inquiry, as a means of obtaining a default on attorneys' fees. If this Court reviews the only requests relevant to the issue of whether the Demand for Judgment was timely, the Court will find that NATIONWIDE never once refused to comply with the ROBINSONS' request for any such information in its possession.

It is submitted that the ROBINSONS' counsel's insistence on taking the long road for no apparent purpose other than to harass and intimidate NATIONWIDE should not have been rewarded by the trial court's sanction orders. The St. Arnauld deposition transcripts demonstrate that it was Mr. Asencio, and not NATIONWIDE'S counsel, who engaged in the most heinous discovery abuse.

This post-trial deposition of St. Arnauld was ostensibly set in relation to the ROBINSONS' Motion for Attorneys' Fees, which was based solely on the ROBINSONS' demands for judgment. Prior to the deposition, NATIONWIDE moved for protective orders arguing that given that the trial had been concluded and the issues relative to whether the Plaintiffs are entitled to attorneys' fees were wholly legal, and not factual, in nature (i.e., whether the proposals were timely served, whether the proposal met the requirements of Rule 1.442), no deposition was necessary and any questions asked at the deposition would necessarily be irrelevant and unnecessarily intrusive. (RI.844-845) In addition, NATIONWIDE argued that it anticipated that the Plaintiffs' counsel Diego Asencio would attempt to utilize the deposition as a means to build a bad faith case against NATIONWIDE, which would be entirely improper as said claim has not been filed and is not yet ripe since no judgment has been rendered in this case.

NATIONWIDE made every attempt to limit and focus the fee discovery but was unsuccessful in obtaining a protective order before the deposition.[14] In accordance with Mr. Asencio's representations to this Court that

[14] NATIONWIDE was concerned because the ROBINSONS' Notice of Taking Deposition requested that the witness bring with him NATIONWIDE'S claims file, which it had declined to produce as privileged in response to the Requests for Production that were the subject of the Petition.

by having Mr. St. Arnauld attend the deposition with its claims file, NATIONWIDE would not be waiving its privileges, NATIONWIDE attended the deposition and appropriately objected to any and all questions calling for the inspection of privileged documents and any questions that impinged upon work product and attorney-client privileges. (RIII.201-400) St. Arnauld was instructed by NATIONWIDE'S counsel not to answer questions that invaded its privileges and not to review documents in the claims file in response to Mr. Asencio's questions, so as not to inadvertently waive its privileges. (RI.944-952, 957-964) See, Fla.Stat. 90.613 (witness who refreshes recollection by reviewing documents must thereafter produce those documents even if the witness does not disclose privileged information contained within those documents).[15] See also, Merlin v. Boca Raton Community Hosp., Inc. 479 So. 2d 236 (Fla. 4th DCA 1985).

Mr. Asencio was advised by NATIONWIDE'S counsel at the inception of the deposition that given that this Court had not yet ruled on its privilege objections or conducted the in camera inspection that Mr. Asencio himself

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[15] At the deposition, Mr. Asencio incorrectly advised the witness that "there's no waiver of privilege by looking at that file and stating any non-privileged facts". (RIII.213) Later, Mr. Asencio asked the witness, "[d]o you honestly believe this lawyer can get away with not letting you answer any questions, whether privileged or not, by just saying you're looking at the file therefore some privilege is violated?" (RIII.250).

admitted was its right, the witness would not be reviewing documents in the claims file so as to preserve any and all privileges. (RIII.211, 213). Thereafter, Mr. Asencio conducted a three-hour deposition which can best be described as an egregious abuse of the discovery process conducted for the purposes of threatening the witness and Defendant, demeaning and belittling the Defendant's counsel, abusing and harassing the witness and attempting to drive a wedge between the Defendant and its counsel.[16] (RIII.201-400)

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[16] The examples of Mr. Asencio's abuse of the discovery process at the depositions are too numerous to be set out in full here, but we can summarize that conduct as follows:

a. Mr. Asencio's repeated threats of future bad faith litigation resulting from the witness' failure to answer his improper questions calling for privileged information and to review the claims file (RIII.. 236, 241; 247, 248, 273, 289, 300, 310, 321, 323, 324, 325, 336-337, 342, 352);

b. Mr. Asencio's repeated comments belittling NATIONWIDE'S counsel (RIII. 234; 251, 260-261, 262-263, 265, 294, 297, 303, 325, 335, 352);

c. Mr. Asencio's repeated suggestions to the witness that its counsel's defense in this case was improper or incompetent (RIII.251, 260-261, 335, 352, 353);

d. Mr. Asencio's repeated suggestions to the witness that NATIONWIDE obtain a review and opinion of other attorneys regarding the alleged incompetence of its counsel (RIII.251-252, 261, 272, 352-353, 354)

We believe that the abusive discovery tactics utilized by the ROBINSONS' counsel should not be rewarded and should preclude the

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e. Mr. Asencio's suggestion that the witness and/or NATIONWIDE communicate directly with him rather than through its defense counsel (RIII.354);

f. Mr. Asencio's repeated suggestions that NATIONWIDE'S privilege objections were made in bad faith and were a violation of its asserted duties to its insured (RIII.227, 228, 231, 259, 288, 302-303, 306, 315, 335, 336, 351);

g. Mr. Asencio's repeated suggestions that NATIONWIDE'S counsel was wasting the defendant's money (RIII.261, 262, 335);

h. Mr. Asencio's repeated suggestions that the witness' refusal to review the claims file and to waive its privileges on advice of counsel was a "game" played for the sole purpose of "hiding" information from its insured (RIII.227, 228, 235, 256, 259, 279, 280, 288, 290-291, 292, 293);

i. Mr. Asencio's repeated questions regarding NATIONWIDE'S practices and procedures relative to the adjusting of claims, a topic outside the scope of the Notice of Taking Deposition and relevant only to a punitive damage claim raised in a bad faith claim (RIII.219, 221, 222, 223 226, 231, 245, 288, 322);

j. Mr. Asencio's repeated comments and questions designed to disparage NATIONWIDE'S reputation (RIII.232-234, 315-316, 318, 323, 338);

k. Mr. Asencio's repeated efforts to give legal advice to the witness and NATIONWIDE contrary to that given by NATIONWIDE'S own counsel (RIII.243, 289).

ROBINSONS from seeking sanctions against NATIONWIDE. The Fourth District's decision could be affirmed on this basis as well.

VI. The Fourth District erred in determining that NATIONWIDE had waived its right to contend that pre-judgment interest was not recoverable in light of the fact that, at the time the award was entered, the governing law in the Fourth District was to the contrary.

The Fourth District erred when it found that NATIONWIDE waived its right to contend that pre-judgment interest was not recoverable in light of the fact that, at the time the award of such interest was entered, the governing law in the Fourth District was to the contrary. After the judgment was entered but before the appeal was considered, this Court held that post-verdict, pre-judgment interest is not recoverable in a personal injury action. Amerace Corp. v. Stallings, 823 So. 2d 110 (Fla. 2002).

With respect to the preservation issue, NATIONWIDE concedes that it did not argue at the trial court level that no pre-judgment interest should be awarded because it was not recoverable under the law.[17] In fact, at the time of the hearing,

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[17] NATIONWIDE **did** object to the amount of interest requested because it had tendered a check for its policy limits to the ROBINSONS' counsel on the day after the jury's verdict and therefore, if pre-judgment interest was to be included in the judgment, it would necessarily have to be limited to a single day's interest.

the clear law in the Fourth District, as expressed in Budget Rent-a-Car v. Castellano, 764 So. 2d 889 (Fla. 4th DCA 2000) and Palm Beach County School Board v. Montgomery, 641 So. 2d 183 (Fla. 4th DCA 1994), was that pre-judgment interest **is** recoverable in personal injury actions from the date of the verdict until the date of the final judgment. Therefore, NATIONWIDE'S counsel was duty bound to concede the correctness of the ROBINSONS' contention that, as personal injury plaintiffs, they were entitled to pre-judgment interest and could not have argued in good faith that the trial court should ignore the then binding law.

The primary purpose of preserving an issue for appeal is to provide the trial court with an opportunity to render a legally correct ruling. See, State v. Jefferson, 758 So. 2d 661, 665 (Fla. 2002)(the "contemporaneous objection rule" is "intended to give trial judges an opportunity to address objections made by counsel in trial proceedings and to correct errors accordingly"). To hold that a party should argue against the binding law simply to "preserve" the issue in case that law changes in the interim would require that a party not only violate its counsel's ethical obligations under Rules Regulating the Florida Bar 4-3.3 (which requires that a party disclose adverse binding authority to the trial court), but would also require that party to engage in an essentially useless and counterproductive argument, since

the trial court is legally bound to follow the law in effect at the time of its ruling. Since NATIONWIDE properly conceded what was, at the time of the hearing, the governing law on the issue, but nevertheless objected to the inclusion of pre-judgment interest in the judgment, NATIONWIDE did not waive its right to raise Amarace as authority for a reversal of the trial court's award of pre-judgment interest.

CONCLUSION

For the foregoing reasons, the Respondent NATIONWIDE MUTUAL FIRE INSURANCE COMPANY respectfully requests that this Court decline to exercise its discretionary jurisdiction to consider this case and to affirm the Fourth District Court of Appeal's decision.

Respectfully submitted,

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HINDA KLEIN, ESQUIRE

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 24th day of February, 2004, to: Diego C. Asencio, Esquire, Diego C. Asencio, P.A., 636 U.S. Highway 1, Suite 115, North Palm Beach, Florida 33408; Richard A. Kupfer, Esquire, Richard A. Kupfer, P.A., 5725 Corporate Way, Suite 106, West Palm Beach, Fla. 33407

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CERTIFICATE OF TYPEFACE COMPLIANCE

The undersigned hereby certifies that this brief is filed in compliance with the requirements set forth in Rule 9.210 of the Florida Rules of Appellate Procedure. The brief is presented in the Times New Roman, 14-point font.

BY:______________________

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