IN THE SUPREME COURT OF FLORIDA

STACEY ROBINSON, and
ROBERT ROBINSON,
Petitioners,

v.

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,
Respondent.
_____/

FLA. SUP. CT.
CASE NO. SC03-_____

FOURTH DCA CASE NOS.
4D01-4894 & 4D02-977

PETITIONERS' INITIAL BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

This case involves the Fourth DCA's order quashing the trial court's entry of sanctions (striking of pleadings) against Nationwide for multiple discovery violations, even after finding the trial court committed no abuse of discretion in imposing sanctions since "The record is rife with instances of Nationwide's stonewalling tactics and efforts to thwart discovery sought by the Plaintiffs." [1] (App. "A")

The underlying case involved an automobile accident that went to trial and resulted in a verdict substantially exceeding the Plaintiff's pre-trial proposal for settlement. Nationwide is the Plaintiffs' (Mr. & Mrs. Robinson) uninsured motorist carrier. Zuckerman is the uninsured driver who, while driving drunk, rear ended the Plaintiffs' vehicle. The action was filed in 1997 and has resulted in contentious and

[1] The language used by the Fourth DCA is similar to the language used by the trial judge, who also found Nationwide's discovery conduct deplorable. The Fourth DCA cited one portion of the trial court's order finding "a deliberate and contumacious disregard by Nationwide of its discovery obligations" after the trial court had previously ordered discovery to be produced.

protracted litigation for the last seven years, including several appeals. The proposal for settlement, sent very early in the case, was ignored by Nationwide.

After the verdict, the Plaintiffs moved for an award of attorney's fees pursuant to the proposal for settlement and Nationwide took the position that the proposal was void because the certificate of service on it revealed it was mailed out less than 90 days (by six days) after the Complaint had been served on Nationwide. Plaintiffs sought discovery to show that the proposal for settlement was not actually mailed until the week after the date stated on the certificate of service, that it was received by Nationwide after the 90 day waiting period, and that Nationwide had actual notice of the lawsuit being filed at least 12 days before it was formally served. The trial court permitted this area of discovery to be pursued.

Nationwide resisted and refused to comply with multiple orders of the trial court, even after unsuccessfully seeking certiorari review and even after the court first entered less drastic sanctions in the form of attorney's fees. Ultimately, after several more months of hearings on the same issues that had already been ruled on and after wasting many hours of court time the trial court's patience with Nationwide finally wore thin. The trial judge granted the Plaintiffs' motion to strike Nationwide's pleadings in response to the motion for attorney's fees as a sanction for its unrelenting discovery misconduct. An attorney fee and cost judgment was then entered against

Nationwide and Nationwide appealed the order as being an abuse of discretion.

The Fourth DCA found that the trial court did not abuse its discretion to enter sanctions against Nationwide after noting that the record is replete with instances of Nationwide's stonewalling tactics and efforts to thwart the Plaintiffs' attempted discovery. However, the Fourth DCA nevertheless quashed the sanctions entered by the trial court based on the reasoning that the proposal for settlement was void on its face (due to the date shown on the certificate of service) and that no amount of misconduct by a party can "breathe new life into a void claim." (See App. "A") With all due respect, that reasoning is not only at odds with holdings from other district courts and from this court, but it emasculates the intent behind the rule of procedure authorizing the striking of pleadings for egregious misconduct and, for the first time ever in Florida jurisprudence, it creates an irrebuttable presumption regarding the date typed into a certificate of service.

SUMMARY OF ARGUMENT

The Fourth DCA's opinion expressly and directly conflicts with the Third DCA in the Kuvin v. Keller case, as well as with this court in Mercer v. Raine, as well as with a line of cases that holds a certificate of service to create a rebuttable presumption rather than a conclusive presumption.

ARGUMENT

II. WHETHER THE OPINION OF THE FOURTH

DCA FINDING THE 90 DAY WAITING PERIOD IN FLA. R. CIV. P. 1.442 TO RENDER VOID A PROPOSAL FOR SETTLEMENT MAILED A FEW DAYS EARLY, EVEN IF RECEIVED AFTER 90 DAYS, EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE THIRD DCA IN KUVIN V. KELLER LADDERS, INC.?

The Fourth DCA below cited and expressly followed its own prior decision in Grip Devl'p., Inc. v. Coldwell Banker Residential Real Estate, Inc., 788 So2d 262 (Fla. 4th DCA 2000), and held that the 90 day waiting period in Fla.R.Civ.P. 1.442 renders void a proposal for settlement that is mailed out before 90 days has elapsed after the Defendant was served with the complaint. The Fourth DCA interprets "service" of the complaint as occurring when the defendant receives delivery of the complaint and summons, but interprets "service" of the proposal for settlement as occurring on the date it was mailed regardless of when it was received. That was also the holding of the Grip case which inspired a vigorous dissent by Judge Farmer (which was later adopted by the Third DCA in Kuvin, supra.).

The majority of the Fourth DCA in Grip expressly rejected the notion that a premature proposal for settlement should be treated any differently than one that is served too late (i.e. less than 45 days before the date set for trial). In his dissent, Judge Farmer noted that the proposal for settlement in that case, although mailed out

87 days after service of process, was apparently received after the 90 day waiting period expired. Judge Farmer opined that the 90 day provision merely imposes a condition precedent to delay settlement offers until after the defendant has a reasonable time to evaluate the claim and its defenses. Judge Farmer cited this court's opinion in Gulliver Academy, Inc, v. Bodek, 694 So2d 675 (Fla. 1997) which held the time limits for serving proposals for settlement are not to be deemed inflexible and can be adjusted by the trial court under appropriate circumstances. Judge Farmer also discussed several other district court cases that considered certain variances from Rule 1.442 to be harmless and insignificant enough not to void the proposal for settlement. Judge Farmer noted that the goal behind setting a rigid deadline ending 45 days before trial is completely different than the purpose behind the 90 day waiting period and that "too early" should not be treated the same as "too late".

Judge Farmer also cited a litany of cases holding premature filings to "remain in limbo" or to be subject to temporary abatement rather than dismissal based on voidness. Judge Farmer noted the illogic of considering a settlement offer to be made before it is received and of allowing a defendant to spring a "catch 22" defense after trial when it is too late for the plaintiff to cure the technical defect by serving the proposal again after 90 days has expired.

The Third DCA has expressly rejected the reasoning of the majority of

the Fourth DCA in Grip, supra, and instead has expressly agreed with the dissenting opinion of Judge Farmer in Grip. See Kuvin v. Keller Ladders, Inc., 797 So2d 611 (Fla. 3d DCA 2001). The Third DCA held that a violation of the 90 day waiting period in Rule 1.442 may be considered "a harmless technical violation which does not affect the rights of the parties." Although the Kuvin case involved a defendant who was too early in serving a proposal for settlement, rather than a plaintiff being too early as in the Grip case, the Third DCA stated: "

> It is obvious that our approach to the issue is entirely contrary to

that of the majority in Grip and entirely in accordance with Judge Farmer's dissent. If this renders us in

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The Kuvin case, although acknowledging a probable conflict with Grip, was never brought to this court to resolve the conflict. The Fourth DCA has now, in the present case, reaffirmed its erroneous position in the Grip case and, in doing so, has perpetuated the conflict that exists on this issue between the Third and Fourth Districts. That conflict will apparently continue until it is resolved by this court.

II. WHETHER THE OPINION OF THE FOURTH DCA EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS FROM SEVERAL OTHER DISTRICT COURTS THAT HAVE HELD THE DATE ON A CERTIFICATE OF SERVICE TO CREATE A REBUTTABLE PRESUMPTION OF MAILING ON THAT DATE, WHICH CAN BE OVERCOME BY OTHER EVIDENCE OF MAILING ON A DIFFERENT DATE?

The Fourth DCA below held that the sanction of striking Nationwide's defenses to an award of attorney's fees cannot be allowed here because, according to the certificate of service, the proposal for settlement was not timely served. The Fourth DCA noted that there was a dispute raised about when the proposal was actually mailed, notwithstanding the date stated on the certificate of service. The certificate of service indicates mailing on November 26, 1997 which is 84 days after service of process on September 3, 1997. That was also the Wednesday before the long Thanksgiving weekend. Plaintiffs sought to prove through discovery that the proposal was not actually mailed until after the Thanksgiving weekend was over, on the first or second day of December. December 2, 1997 was the 90th day after service of process. Plaintiffs also sought to discover exactly when Nationwide received the proposal for settlement and how it disposed of the post-marked envelope. It was

likely received after the 90 day waiting period had expired. The Plaintiffs were also hoping, through discovery, to prove that Nationwide had actual knowledge the lawsuit was filed at least 12 days before it was formally served.

The Fourth DCA held that none of that mattered because the courts should not look beyond the date stated in the certificate of service to determine the timeliness of a proposal for settlement. (See App. "A") According to the Fourth DCA, the Plaintiffs here can not be allowed to impugn the credibility of the date typed into the certificate of service to show that the document really was served several days later. That conclusion is directly contrary to numerous cases holding that a certificate of service on a pleading creates only a rebuttable presumption that the document was mailed on that date. See Abrams v. Paul, 453 So2d 826 (Fla. 1st DCA 1983) (holding that "the presumption raised by the certificate of service is clearly not conclusive"); Scutieri v. Miller, 584 So2d 15 (Fla. 3d DCA 1991); Jones v. State, 785 So2d 561 (Fla. 2d DCA 2001). Fla.R.Civ.P. 1.080(f) provides that a certificate of service "shall be taken as prima facie proof of such service". "Prima facie" does not mean "irrebuttable".

The Fourth DCA's holding expressly conflicts not only with the cases cited above but is also inconsistent with cases from this court holding irrebutable presumptions to be unconstitutional. Eg. Straughn v. K & K Land Mgt., Inc., 326

So2d 421 (Fla. 1976). Although the Fourth DCA's stated goal was to create a bright line rule that would be easy to apply, it now has created conflict and uncertainty as to what types of certificates of service can be rebutted with evidence and what types cannot.

III. WHETHER THE OPINION OF THE FOURTH DCA FINDING THAT A TRIAL JUDGE CANNOT STRIKE A DEFENDANT'S PLEADINGS AS A SANCTION WITHOUT FIRST EXAMINING THE VALIDITY OF THE PLAINTIFF'S CLAIM, EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT IN MERCER V. RAINE?

Although the Fourth DCA's opinion begins by citing and paying homage to this court's decision in Mercer v. Raine, 443 So2d 944 (Fla. 1983), it then goes on to engraft an exception to Mercer that neither this court nor any other court has ever approved. The Fourth DCA 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 merit to the plaintiff's claim to make sure it is not void. No authority is cited to support that conclusion, and it not only conflicts with Mercer v. Raine, but it emasculates the intent behind Rule 1.380.

According to Mercer v. Raine, the issue on appeal is simply whether reasonable

people could differ on the propriety of the action taken by the trial judge. Here, Nationwide's stonewalling tactics were calculated to deprive the Plaintiffs of having any chance to prove timely service of their proposal for settlement. After less drastic sanctions proved ineffectual against Nationwide, the trial court finally entered a sanction that went directly to the issue that was involved in the Plaintiffs' attempted discovery. Nationwide had refused to appear at depositions or produce documents ordered multiple times by the trial court. Its conduct was absolutely flagrant. The Fourth DCA's holding means that if a defendant is convinced the plaintiff's claim is void it has little to lose by refusing to cooperate with any discovery or to comply with court orders, since its defenses cannot possibly be stricken.

The Fourth DCA's opinion, which determines that the proposal for settlement was void on its face, deprives Plaintiffs from the opportunity to prove otherwise and makes a factual finding before the trial court ever had an opportunity to consider the evidence (because Nationwide refused to produce it). By engrafting exceptions that are in no way inferred by Rule 1.380(2)(B) & (C) [2], and limiting trial court discretion to deal with repeated discovery misconduct in a way not authorized by this court in Mercer v. Raine, the Fourth DCA's opinion creates express and direct conflict with

[2] Rule 1.380(b)(2)(A)(B) & (C) authorizes a trial court to strike a disobedient party's pleadings, to refuse to allow that party to defend against designated claims, to enter judgment by default against the disobedient party, and to consider certain facts in issue to be viewed against the position of the disobedient party.

Mercer on an issue that is likely to recur and should be resolved. The district court's misapplication of supreme court precedent constitutes an express and direct conflict. See Wale v. Barnes, 278 So2d 601 (Fla. 1973).

CONCLUSION

This court should exercise its discretionary jurisdiction to review the Fourth District's written opinion and should direct the parties to file briefs on the merits.

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true and correct copy of the foregoing document has been furnished by U.S. Mail this 18th day of September 2003 to: **Hinda Klein, Esq.** , Conroy, Simberg & Gannon, 3340 Hollywood Blvd., Hollywood, FL 33021, counsel for Respondent.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for Petitioner certifies that the size and style of type used in this document is 14 Point Times Roman.

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APPENDIX TO PETITIONERS' INITIAL BRIEF ON JURISDICTION

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