IN THE SUPREME COURT OF FLORIDA

STACEY ROBINSON, and
ROBERT ROBINSON,
Petitioners,

CASE NO. SC03-1670

v.

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,
Respondent.
_____/

PETITIONERS' REPLY BRIEF ON THE MERITS

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REPLY ARGUMENT

Nationwide has interestingly turned our three questions presented into six questions presented. Nationwide affirmatively seeks for this court to quash certain aspects of the Fourth DCA's opinion below, even though Nationwide never filed a cross petition to invoke this court's jurisdiction to review other aspects of the Fourth DCA's opinion that have nothing to do with the issues we have properly raised. Nationwide also spends the majority of its brief discussing why sanctions should not have been entered at all against it, or, if anything, should have been entered against the Robinsons or their trial attorney, Diego Asencio, Esq., (whose name appears in the text of Nationwide's brief no less than 36 times).

At this stage, the finger pointing is over. That is not why we are here. We will first respond briefly to the new material just injected by Nationwide, all of which is improperly raised and extraneous to the only three questions involved in this proceeding.

In arguing that no sanctions should have been entered against Nationwide because it did nothing wrong, Nationwide asks this court to become a third-tier fact finder and to review not only whether the trial court abused its discretion to find Nationwide guilty of a "deliberate and contumacious disregard of the court's orders" (App. "E"), but also whether the three appellate judges on the Fourth DCA all abused their discretion in finding that the record amply supports the trial court's findings. This is not why we are now here before the state supreme court, and we respectfully decline Nationwide's attempt to redirect the entire focus of this proceeding. Although Nationwide still does not think it did anything wrong, the trial court's several orders detailing otherwise appear in the Appendix to our Initial Brief at App. "D", "E" and "F"; and a more detailed recitation of facts with record citations appears in the same Appendix at App. "C".

The trial court also found that Nationwide should forfeit the right to challenge the claim for a contingency multiplier for the same reasons that led to its other defenses being stricken. (App. "F", p. 17) Nationwide has not separately addressed that, so we will not either.

Nationwide also argues that it was justified in ignoring at least one order of the trial court compelling production "forthwith" since it was supposedly entered ex parte and was therefore "void". That is not correct.

After initially setting a motion for hearing (a motion for protective order, for extension of time to comply with discovery requests, and to require posting of a bond), Nationwide notified the Robinsons' attorney three days before the scheduled hearing that they were canceling the hearing (but not withdrawing all the motions). The Robinsons' attorney faxed back a letter the same day (three days before the hearing) advising that he will attend the scheduled hearing and "failing to attend is at your own peril." (See Reply Brief App. "D".) The Robinsons did previously cross notice the same hearing, contrary to what Nationwide says in its brief. (See Reply Brief App. "B" and R. IV/423-424)

Nationwide's attorneys elected not to appear at the scheduled hearing, an order was entered by the court (see Reply Brief App. "E"), and now Nationwide claims they were denied due process. A last minute decision not to attend a scheduled hearing is not a denial of due process.

Nationwide also argues that the trial court was wrong to order discovery concerning the amount of attorney's fees prior to a determination of entitlement to attorney's fees. However, the discovery sought by the Robinsons went to their entitlement to attorney's fees since timely service of the proposal for settlement was being raised by Nationwide as a defense to entitlement. Some of the discovery also went to the reasonableness of time spent by counsel. Nationwide cites no authority

making it reversible error to allow simultaneous discovery on both fee-related issues.

Nationwide also separately challenges the Fourth DCA's finding that Nationwide did not preserve for appeal any challenge to the award of pre-judgment interest because it never objected to such an award in the trial court. Here again, Nationwide is challenging a separate aspect of the Fourth DCA's opinion without having ever filed a cross petition to invoke this court's jurisdiction to review a separate issue.[1] Moreover, Nationwide is not saying the Fourth DCA was "right for the wrong reason" because Nationwide is seeking to quash this aspect of the Fourth DCA's opinion, rather than just affirm it for an alternative reason.

Additionally, Nationwide is wrong on the merits. If an issue is pending on its merits in the Florida Supreme Court (as the pre-judgment interest issue was at the time this was presented to the trial court)[2] a party can cite controlling case law from the Fourth DCA but still preserve its objection on the record to the imposition of pre-

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[1] We acknowledge that this court has jurisdiction to consider every issue in the case once it has jurisdiction to review the case on any issue. However, that is a different matter from whether this court ought to exercise such pendent jurisdiction over issues that were not properly brought up here. This court should not do so unless there is a compelling reason to do so, and here there is not.

[2] This court accepted jurisdiction to review the merits of this issue on November 13, 2000. See Amerace Corp. v. Stallings, 779 So2d 269 (Fla. 2000). That was well over a year before Nationwide stipulated to pre-judgment interest in the present case (or at least failed to state any objection to it).

judgment interest while the issue is pending in the supreme court. There is no reason, ethical or otherwise, that could not have been done, but it was not done by Nationwide's attorneys. From the trial judge's perspective, there was no dispute whatsoever about the award of pre-judgment interest, nor any objection to it. The Fourth DCA was correct to find the issue was not preserved for appeal.

We now turn to the three issues that have been properly brought to this court.

I. CONFLICT WITH KUVIN V. KELLER LADDERS, INC.

Nationwide argues that even if there is a conflict between the present case and Kuvin v. Keller Ladders, Inc., 797 So2d 611 (Fla. 3d DCA 2001) this court has most recently clarified this by sub silentio overruling cases like Kuvin and holding instead that Fla.R.Civ.P. 1.442 must be strictly construed. Nationwide relies on Sarkis v. Allstate Ins. Co., 28 Fla. L. Weekly S740 (Fla. Oct. 2, 2003) and Willis Shaw Express, Inc. v. Hilyer Sod, Inc., 849 So2d 276 (Fla. 2003), but Nationwide acknowledges that neither of those cases dealt with the timeliness of serving a proposal for settlement.

The fact that Rule 1.442 should be strictly construed does not mean that a party should be precluded from correcting a clerical error in a certificate of service, or that a proposal for settlement that was prematurely mailed out has to be treated as void from the start rather than just ineffective until the 90 day waiting period has expired.

The point of the offer of judgment statute is to encourage parties to settle. The point of the 90 day waiting period is to give the receiving party sufficient time to evaluate the claims and defenses before the 30 day time period to respond begins to run. Both of those goals can be accomplished by treating a prematurely mailed proposal for settlement as abated until the 90 days has expired, rather than as void ab initio.[3] Nothing in Rule 1.442 says it is to be treated as void ab initio. It just blindly elevates form over substance to do that.

Judge Farmer's dissent in the Grip appeal, which was adopted by the Third DCA in Kuvin, discusses how premature filings are treated as being "in limbo" rather than void ab initio in various other areas of the law, including prematurely filed notices of appeal. E.g. Williams v. State, 324 So2d 74 (Fla. 1975); Sloman v. FPL, 382 So2d 834 (Fla. 4th DCA 1980). Nationwide is asking this court to take an unyielding approach to this issue without even trying to explain why that is justified or what good will come of it as a matter of public policy. Judge Farmer's approach, and the Third DCA's approach, is supported by reason and public policy.

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[3] The mailing of a proposal for settlement, by itself, gives the receiving party an extra 5 days to respond. See City of Largo v. Barker, 538 So2d 556 (Fla. 2d DCA 1989). There is no practical difference therefore, between a proposal for settlement mailed out 85 days after service of process and one that is hand delivered 90 days after service of process. In both cases, the receiving party has the exact same amount of time to respond and the exact same opportunity to evaluate the claims and defenses.

Nationwide interprets the Sarkis case and the Willis case as standing for the proposition that "There is no such thing as a harmless technical violation of Rule 1.442." Neither case says that. Otherwise, an entire line of district court cases have just been overruled sub silentio, not to mention this court's own decision in Gulliver Academy, Inc. v. Bodek, 694 So2d 675 (Fla. 1997)(holding the time limits for serving proposals for settlement are not inflexible and can be adjusted by the trial court under appropriate circumstances). This court has stated that it does not intentionally overrule itself sub silentio in any case. See Puryear v. State, 810 So2d 901 (Fla. 2002).

Nationwide also argues that, aside from being prematurely mailed out, the Robinson's proposal for settlement was not apportioned as between Mr. and Mrs. Robinson so it is void for that reason as well. There are several responses to that.

First, the Fourth DCA below did not address this issue at all, so it has nothing to do with why we are here.

Second, a proposal for settlement does not have to be apportioned as between one spouse who is injured and the other who has a derivative loss of consortium claim. That is not the same situation as the case cited by Nationwide, Willis Shaw Express, Inc. v. Hilyer Sod, Inc., 849 So2d 276 (Fla. 2003), which involved two separate plaintiffs each having separate claims for loss of their respective personal property. Under those circumstances, a joint offer of judgment must be apportioned between the

two plaintiffs. Willis Shaw Express, supra. But that only applies to plaintiffs having completely independent claims; it does not apply to two married plaintiffs with interdependent claims who join together in making an unapportioned proposal for settlement. See Safelite Glass Corp. v. Samuel, 771 So2d 44 (Fla. 4th DCA 2000) and cases cited therein. But see Allstate v. Materiale, 787 So2d 173 (Fla. 2d DCA 2001)(conflict certified but supreme court jurisdiction not invoked).

Third, and most importantly, all of this is irrelevant in this case because the trial court struck all of Nationwide's defenses to the claim for attorney's fees. That includes the defense that the proposal for settlement was premature, and the defense that the proposal for settlement was not apportioned between Mr. and Mrs. Robinson. Regardless of whatever the substantive law might have been on either of those two issues, it simply does not matter anymore after those defenses were stricken as a sanction for discovery misconduct. "Stricken" means stricken!

II. CONFLICT WITH OTHER DCA OPINIONS DISCUSSING THE REBUTTABLE PRESUMPTION RAISED BY A CERTIFICATE OF SERVICE

Nationwide argues that "prima facie" evidence means that a certificate of service cannot be rebutted by the party who mistakenly filled in the date. That is not what

"prima facie" means in Fla.R.Civ.P. 1.080(f). According to Black's Law Dictionary, "prima facie" means "a fact presumed to be true unless disproved by some evidence to the contrary". In other words, a rebuttable presumption. Literally translated from Latin, it means "at first sight". Nationwide argues that even if the postmarked envelope in which the proposal was mailed conflicts with the date typed into the certificate of service, it still would not be enough to rebut the certificate of service as a matter of law. Nationwide cites Mr. Martinez of Miami, Inc. v. Ponce de Leon Fed. S&L Assoc., 558 So2d 153 (Fla. 3d DCA 1990), but that case only holds that an evidentiary hearing is required before the court can find that a postmarked envelope trumps a certificate of service date. We never made it to an evidentiary hearing in the present case due to Nationwide's discovery misconduct.

Nationwide alternatively argues that even if a certificate of service could generally be rebutted, one attached to a proposal for settlement is an exception because Rule 1.442 is strictly construed. However, strictly construing Rule 1.442, it says nothing about rebutting a certificate of service. If it is to be strictly construed we cannot read something into it which is not there. According to Nationwide, maybe every other type of certificate of service can be rebutted but not one attached to a proposal for settlement, and everyone is supposed to remember that even though Rule 1.442 says nothing about it.

Nationwide also asserts that the date of mailing the proposal is secondary because the "evidence" shows that a fax copy was received by Nationwide's counsel on the same date typed into the certificate of service. What "evidence" is that? First, there is a statement blurted out by Nationwide's attorney at a deposition of Nationwide's adjustor while the attorney was not under oath or subject to cross examination. That is not "evidence". Nationwide also attaches an appendix to its brief containing an unsworn copy of what purports to be an excerpt of its attorney's time records. That is not "evidence" either, for the same reasons. The attorney's time records purport to receive and transmit a telefax copy of the proposal for settlement to Nationwide's adjustor on the same date filled in on the certificate of service. Where is the telefax copy itself that was supposedly received and transmitted on that date? Why was that not produced in discovery? Where is the postmarked envelope that carried the hard copy to Nationwide's counsel?

Nationwide never swore to the lower court that it did not have the postmarked envelope, although it now makes that claim in its brief. If it was going to raise a defense such as this, would it be sensible to discard both the postmarked envelope and the fax copy of the proposal and keep only the hard copy (that has a date filled in which may be incorrect)? Why would the proposal be faxed to begin with? There was no urgency and the certificate of service does not say it was faxed and mailed, but

only mailed. (App. "B")

Aside from the lack of "evidence", Nationwide's argument is illogical. According to Nationwide, if a proposal for settlement is mailed on the 90th day it is valid, but if it was also faxed to opposing counsel at 5:00 p.m. the day before it was mailed, then it is premature and no longer valid.

Nationwide hardly mentions that it had actual knowledge of the lawsuit being filed at least 13 days before it was formally served with process. The lawsuit was filed on July 17, 1997 and there was some initial difficulty in getting service. Nationwide was not formally served until September 3, 1997. However, as the trial court found (see App. "F", pp. 1 - 2), Nationwide had actual knowledge that the lawsuit had been filed at least 13 days before Nationwide was formally served with process. Nationwide argues that is irrelevant, but it is not irrelevant. It proves substantial compliance with the required time parameters because Nationwide knew it had been sued and may have even received advance copies of the suit papers more than 90 days before it was served with the proposal for settlement. The adjustor's log entries were never produced but could have even revealed a waiver of formal service. This was certainly a relevant area of discovery.

III. CONFLICT WITH MERCER V. RAINE

Nationwide states in its brief at page 10, "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." That really is the bottom line issue under this point, and Nationwide's position makes no sense for one simple reason: "stricken" means stricken.

Nationwide seeks to undo its being stricken at all by arguing that the trial court had no authority to strike its defenses since they were raised in a "motion" rather than in a "pleading". Let's explore that. After the jury's verdict was rendered, the Robinsons filed their motion for an award of attorney's fees pursuant to the proposal for settlement. (R. I/647-48, 658-66) Nationwide then raised defenses to that claim arguing that the proposal for settlement was void. But, instead of entitling its pleading as a "response", it raised those defenses in a "motion to strike the plaintiff's attorney fee motion". (R. I/846-49) Because of that title, Nationwide now argues the trial court had no authority under Rule 1.380(b)(2) to strike its defenses regardless of its conduct.

Fla.R.Civ.P. 1.380(b)(2)(A)(B)&(C) does not limit a trial court to the striking of only "pleadings" for discovery misconduct. The rule expressly authorizes trial courts to deal with discovery misconduct in multiple ways. The court may "refuse to allow the disobedient party to support or oppose designated claims or defenses" or may "consider certain facts in issue to be viewed against the position of the

disobedient party and to enter judgment by default." Nationwide argues that the Robinsons' claim for attorney's fees is not a "designated claim". Then what is it? Nationwide does not say. Nationwide states that a party's "opposition to a fee request" is not a "pleading" that can be stricken. Since when? Nationwide cannot immunize itself by raising its defenses in a "motion" rather than a "response". The trial court's authority to enforce its own orders is not subject to being manipulated by the way a party entitles its pleadings.

Nationwide relies on Bradford Motor Cars, Inc. v. Frem, 511 So2d 1120 (Fla. 4th DCA 1987) which holds that documents actually produced in discovery cannot be stricken as a sanction for failure to produce other documents. That is not what the present case is about. This case is about striking Nationwide's defenses to a designated claim, as expressly authorized by Rule 1.380.

According to this court's holding in Mercer v. Raine, 443 So2d 944 (Fla. 1983), the standard of review over an order imposing sanctions for discovery misconduct is simply whether reasonable persons could differ with the propriety of the action taken by the trial court (i.e., abuse of discretion). Nationwide argues that the sanction imposed by the trial court was excessively harsh and that the "punishment does not fit the crime". However, whether the punishment fits the crime is also subject to the abuse of discretion standard of review. It is not the function of an appellate court

(which was not the court that wasted so many hours of time due to Nationwide's obstructionist tactics) to second guess the trial court's imposition of sanctions absent an abuse of discretion.

The Fourth DCA below held that Nationwide's objection to attorney's fees could not legally be stricken for discovery misconduct when the proposal for settlement was prematurely served. That holding by the Fourth DCA is erroneous and should now be quashed with specific directions to reinstate the final judgment, nunc pro tunc, against Nationwide.

EPILOGUE

In the conclusion to our previous brief on the merits, we not only requested this court to quash the Fourth DCA's opinion, but also to remand with instructions to reinstate the final judgment (nunc pro tunc), so there would be no possible ambiguity. We explained our reason for that request was due to Nationwide's history of resurrecting issues that should no longer be issues and trying to capitalize on any hint of ambiguity in the court's orders. If anything, we believe the way Nationwide has doubled the issues presented to this court and drafted its brief on the merits, including subjects not even discussed by the Fourth DCA, illustrates perfectly what we were talking about. We once again renew our request for specific directions so that this case, which has already generated nine appellate proceedings (when it should have

settled for $35,000 seven years ago) can finally be put to rest.

CONCLUSION

This court should quash the opinion of the Fourth DCA below and remand the case back to that court with instructions to reinstate the trial court's sanction order and attorney's fee judgment, nunc pro tunc.

Moreover, this court should grant the Petitioners' separately filed motion for appellate attorney's fees pursuant to the offer of judgment statute.

Respectfully submitted,

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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 19th day of March 2004 to: **Hinda Klein, Esq.** , Conroy, Simberg & Gannon, 3340 Hollywood Blvd., Hollywood, FL 33021, counsel for Respondent.

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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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AMENDED APPENDIX TO PETITIONERS' REPLY BRIEF ON THE MERITS

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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 29th day of March 2004 to: **Hinda Klein, Esq.** , Conroy, Simberg & Gannon, 3340 Hollywood Blvd., Hollywood, FL 33021, counsel for Respondent.

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