IN THE SUPREME COURT
OF THE STATE OF FLORIDA

SUZANNE S. HAM,

Petitioner,

vs.

Case No.: SC03-2038
DCA No.: 1D02-5464

SCOTT RYAN DUNMIRE and
ALL AMERICAN TERMITE &
PEST CONTROL, INC.,

Respondents.

RESPONDENTS' ANSWER BRIEF ON THE MERITS

On Appeal from the Circuit Court in and for Escambia County
The Hon. Kenneth B. Bell, Judge
Case No: 99-1948-CA-01

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STATEMENT OF THE CASE

This case is before this Court on the Petitioner's request for this Court to invoke its discretionary jurisdiction to review a decision of the First District Court of Appeal. That decision, Ham v. Dunmire, 855 So.2d 1238 (Fla. 1st DCA 2003), affirmed an order of the Circuit Court in and for Escambia County, dismissing Petitioner's action because of her failure to comply with the Circuit Court's Order Setting Jury Trial and the Circuit Court's stipulated order on the Respondents' motion to compel the Petitioner to respond to discovery. In affirming the Circuit Court, the Court of Appeal certified a conflict between its decision and the decision of the Fourth District Court of Appeal in Marin v. Batista, 639 So.2d 630 (Fla. 4th DCA 1994). This Court has postponed its decision on jurisdiction.

STATEMENT OF FACTS

This case arises out of an automobile accident that occurred on February 28, 1996. (R:1) The defendants/respondents admitted liability and the case proceeded on the issues of damages and causation. (R:1-4; 20) On April 1, 2002, the trial court issued its Order Setting Jury Trial and Requiring Mediation, placing the case on the September 30, 2002, trial docket. (R:30-31). The Order also set a discovery cut-off of September 15, 2002, a deadline for the exchange of witness lists and a time frame during which counsel for the parties were to meet and examine exhibits and jury instructions. (R:30)

The defendants hand served interrogatories on May 16, 2002 (R:33), which went unanswered, resulting in a stipulated order requiring plaintiff/petitioner's answers to be served on or before September 13, 2002. (R:39) The

answers to interrogatories remained unanswered and on September 23, 2002, one week after the cut off of discovery, the defendants filed the motion for sanctions that is the subject of this appeal.

In addition to plaintiff's failure to provide answers to discovery as required by the stipulated order, the plaintiff also had not disclosed her trial witnesses and exhibits, nor had she participated in the meeting between counsel, all as required by the trial court's Order Setting Jury Trial. (R:28-29)

The motion for sanctions was heard on September 26, 2002 (R:69), but was not reported. On October 7, 2002, the trial court issued a written order on the motion for sanctions (R:41), finding specifically that:

1. The Plaintiff willfully and inexcusably failed to comply with paragraph 3 of this Court's Pretrial Order dated April 1, 2002 by failing to file a Witness List.

2. The Plaintiff willfully and inexcusably failed to comply with paragraph 5 of this Court's Pretrial Order dated April 1, 2002 by failing to disclose exhibits to defense counsel.

3. The Plaintiff willfully and inexcusably failed to comply with this Court's order dated September 6, 2002 granting Defendants' Motion to Compel.

Having set forth these specific findings, the trial court granted the defendants' motion for sanctions and dismissed the case, with prejudice. (R:41) A Final Judgment was rendered the same day. (R:43)

A timely motion for rehearing was filed by the plaintiff (R:44-45), which was denied. (R:46) In denying the motion for rehearing, the trial court reiterated it reasons for granting the motion for sanctions and dismissing the case, pointing out that the requirements of the Order Setting Jury Trial had been known by the plaintiff for five months, quoting the portion of the Order setting forth the consequences of its violation, in the same bold, all capital letters as the Order itself:

> **"ALL PARTIES AND COUNSEL MUST STRICTLY COMPLY WITH THIS ORDER. FAILURE TO FULLY COMPLY MAY RESULT IN SANCTIONS, INCLUDING, WITHOUT LIMITATION, STRIKING THE PLEADINGS, ENTRY OF DEFAULT, DISMISSAL OF THIS ACTION OR CONTEMPT."** (R:32,47)

SUMMARY OF THE ARGUMENT

1. The trial court made specific findings of fact, reduced to a written order, that the petitioner willfully and inexcusably failed to comply with the court's Pretrial Order of April 1, 2002, by

failing to file a witness list and by failing to disclose trial exhibits to opposing counsel, and that plaintiff willfully and inexcusably failed to comply with the stipulated order of September 6, 2002, granting the respondents' motion to compel.

2. The decision whether to impose the sanction of dismissal is within the sound discretion of the trial court and will not be disturbed on appeal absent a clear showing of abuse. If reasonable persons could differ as to the propriety of the actions taken, there can be no finding of an abuse of discretion. Here, a review of the record does not demonstrate an abuse of the trial court's discretion, but rather a reasoned and rational response to multiple failures on the part of the petitioner to comply with the orders of the trial court.

3. The stage of the case where the disobedience occurred and the irreparable prejudice to respondent as a result the failure of the petitioner to disclose critical evidence on the eve of trial alone justified dismissal of the case. Even if not, however, consideration of factors set forth by this Court compels the same conclusion. Although the Court of Appeal concluded that the petitioner herself was not at fault, the record does not disclose who was at fault, leaving the respondent's actual role open to question. The petitioner's attorney has not

admitted fault and has not offered a reasonable explanation for the petitioner's disobedience. Neither the petitioner nor her attorney, for that matter, have offered any explanation at all. Even if, however, fault lies entirely with petitioner's attorney, it is not likely due to neglect or inexperience and it was, in fact, part of multiple acts of disobedience of two different orders of the trial court. The ensuing delay has significantly prejudiced respondents and has created significant problems of judicial administration. There also is no other viable sanction that could have cured the prejudice caused by the petitioner's violations of the courts orders.

ARGUMENT

I. THE TRIAL COURT MADE EXPRESS WRITTEN FINDINGS OF PETITIONER'S DISOBEDIENCE.

In Commonwealth Federal Savings and Loan Association v. Tubero, 569 So.2d 1271 (Fla. 1990), this Court made it clear that "an express written finding of willful or deliberate refusal to obey a court order ... [is] necessary to sustain the severe sanctions of dismissal or default against a noncomplying plaintiff or defendant." 569 So.2d at 1272. While this Court's decision in Tubero was concerned with dismissal for a party's failure to obey a discovery order under Fla.R.Civ.P. Rule 1.380, respondents believe that the same rules and standards would necessarily apply to an order dismissing a case for failure to comply with any court order under Rule 1.420(b). Here, neither of the trial court's orders, nor the decision of the Court of Appeal, state under which Rule the case was dismissed, and it seems that either or both are applicable.

Regardless of which Rule applies, however, it is clear that the trial court has complied with the requirements set forth by this Court in Tubero, in that it made "an express written finding of willful or deliberate refusal to obey a court order." The trial court, in fact, made two express written findings, first when it granted respondents' motion for sanctions and again when it denied the petitioner's motion for rehearing. In its order granting the motion for sanctions,

the trial court could not have been more clear and unambiguous as to its findings:

> "1. The Plaintiff willfully and inexcusably failed to comply with paragraph 3 of this Court's Pretrial Order dated April 1, 2002 by failing to file a Witness List.
>
> 2. The Plaintiff willfully and inexcusably failed to comply with paragraph 5 of this Court's Pretrial Order dated April 1, 2002 by failing to disclose exhibits to defense counsel.
>
> 3. The Plaintiff willfully and inexcusably failed to comply with this Court's order dated September 6, 2002 granting Defendants' Motion to Compel."

(R:41-42)

In its subsequent order denying the petitioner's motion for rehearing, the trial court again could not have been more clear in explaining both why it dismissed the case and why it would not entertain the motion for rehearing, first restating the known consequences of failing to comply with the Order Setting Jury Trial and then reiterating its findings that the petitioner's conduct was willful and inexcusable:

> "Despite being aware of this Court's requirements and the possible sanctions for non-compliance, the Plaintiff failed to not only file the requisite witness list on or before September 3rd, 2002, she failed to do so after receipt of Defendant's motion or prior to the hearing on September 26th. Additionally, despite this Court's entry of an Order on Defendant's motion to compel on September 6, 2002, the Plaintiff still willfully and inexcusably failed to answer the Defendants' second interrogatories filed with the Court on

> May 16, 2002. Lastly, though Plaintiff's counsel presented a different version, this Court accepted the defense counsel's version that Plaintiff's counsel failed to show up at a scheduled meeting to review each other's exhibits as required by the pretrial order and that he had failed to respond to the Defendants' counsel's request for a list of those exhibits which was made by letter dated September 16, 2002, and attached as Exhibit D to the Defendants' motion." (R:46-7)

There are not, as this Court held, in Tubero, any "magic words" that must be contained in the trial court's order of dismissal. The order must only contain a finding that the conduct upon which the order is based was equivalent to willfulness or deliberate disregard. 569 So.2d at 1273. Here, regardless of whether they are "magic words," the words used by the trial court, are plain, clear, unambiguous and susceptible to no other interpretation than that "The Plaintiff willfully and inexcusably failed to comply..." with the orders of the trial court.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING PETITIONER'S CASE.

It is well established that the findings of a trial court, as the trier of fact, come to an appellate court "clothed with a presumption of correctness" (Real Time Laboratories, Inc., v. Predator Systems, Inc., 757 So.2d 634, 637 (Fla. 4th DCA 2000), and the trial court's findings "will not be disturbed in the absence of a clear showing that the trial court committed error or the evidence demonstrates the judge's conclusions were clearly erroneous." Id., *citing* Mogee v.

Haller, 222 So.2d 468, 470

(Fla. 1st DCA 1969).

The reasoning behind this rule has been repeatedly recognized by this Court: the trial judge "sees the parties first-hand and is more fully informed of the situation..." Farish v. Lum's, Inc., 267 So.2d 325, 327-8 (Fla. 1972), and accordingly, has "a superior vantage point ." Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980). In the absence of facts showing an abuse of discretion, this Court has also repeatedly held that "the trial court's decision excusing, or refusing to excuse, noncompliance with the rules ... must be affirmed ... [and that] it is the duty of the trial court, not the appellate courts, to make that determination." (Mercer v. Raine, 443 So.2d 944, 945 (Fla. 1984), *quoting* Farish, *supra,* at 327-8). This is true even if the members of the appellate panel themselves would have employed a less severe sanction. *See,* Johnson v. Landmark First National Bank, 415 So.2d 161 (Fla. 4th DCA 1982).

Here, the trial court, based on the statements and arguments of counsel and review of the court file (R:46) reached the conclusion that petitioner had violated not just one, but several orders of the Court. In the order granting the motion for sanctions and dismissing the case, the trial court made it clear that these violations were committed

"willfully and inexcusably." (R:41) In the order denying petitioner's motion for rehearing, the trial court again set forth its factual findings and the reasoning behind them, pointing out that petitioner was forewarned as to the consequences of any failure to comply with the pretrial order. These two orders from the trial court clearly reflect that the court considered the evidence before it and from that evidence made the factual determination that the petitioner failed to comply with the pretrial and discovery orders and that the failure was "willful and inexcusable." The written decision of the trial court, therefore, hardly reflects the type of quick, summary proceeding petitioner wants this Court to envision, with a perfunctory decision made without thought or deliberation. The two orders from the trial court, instead, reflect the deliberative weighing of the evidence by the trier of fact and the rendering of findings and a ruling consistent with the law as repeatedly reaffirmed by this Court.

III. EVEN IF PETITIONER HERSELF WAS NOT PRIMARILY AT FAULT, HER ATTORNEY'S CONDUCT JUSTIFIED DISMISSAL OF THE CASE.

This Court has recognized that dismissal of a case based solely on an attorney's neglect has the undue effect of punishing a litigant when, in fact, the one that ought to be punished is the lawyer. In Kozel v. Ostendorf, 629 So.2d

817 (Fla. 1993), this Court considered this issue in the context of a medical malpractice case, where the trial court had granted a motion to dismiss, with leave to amend within twenty days, and the amended complaint was not filed for over five months. On the defendant's motion, the trial court dismissed with prejudice and the Court of Appeal affirmed. This Court considered the case in light of the conflicting case of Clay v. City of Margate, 546 So.2d 434 (Fla. 4th DCA), *review denied*, 553 So.2d 1164 (Fla. 1989), which involved a plaintiff's failure to file a more definite statement until four months after being ordered to do so. The trial court dismissed the action and the Court of Appeal reversed, finding that dismissal under those circumstances was too severe a sanction. In each case it was clear that the litigant was not involved in the failure to comply with the trial court's order and that counsel was solely at fault.

Both Kozel and Clay are distinguishable from this matter in that they both involved orders to file, essentially, amended or restated initial pleadings. Both cases, therefore, were in their preliminary stages, were not at issue and, presumably, were months, if not years, from being set for trial.

Here, however, the petitioner disobeyed an order to provide discovery already many months past due (an order to which the petitioner had, in fact, stipulated) and, even more important, disobeyed a pretrial order requiring her to

identify trial witnesses and exhibits, all on the eve of trial. Respondents submit that the nature of the petitioner's violation here is substantively different and of far more serious consequence than the failure of a plaintiff to amend a complaint on time. The failure of a plaintiff to amend a complaint or provide a more definite statement does little, at that stage of the case, to irreparably prejudice the other party, especially in a case like Clay, where the litigation continued to move forward despite the absence of the plaintiff's more definite statement. 546 So.2d at 435. The failure of a plaintiff to disclose trial witnesses and exhibits and to answer past due discovery on the eve of trial, however, leaves the defendant unable to prepare for trial and exposes the defendant to all kinds of unknown surprises and traps to be sprung by the plaintiff once trial begins. A plaintiff's attempt to conduct a trial by ambush, therefore, warrants the harshest sanction, if only to protect the rights of the defendant, regardless of who was at fault.

In Kozel, this Court adopted a set of guidelines that were suggested by Judge Altenbernd in his dissent to the Court of Appeal's majority opinion. Kozel v. Ostendorf, 603 So.2d 602, 605 (Fla. 2d DCA 1992). Those guidelines provide a framework for judging the severity of a party's action or the type of sanction that should be imposed when it appears that the attorney was responsible for the disobedience rather than the litigant. Even if this Court does not

believe that the timing and nature of petitioner's disobedience alone justifies dismissal of her case, application of the factors set forth in Kozel to the facts of this case compels the conclusion that the trial court's decision was correct.

The factors for the trial court to consider are: 1) whether the attorney's disobedience was willful, deliberate or contumacious, rather than an act of neglect or inexperience; 2) whether the attorney has been previously sanctioned; 3) whether the client was personally involved in the act of disobedience; 4) whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion; 5) whether the attorney offered reasonable justification for noncompliance; and 6) whether the delay created significant problems for judicial administration.

As for the first factor, the trial court here found that the respondent's failure to comply with its orders was intentional and inexcusable and, even though the Court of Appeal concluded that the petitioner herself was not at fault, the record does not disclose who was actually at fault, leaving the respondent's actual role open to question. Regardless, therefore, of whether the respondent herself knew anything of her attorney's disobedience of the trial court's orders or was in some way responsible for it, the facts here disclose an intentional act of disobedience on the part of somebody. Nothing here points to neglect, such as a motion for relief from the dismissal pursuant to

Fla.R.Civ.P. 1.540 might have indicated, and there is no suggestion that the petitioner's attorney is inexperienced. In fact, and this relates also to the fifth factor set out by this Court in Kozel, the petitioner's attorney has not offered any explanation or justification, let alone a reasonable one, for the failure to comply with the trial court's orders. The first and fifth of the Kozel factors, therefore, must be resolved in favor of dismissal.

Consideration of the second factor also supports the actions of the trial court, inasmuch as the dismissal was the result of the disobedience of multiple orders on the part of the petitioner and not just one isolated or insignificant incident. Likewise, the prejudice to the respondents caused by the petitioner's failure to respond to discovery and to identify witnesses and exhibits on the eve of trial is self-evident, as discussed above. Also, the effect of all this on the trial court's already crowded docket is clear, including the likelihood that, had the case not been dismissed, the trial would have had to be continued, resolving the fourth and sixth factors in favor of dismissal.

In Kozel, this Court held that, upon consideration of these six factors, if a sanction less severe than dismissal with prejudice appears to be a viable alternative, the trial court should employ such an alternative. 629 So.2d at 818. Here, however, there is no such viable alternative. No lesser sanction would have provided the names of the petitioner's

trial witnesses or identified what exhibits the petitioner intended to bring to trial. A monetary sanction might have put a few hundred dollars into someone's pocket, but it would not have provided answers to interrogatories that were five months past due. Since the effect of the petitioner's violation was to deprive the respondents of the information necessary to defend against the petitioner's claim, the only fair and proportionate sanction was to deny the petitioner the right to prosecute the claim altogether.

CONCLUSION

The trial court did not abuse its discretion in dismissing this case. The trial court made a written finding that the petitioner intentionally and inexcusably violated its orders and responded with a reasoned and appropriate sanction. The order of the trial court and the decision of the Court of Appeal, therefore, should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Times New Roman 14

point font and complies with the requirements of Fla.R.App.P. 9.210.

____

Bruce C. Fehr

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this document was provided to Richard P. Warfield, Esq., 201 East Government Street, Pensacola, Florida 32502, by hand delivery, this ____ day of January, 2004.

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