IN THE SUPREME COURT OF FLORIDA

SUZANNE S. HAM,

Petitioner,

vs.

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

Respondents.

CASE NO.: SC03-2038
DCA NO.: 1D02-4564
L.T. No.: 99-1948-CA-01

PETITIONER'S INITIAL BRIEF ON THE MERITS

Attorney Filing Brief
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STATEMENT OF THE CASE AND FACTS

This case is here, from the District Court of Appeal, First District of Florida, which certified a direct conflict between it's decision herein and decisions of other District Courts of Appeal. (App. 1,2)

This matter was commenced in the Circuit Court of Escambia County, Florida, where the Petitioner was Plaintiff and the Respondents were Defendants. This is an automobile negligence case in which the Plaintiff sustained permanent injuries resulting from a rear-end type collision.

The Respondents answered the Petitioner's Amended Complaint and admitted the driver of the Respondent's vehicle was negligent in running into the rear of the Petitioner's vehicle. Thereafter, the parties engaged in extensive discovery on the issue of the Petitioner's damages and the causation thereof, with the Respondents obtaining by depositions duces tecum, the medical records of twenty-five (25) health care providers. The trial court entered a stipulated order on September 6, 2002, requiring the Petitioner to provide answers to the Respondents' Second Interrogatories on or before September 13, 2002. For various reasons these answers were not timely filed and the Respondents filed a Motion for Sanctions on September 23, 2002. A hearing for this Motion for Sanctions was scheduled for September 26, 2002, with fifteen (15) minutes being reserved for hearing, and with both parties to appear by telephone.

Before the date of the hearing on the Motion for Sanctions, the Petitioner served her answers to the second interrogatories. The Petitioner was not present at the hearing on this motion and no testimony was taken. At the conclusion of counsels' discussion at the hearing on the Respondents' motion, the Court simply announced it would grant the motion and dismiss the case without any specific findings of fact. Thereafter, the Respondents' counsel prepared and submitted to the Court an Order for Sanctions and proposed final judgment. Upon the Petitioner's counsel receipt of these proposed documents, he immediately made his objections known to the order on the Respondent's Motion for Sanctions, and hand delivered a letter to the Court listing his specific objections to the proposed order, since there were no findings of fact made at the hearing.

The Petitioner timely filed her Motion for Rehearing reciting that there was no evidentiary hearing and the Court made no findings of fact before announcing dismissal of the case. (R.44,45) The Court then entered it's order summarily denying the Petitioner's Motion for Rehearing, without affording the Petitioner the opportunity to be heard and present legal and factual evidence and argument in support of the motion. (R46-48)

The case was timely appealed to the District Court of Appeal, First District of Florida, which after oral argument, affirmed the decision of the trial court, but in doing

so, certified conflict with the District Court of Appeal, Third District of Florida. See Marin v. Batista, 639 So.2d 630 (Fla. 3rd DCA 1994) (App. 3,4)

SUMMARY OF THE ARGUMENT

The trial court erred in dismissing the case for Petitioner's failure to timely comply with court ordered discovery demands which was tantamount to a dismissal with prejudice since the statute of limitations had expired. Dismissal of a case is the most drastic sanctions and should be invoked only in extreme situations and upon a showing of deliberate and contumacious disregard of trial court's authority. Before imposing the sanctions of dismissal, the court must make a finding that Petitioner's conduct was a deliberate, willful and contumacious disregard of the court's authority and failure to make such a finding is reversible error.

The hearing on the Respondent's motion was scheduled for fifteen (15) minutes and both counsel appeared via telephone. No testimony was taken and the court simply announced its ruling of dismissal without any findings that Petitioner herself was guilty of deliberate, willful or contumacious misconduct.

In its opinion, the District Court of Appeal recited that "the party herself was in no way at fault." (App. 2)

ARGUMENT

ISSUE PRESENTED FOR REVIEW

DID THE TRIAL COURT ERR IN IMPOSING THE SANCTION OF DISMISSAL FOR PETITIONER'S FAILURE TO TIMELY ANSWER INTERROGATORIES AS REQUIRED BY COURT ORDER AND FOR FAILURE TO COMPLY WITH A PRETRIAL ORDER, WITHOUT FIRST MAKING A FINDING THAT THE PETITIONER HERSELF DELIBERATELY, WILLFULLY OR CONTUMACIOUSLY, FAILED TO COMPLY WITH THE COURT ORDERS.

THE STANDARD OF REVIEW IS WHETHER OR NOT THERE WAS AN ABUSE OF DISCRETION BY THE TRIAL COURT IN DISMISSING THIS CASE.

After the pleadings were settled, the Respondent engaged in extensive discovery thereby obtaining copies of all medical records from doctors, hospital and other health care providers who had seen or treated the Petitioner both before and after this accident. The trial court entered an order on September 6, 2002, requiring the Petitioner to answer the Respondents' Second Interrogatories before September 13, 2002. The interrogatories were not answered within the time required and the Respondents filed a Motion for Sanctions on September 23, 2002. (R28-40) On September 24, 2002, before the scheduled hearing on the Respondents' motion, the

Petitioner's attorney delivered the interrogatory answers to the Respondents' attorneys. The hearing on the Respondents' Motion for Sanctions was scheduled for a telephonic hearing and fifteen (15) minutes had been reserved. At the conclusion of the telephonic discussion between counsel for the parties and the Court, the trial judge simply announced that the Respondents' motion was granted and the case dismissed. There was absolutely no finding of any deliberate, willful or contumacious conduct on the part of the Petitioner herself.

Florida Courts have consistently held the dismissal of a cause of action for failure to comply with an order of court is the most severe of all sanctions and should be employed only in extreme circumstances. (See e.g. Clay v. City of Margate, 546 So.2d 434 (Fla. 4th DCA 1989)).

In Commonwealth Federal Savings and Loan Association v. Tubero, 569 So.2d 1271 (Fla. 1990) the Supreme Court answered a certified question from the District Court of Appeal, Fourth District, and quoted from an earlier case and said (p. 1272) in Mercer v. Raine, 443 So.2d 944 (Fla. 1983), this Court considered the circumstances under which a trial judge was authorized to strike pleadings or enter a default for noncompliance with an order compelling discovery. And said (p.1272)

> "While noting that because of the severity of such a sanction it should only be employed in extreme circumstances, we said: A deliberate and contumacious

> disregard of the court's authority will justify application of the severest of sanctions."

The Court also noted (p.1273)

> "We hasten to add that no "magic words" are required but rather only a finding that the conduct upon which the order is based was equivalent to willfulness or deliberate disregard."

In Carr v. Dean Steel Buildings, Inc., et al., 619 So.2d 392 (Fla. 1st DCA 1993) held (p.394)

> "Generally, courts have been reluctant to uphold a dismissal where there has been no finding of willful non-compliance or bad faith. An express written finding of willful disregard of an order of the court is essential to justify the severe sanction of dismissal."

In a personal injury case Townsend v. Feinberg, 659 So.2d 1218 (Fla. 4th DCA 1995) the case was dismissed by the trial court for failure of the Plaintiff to attend a court-ordered independent medical examination and scheduled deposition and granted the Defendant's Motion for Sanctions by striking the Plaintiff's pleadings and dismissed the case with prejudice. The Appellate Court reversed the order of dismissal and held (p.1219)

> "It is uniformly held that dismissal is a drastic remedy which courts should employ only in extreme situations..... Prior to exercising its discretion to grant dismissal based on failure to comply with a court order, the court must make a finding that the failure to comply was willful or

> contumacious. ....The failure to make the requisite findings in the order of dismissal constitutes reversible error." (Underlining supplied)

And the further court held:

> "We do not mean to imply that the mere inclusion of the "magic words" in the order of dismissal would have cured the error in this case. To the contrary, there is nothing in the record which indicates that appellant willfully failed to comply with the court's orders."

The case, which the District Court of Appeal referred to as being in conflict with its decision, Marin v. Batista, 639 So.2d 630 (Fla. 3rd DCA 1994) the Court reversed the trial court's dismissal of the appellant's suit based on findings of misconduct on the part of appellant's counsel with respect to a speedy and fair resolution of the litigation, and said:

> "Dismissal of an action is a drastic remedy which should be used only in extreme situations and upon a showing of deliberate and contumacious disregard of the trial court's authority. ...... Moreover, the sanction of dismissal necessarily visits the sins of the attorney upon the client/litigant. ...... Consequently, since the record reflects absolutely no malfeasance on the part of the appellant, we find that the trial court abused its discretion by dismissing the appellant's case." (Underlining supplied)

At the conclusion of the Respondents' telephonic hearing on its' Motion for Sanctions, the trial court simply announced the motion would be granted and the case dismissed. There was no finding of willful or contumacious conduct on the part of

the Petitioner herself prior to the announced ruling, which conflicts with the holding in the Townsend case (supra). When I, as Petitioner's attorney, received the proposed order granting the motion for sanctions as prepared by the Respondents' attorney, I immediately hand delivered a letter to the trial judge objecting to the proposed order on the ground that no findings as set forth in the proposed Order Granting Sanctions were made at the conclusion of the hearing. Notwithstanding the objections, the trial court entered the Order Granting Sanctions as submitted by the Respondents' attorney. (R41,42) Since the record reflects no malfeasance on the part of the Petitioner herself, we submit the trial court abused its' discretion by dismissing her case. And that this action by the trial court is in direct conflict with the Marin case (supra).

The Petitioner filed a Motion for Rehearing of the Order Granting Sanctions on the grounds that the court made no findings of willful or contumacious conduct on the part of the Petitioner herself. The Motion for Rehearing was summarily denied by the court without affording the Petitioner and opportunity to present evidence and argue law. (R46-48)

CONCLUSION

We respectfully submit the trial court abused its discretion by imposing the most severe sanction of dismissal of the Petitioner's case. Prior to dismissal, the trial court made no findings that Petitioner's conduct demonstrated a willful or contumacious disregard of the court's authority. The "magic words" in the order dismissing the Petitioner's case were words supplied by the Respondents' attorney and not announced by the trial court prior to the dismissal.

The trial court's decision and its affirmation by the District Court of Appeal is, we submit, in direct conflict with the holdings of the Townsend and Marin case (supra).

We urge the final judgment based upon the erroneous order of dismissal should be reversed upon the authorities cited herein and the holdings of those cases should be adopted as the correct statement of Florida law. The case should be remanded for further proceedings in the trial court.

Respectfully submitted,

____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing has been furnished to John A. Unzicker, Esq., of Vernis & Bowling of NW Florida, as attorney for Respondents, at 635 W. Garden Street, Pensacola, Florida 32501, via hand delivery this _____ day of December, 2003.

____

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CERTIFICATION OF TYPE FONT

This is to certify that the font requirement of Rule 9.210(a) has been complied with in this brief and Times New Roman 14-point font has been used.

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