

IN THE SUPREME COURT OF FLORIDA

SUZANNE S. HAM,

Petitioner,

vs.

CASE NO.: SC03-2038

DCA NO.: 1D02-4564

L.T. No.: 99-1948-CA-01

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

Respondents.

---

PETITIONER'S REPLY BRIEF

---

Attorney Filing Brief  
RICHARD P. WARFIELD  
201 E. Government Street  
Pensacola, Florida 32501  
Tel: (850) 433-9075  
Florida Bar No.: 084808

## TABLE OF CONTENTS

Table of Citations Page ii

Argument

The Petitioner states the issue presented for review is as follows:

“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 her failure to comply with a pretrial order, without first making a finding that Petitioner’s failure to comply was willful or contumacious?”

Pages 1, 2  
and 3

Conclusion Page 4

Certificate of Service Page 5

Certification of Type Font Page 6

## **TABLE OF CITATIONS**

### **CASE CITATIONS**

Marin v. Batista, 639 So.2d 630 (Fla. 3<sup>rd</sup> DCA 1994) Page 3

Townsend v. Feinberg, 659 So.2d 1218 (Fla. 4<sup>th</sup> DCA 1995) Page 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 "hearing" on Respondents' Motion for Sanctions was via telephone conference and lasted approximately ten (10) minutes. No one appeared in person for either Petitioner or Respondents. No evidence was presented. At the conclusion of the hearing, the Trial Judge verbally ruled the Motion for Sanctions was granted and the case dismissed. Since the statute of limitations had expired, this was a dismissal with prejudice. The Trial Court made no finding that the Petitioner's conduct was a deliberate, willful and contumacious disregard of the Court's authority.

In preparing the written order to present to the Trial Judge Respondents' inserted the necessary verbiage that Petitioner's conduct was "willful, deliberate and contumacious." When Petitioner's counsel received a copy of this proposed order, he immediately hand-delivered a letter to the Trial Judge objecting to the proposed

order for the reasons there was no evidentiary hearing and no findings of fact made that either the Petitioner's or her counsel's conduct was willful, deliberate and contumacious prior to exercising its discretion to order a dismissal of the case.

In the answer to the complaint, Respondents admitted liability for the vehicular accident. Thus, the only issues to be tried were the Petitioner's damages and the causation thereof. We submit the Respondents could not have been prejudiced by the failure of Petitioner to timely answer the second interrogatories or to submit her list of witnesses, since Respondents had already obtained by deposition duces tecum the medical records of twenty-five (25) health care providers, and depositions of the physicians who treated her for injuries caused by the accident. The Petitioner's deposition also was taken. There could have been no surprises which would create a "trial by ambush" as argued by the Respondents.

The imposition of the sanction of dismissal by the Trial Court prior to any finding that Petitioner was guilty of willful, deliberate and contumacious conduct "flies in the face" of the ruling of the Townsend case. (Townsend v. Feinberg, 659 So.2d 1218 (Fla. 4<sup>th</sup> DCA 1995))

Since the Petitioner, herself, "was in no way at fault," as noted in the opinion of the District Court of Appeal, we submit the dismissal of her case was an abuse of the

Trial Court's discretion and contrary to the rule articulated in Marin v. Batista, 639 So.2d 630 (Fla. 3<sup>rd</sup> DCA 1994).

**CONCLUSION**

We submit the decision of the District Court of Appeal, First District, should be quashed and the case remanded to the Trial Court for further proceedings.

Respectfully submitted,

---

Richard P. Warfield  
201 E. Government Street  
Pensacola, Florida 32501  
Tel: (850) 433-9075  
Florida Bar No: 084808  
Attorney for the Appellant

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY a true and correct copy of the foregoing has been furnished to Bruce A. Fehr, Esq., of Vernis & Bowling of NW Florida, as attorney for Respondents, at 315 South Palafox Street, Pensacola, Florida 32502, via hand delivery this \_\_\_\_\_ day of February, 2004.

---

RICHARD P. WARFIELD  
201 E. Government Street  
Pensacola, Florida 32501  
Tel: (850) 433-9075  
Florida Bar No: 084808  
Attorney for the Appellant



**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.

---

RICHARD P. WARFIELD  
201 E. Government Street  
Pensacola, Florida 32501  
Tel: (850) 433-9075  
Florida Bar No: 084808  
Attorney for the Appellant