In the District Court of Appeal
Fourth District of Florida

CASE NO.

(Circuit Court Case No.

Appellant,

v.

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR THE SPECIALTY UNDERWRITING AND RESIDENTIAL FINANCE TRUST MORTGAGE LOAN ASSET-BACKED CERTIFICATES SERIES 2007-BC2,

Appellee.

ON APPEAL FROM THE FIFTEENTH JUDICIAL
CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

Counsel for Appellant
1015 N. State Road 7, Suite C
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Designated Email for Service:
service@icelegal.com
service1@icelegal.com
service2@icelegal.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Statutes

Other Authorities

NOTE ABOUT TRANSCRIPTS FOR FEBRUARY 27, 2014
(Explanation of references in brief to "T(App). __")

On February 27, 2014, the proceedings took place primarily in Judge Frusciante's courtroom, but a six-minute portion took place in another courtroom. Even though the attorneys and the judge were the same, a different court reporter transcribed the six minutes outside Judge Frusciante's courtroom. Afterwards, the judge and the attorneys returned to the original courtroom where the original reporter resumed, capturing the remainder of the proceedings that day on the first transcript. Due to the confusion that may be caused by having to jump from one transcript to another and then back—and because the sequence of the series of mini-hearings that day are important—the transcripts have been arranged in the Appendix in chronological order such that the six-minute transcript is embedded at the appropriate place (page 17) in the larger transcript. The transcript pages were then numbered to be chronologically consecutive with the designation "T(App.)__" which will be the page numbers referenced in the brief.

STATEMENT OF THE CASE AND FACTS

I. Introduction

This is a non-final appeal arising from a sanction imposed by the trial court without an evidentiary hearing and later enforced by a different judge against counsel (also without an evidentiary hearing), even though the original judge had expressly removed "counsel" from the proposed sanction order.

II. Appellant's Statement of the Facts

Appellant, [redacted] ("the Law Firm"), represented the Defendant, David Wodehouse (now deceased), in a foreclosure case brought by the Appellee, U.S. Bank National Association, as Trustee for the Specialty Underwriting and Residential Finance Trust Mortgage Loan Asset-Backed Certificates Series 2007-BC2 ("the Bank"). Mr. Wodehouse ("Mr. Wodehouse" or "the Defendant") filed a separate appeal from the final judgment entered against him before his death.[1]

A. At the first trial setting, the trial court rescheduled the trial because the Bank failed to comply with the trial order.

The trial court scheduled the trial of the foreclosure case to take place on February 10, 2014.[2] The trial order required that **"The parties shall within 10**

[1] *Wodehouse v. U.S. Bank National Association*, Case No. 4D14-1484.

[2] Order Setting Residential Foreclosure Non-Jury Trial and Directing Pretrial Procedures, December 5, 2013 (App. 41).

days exchange lists of all trial exhibits, names and addresses of all trial witnesses, names and addresses of all expert witnesses"[3]—which would have been December 15, 2013. The Bank, however, filed its witness and exhibit list over a month after that deadline.[4] Even then, it did not actually name a witness until eleven days before trial.[5] Then it substituted that witness with a different witness four days before trial.[6] The Defendant, therefore, asked the court to enforce the trial order by prohibiting any testimony from the witness or to dismiss the action entirely.[7] The Defendant's motion also pointed out that the Bank had provided a number of new documents after hours on the Friday before the Monday trial—documents it intended to use as exhibits.[8]

On the day of trial, the parties argued the motion and the court (Judge Frusciante) agreed that the Bank had failed to comply with the trial order:

---

[3] *Id*. (emphasis original).

[4] Plaintiff's Witness and Exhibit List, served January 21, 2014 (App. 47).

[5] Plaintiff's Amended Witness and Exhibit List, served January 30, 2014 (App. 49).

[6] Plaintiff's Second Amended Witness and Exhibit List, served February 6, 2014 (App. 51).

[7] Defendant, David E. Wodehouse's, Motion for Sanctions and Motion in Limine, served February 10, 2014 (App. 53).

[8] *Id*. at 3.

> …What I'm hearing and seeing is a constant disregard for the trial order. Even, at best here, we have a disclosure that is -- I suggest fails to meet its reasonable expectations, certainly from the defense side.
>
> There's a disclosure of a corporate witness, and it doesn't seem to give the kind of clarity to the seeking of the underlying facts in the case in any clear way. We're going to trial. It shouldn't be trial by ambush. It shouldn't be a trial that doesn't have the opportunity for dispensing justice in the appropriate manner.
>
> When are we going to get to the point in these foreclosure cases that the plaintiffs have to see the value of getting timely disclosure?[9]

During the lengthy discussion of the problem, first the Bank asked for a continuance (rather than have its witness stricken),[10] but then opposed a continuance (when the court was considering the prejudicial effect of the eleventh-hour disclosure of documents listed as exhibits).[11]

Ultimately, the court concluded that a continuance was appropriate to cure any prejudice caused by the Bank's late disclosures.[12] When the court suggested that the trial be rescheduled two weeks later (February 24th), counsel for Defendant advised the court that he had oral argument in the appellate court that

---

[9] Transcript of Proceedings before Judge Frusciante dated February 10, 2014, p. 25 (App. 85).

[10] *Id*. at 27 (App. 87).

[11] *Id*. at 81, 85 (App. 141,145).

[12] *Id*. at 80-89 (App. 140-149).

day and that the Law Firm had two other trials in Miami.[13] The court suggested another trial date three days later (February 27th). Defendant's counsel immediately advised the court that this too presented a scheduling problem for the Law Firm as it conflicted with three other trials scheduled that day.[14] The court, nevertheless, reset the trial for that day.[15] But in response to the clerk's advice that all trials were in the morning, the court set this trial in the afternoon. And in doing so, the court obtained the Bank's express agreement to the risk that, if the Law Firm's trials ran over into the afternoon, the trial in this case might be postponed:

> THE CLERK: We can do it at 1:30, because it says 9:00 a.m. for all the trials when they are slightly contested. So they could go over into the afternoon, but we can set one for 1:30 or 1 o'clock, if you want.
>
> THE COURT: Yeah. I do that. I set it for that date at 1:30.[16]
>
> MR. BERWIN: February 27th, Your Honor?

---

[13] *Id*. at 89 (App. 149).

[14] *Id*. at 91 (App. 151). As is the practice endemic to foreclosure cases, the court unilaterally set these trials without calendar call and without consideration of the schedules of counsel or their clients. It is so common that the Bank's lawyer—perhaps unfamiliar with court procedure outside of foreclosure—commented: "The court issues trial dates all the time without checking with the parties; that's what an order setting trial does." (Transcript of Proceedings Before Judge Frusciante, February 27, 2014, 1:30 p.m. pp. 25-26).

[15] Transcript of Proceedings Before Judge Frusciante, February 10, 2014, pp. 92 (App. 152); Order Granting Continuance of Trial dated February 10, 2014 (App.165).

[16] Transcript of Proceedings Before Judge Frusciante, February 10, 2014, pp. 92 (App. 152).

> THE COURT: February 27th. Communicate with one another. Counsel, you heard what he has to say. If he has multiple cases set for trial the same date, and the standard in the system is if somebody is actually in trial in another courtroom, I don't pull them out of that trial. The trial you're in is more important than the trial you're scheduled for.
>
> Do you accept that, Mr. Heller?
>
> MR. HELLER [the Bank's lawyer]: I understand, Your Honor. …[17]

The Bank did not raise an objection to the trial setting under this condition or mention that it would incur unnecessary travel costs for its witness should the trial be postponed under those circumstances.

In addition to the in-court announcement of its conflicts, the Law Firm filed a Notice of Conflict advising the Court and the Bank of its other trials that day, which by that time, had been reduced to two.[18]

B. On the new date, the trial court rescheduled the trial a second time (and entered a sanction) because Defendant's counsel was still in another trial that had run late.

On the appointed day and time, a Law Firm attorney appeared and explained that he was prepared to try the case, but that he was still in the midst of morning

[17] Transcript of Proceedings Before Judge Frusciante, February 10, 2014, pp. 92-93 (App. 152-153).

[18] Defendant, David E. Wodehouse's, Notice of Conflict, served February 26, 2014 (App. 167).

trial which had been projected to be completed before this trial.[19] The Bank objected to any postponement of the trial on the grounds that the Defendant was now being represented by a different attorney from the Law Firm (Mr. Ackley) than had appeared at the first trial setting (Mr. Brotman).[20] Although Mr. Ackley explained that the Law Firm does not assign cases to individual attorneys, and that he, not Mr. Brotman, had prepared for the trial with the new witness and documents,[21] the court still expressed concern that the original attorney had not advised the Bank's lawyers that the trial would be handled by a different attorney at the Law Firm.[22]

The Bank asked that, if the court was inclined to continue the matter, that it be reimbursed for the travel expenses of its witness.[23] The court concluded that it would grant the continuance, but would also shift the travel expenses of the Bank's witness to the defense:

> THE COURT: …But I'm going to grant the continuance, but there is a sanction to whatever whether it's called a sanction or anything else -- maybe the choice of words are not the most artful for me, and I

[19] T(App). 3, 15; (App. 174, 186) (*See*, Note About Transcripts for February 27, 2014, p. iv, *supra*.)

[20] T(App). 4.

[21] T(App). 11-13.

[22] T(App). 9, 11-12.

[23] T(App). 14.

> would hope that counsel would help on the usage of it, but at this point the cost of bringing back the witness for the -- for the Plaintiff is going to be borne by the defense. Okay.[24]

The court expressly denied that he was making a finding of any intentional wrongdoing on the part of the Defendant or its counsel. When Mr. Ackley explained that trial assignments at the Law Firm were fluid and that there was no "attempt to mislead or obfuscate" or "intent to cause problems", the court replied: "I am not putting that intent on your side at this point."[25]

C. The court clarified that it was not sanctioning counsel.

Outside the presence of Defendant's counsel (the court having released Mr. Ackley to complete the other trial), the Bank's lawyers drafted and presented a proposed order that the court itself found objectionable because the lawyers had—in the words of the court—"stuck in" language which had not been part of the oral ruling.[26] Specifically, the Bank's proposed order required that the travel expenses be paid in five days and that they be paid by defense counsel. The trial court, therefore, had instructed the Bank to show the order to Mr. Ackley, who did, in fact, object to this language when he appeared once again before the court later that day:

---

[24] T(App). 20-21.

[25] T(App). 22.

[26] T(App). 32.

> THE COURT: I would have signed [the Bank's proposed order] except counsel stuck in there something about five days and also, I didn't mention five days and I said, go ahead and take it to Mr. Ackley. I also wasn't sure if I used the word defense counsel or defense, so this said defense counsel. So, I said to counsel here --
>
> MR. ACKLEY: I don't believe it was counsel, Your Honor.[27]

In response, the court mused that "[t]he bottom line is it should be counsel because that's who the problem is with, it's not the Defendant."[28] But after further discussion, the court confirmed that he was not entering a sanction against counsel:

> THE COURT: …What aspect of the order are you concerned about, Mr. Ackley?
>
> MR. ACKLEY: I would ask that it not specify counsel and we have reasonable time if we have to pay sanctions, it be reasonable.
>
> THE COURT: I'll do that because that was my initial representation.[29]

D. The court entered the sanction without an evidentiary hearing.

The Defendant also objected to the entry of a sanction without an evidentiary hearing.[30] The court replied that, if the Defendant was insisting on an evidentiary hearing, then he would deny the continuance and would expect Mr. Brotman to appear for the trial "forthwith."[31] When Mr. Ackley offered to call the

---

[27] T(App). 32.

[28] T(App). 32.

[29] T(App). 34 (emphasis added).

[30] T(App). 28.

[31] T(App). 33.

office to determine whether Mr. Brotman could appear forthwith (so as to avoid the imposition of a sanction without an evidentiary hearing), the Bank insisted on the continuance already granted by the court's oral ruling: "we ask that the court sign this order [of continuance]. Your Honor made a decision."[32] The court agreed and proceeded without stopping to permit Mr. Brotman to appear or to permit Mr. Ackley to consult with the Defendant.

The court reset the trial.[33] It entered the sanction without an evidentiary hearing as to fault and additionally ruled that the Bank would not have to prove the amount of the travel costs—even by affidavit.[34] In doing so, the court clearly articulated that he was entering a sanction and that it was based on his belief that he had accommodated one attorney's schedule only to have another appear:

> I am putting down no affidavit required. … I think the record has enough information that I don't have to put down why this sanction is taking place because like I said, I think it's clear, the fact that I am dealing with one attorney today that was not the last attorney and I placed this date today because I wanted to accommodate the other trial attorney's conflicts with other dates that I had given and so all of a sudden I am now dealing with this.[35]

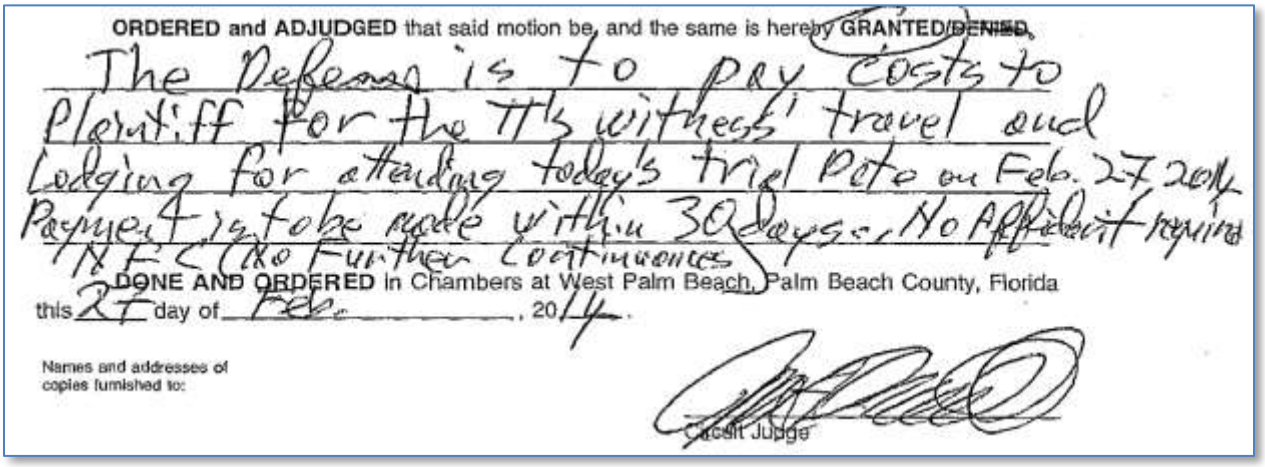
[32] T(App). 34.

[33] T(App). 35.

[34] T(App). 40, 41.

[35] T(App). 40 (emphasis added).

In accordance with its ruling that "counsel" would be removed from the proposed order, the executed order apparently hand-written by the judge himself states only that "the defense" is to pay the travel expense:[36]


ORDERED and ADJUDGED that said motion be, and the same is hereby GRANTED/~~DENIED~~.
The Defense is to pay costs to Plaintiff for the 7 th witness' travel and Lodging for attending today's trial Date on Feb. 27 2014
Payment is to be made within 30 days. No Affidavit required
NFC (No Further Continuances)
DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida this 27 day of Feb., 2014.
Names and addresses of copies furnished to:
Circuit Judge

The Bank submitted unsworn bills totaling $716.45. The Defendant moved to strike the order granting costs to the plaintiff and also asked for an extension of time to comply with the order or permission to deposit the amount claimed by the Bank into the Court Registry until the ruling could be appealed.[37]

E. The Bank's lawyer represents to a different judge that the Defendant had waived its right to an evidentiary hearing.

That motion was heard by a different judge (Judge Breger) who was concerned that it would be inappropriate "to play appellate court for another

[36] Order granting costs against defense, dated February 27, 2014 (App. 218).

[37] Defendant, David Wodehouse's, Motion to Strike Order Granting Costs to Plaintiff On February 27, 2014, Motion to Place Funds in Court Registry, and Motion for Extension of Time to Comply with Court Order, March 27, 2014 (App. 220).

judge."[38] The Bank's lawyer represented that Judge Frusciante had given the Defendant's counsel "ample opportunity…to relieve itself of the obligation to pay the costs by proceeding with an evidentiary hearing that day. They chose not to."[39]

Judge Breger denied the motion to strike the order. He also denied the motion to put the funds into the registry because the Plaintiff, U.S. Bank, was "not going bankrupt."[40] He did grant the Defendant a ten day reprieve to pay the fine.[41]

The trial of the foreclosure case took place as scheduled three days later and the Defendant took an appeal from the judgment entered against him—an appeal which would have challenged evidentiary errors at trial as well as the entry of the sanction order which he had not paid.[42] The Bank agreed to a stay of proceedings pending the appeal.[43]

---

[38] Transcript of Proceedings Before Judge Breger, April 11, 2014, p. 4, 13.

[39] *Id*. at 10.

[40] *Id*. at 16.

[41] Order On Defendant, David Wodehouse's Motion to Strike Order Granting Costs to Plaintiff On February 27, 2014, Motion to Place Funds in Court Registry, and Motion for Extension of Time to Comply with Court Order, April 11, 2014 (App. 242).

[42] See Docket Nos. 158, 161 (App. 29, 30); *Wodehouse v. U.S. Bank*, Case No. 4D14-1484 (Fla. 4th DCA) (appellate docket indicating Notice of Appeal filed April 23, 2014).

[43] Agreed Order on Defendant's Motion to Stay Pending Appeal, May 6th, 2014 (App. 244).

F. The Bank's lawyer represents to a third judge that Judge Frusciante intended to sanction Defendant's counsel, as well as the Defendant.

Three days after the stay order was entered, the Bank moved to enforce the court order and for contempt against both the Defendant and the Law Firm, representing that the order granting costs had been directed against both.[44] The Motion requested that the sanction be more than doubled and that an additional fine of $50.00 a day be imposed on the Defendant and the Law Firm. The Defendant and the Law Firm countered with a memorandum in opposition to the Bank's motion, as well as their own Motion for Sanctions under §57.105, Fla. Stat., both of which asserted that it was frivolous for the Bank to claim that Judge Frusciante had intended to sanction the Law Firm, when he had specifically and expressly edited the proposed order to remove "counsel" as the party to be fined.[45]

At the hearing on the Bank's motion—before yet another judge (Judge Lubitz)—the Bank's lawyer steered the court away from Judge Frusciante's final ruling and focused instead on his comment during argument that the sanction

---

[44] U.S. Bank's' Motion to Enforce Court Order and for Contempt Against Defendant, David E. Wodehouse and His Counsel, [redacted] May 9, 2014 (App. 246).

[45] Defendant David E. Wodehouse and [redacted]s Motion for Sanctions Under Florida Statute § 57.105, May 21, 2014 (App. 257); Defendant, David E. Wodehouse and [redacted]s, Memo in Opposition to Plaintiff's Motion to Enforce Court Order and for Contempt, June 23, 2014 (App. 261).

"should be" against counsel.[46] The Defendant and the Law Firm argued that the order was improper because there was no evidentiary hearing and no findings as to: 1) their bad faith;[47] 2) the Defendant's ability to pay;[48] or 3) the amount of the travel expenses that were attributable to this case.[49]

The new judge interpreted Judge Frusciante's concession of removing "counsel" from the order as merely an "accommodation…so that the Order did not specifically identify the law firm as the offender," but that he still intended to shift the cost to the Law Firm rather than its client.[50] Based on this reasoning, she granted the motion to hold both the Defendant and the Law Firm in contempt.[51] She also declined to disturb Judge Breger's order denying the request to place the funds in the court registry.[52] The court gave the Defendant and the Law Firm an

[46] Transcript of Proceedings Before Judge Lubitz, June 24, 2014, p. 4 (App. 269).

[47] *Id*. at 15-17, 23.

[48] *Id*. at 24-25.

[49] *Id*. at 25.

[50] *Id*. at 34-35.

[51] *Id*.; Order On U.S. Bank's Motion to Enforce Court Order and for Contempt Against Defendant, David E. Wodehouse and His Counsel, [redacted] June 24, 2014 (App. 314).

[52] *Id*. at 36-37.

additional ten days to pay in order to purge the contempt, stating "[y]ou won't have any further sanctions if it's been paid."[53]

The Law Firm paid the fine by check dated that same day—a check made payable directly to the Bank's lawyers as ordered. Also that same day, the Law Firm filed this appeal.[54]

[53] *Id*. at 40-41; Order On U.S. Bank's Motion to Enforce Court Order and for Contempt Against Defendant, David E. Wodehouse and His Counsel, [redacted] June 24, 2014 (App. 314).

[54] Notice of Appeal of Non-Final Order, June 24, 2014 (App. 323).

SUMMARY OF THE ARGUMENT

The Bank seeks to have it both ways: to have the order requiring payment of its costs construed simply as the price of a continuance that the Defendant voluntarily accepted, while at the same time, to have it construed as requiring counsel to pay. But if the Bank's costs are to be paid by counsel, it must be by a sanction, which may only be imposed after notice, an evidentiary hearing, and a specific, detailed finding of intentional bad faith misconduct.

The trial court never intended for the Bank's costs to be paid by counsel for the Defendant and *sua sponte* rejected the Bank's proposed order which obligated counsel to pay. Nor was the cost-shifting a negotiated price for the continuance because the court never gave the Defendant an opportunity to accept any other option. Additionally, in making and discussing the ruling, the court repeatedly used the word "sanction" to describe the basis of the cost-shifting order. Yet, it never held a hearing as to whether the Defendant or its counsel was guilty of intentional misconduct and even stated that it was "not putting that intent on your side…" The court also denied the Defendant a hearing as to the amount of costs attributable to the continuance and even taxed the costs without an affidavit.

The successor judge erred in failing to correct this error of law and in extending the order to include counsel. The order should be reversed.

STANDARD OF REVIEW

This court will only reverse a trial court's decision to impose sanctions if the trial court has abused its discretion. *See Boca Burger, Inc. v. Forum*, 912 So.2d 561, 573 (Fla.2005). But where, as here, the sanction is imposed without a hearing, the trial court has *per se* abused its discretion. *See Glarum v. LaSalle Bank Nat. Ass'n*, 83 So. 3d 780, 781 (Fla. 4th DCA 2011); *Santini v. Cleveland Clinic Florida*, 65 So. 3d 22, 35 (Fla. 4th DCA 2011).

ARGUMENT

I. The successor judge erred in enforcing the sanction order against counsel.

A. Judge Frusciante did not intend that his order apply to counsel.

Judge Frusciante's handwritten order which grants an unspecified motion states that "[t]he Defense is to pay costs to Plaintiff for the [Plaintiff]'s witness' travel and lodging…"[55] This tracked the court's ruling in which it stated that the costs would be "borne by the defense."[56] Nothing in the order or the oral ruling suggests that the court intended that the cost be borne by counsel for the defense.

If the court's use of the word "defense" rather than "defense counsel" were not clear enough, the transcript of the hearing leaves no room for doubt. Not only did the court specifically rewrite the proposed order suggested by the Bank so as to remove the word "counsel," it *sua sponte* raised the fact that requiring counsel to pay did not comport with his oral ruling:

> THE COURT: I would have signed [the Bank's proposed order] except counsel stuck in there something about five days and also, I didn't mention five days and I said, go ahead and take it to Mr. Ackley. I also wasn't sure if I used the word defense counsel or defense, so this said defense counsel. So, I said to counsel here --

[55] Order granting costs, February 27, 2014 (App. 218).

[56] T(App). 20-21.

MR. ACKLEY: I don't believe it was counsel, Your Honor.[57]

There could be no rational interpretation but that the court (correctly) believed that its ruling had not been directed against counsel. Had it intended to make counsel pay the costs, it would not have thought there was an inconsistency and would not have raised the problem on its own accord.

Additionally, the exchange demonstrates that the court used the word "defense" to mean the party, rather than its counsel (and rather than the party and its counsel). Indeed, in the exchange that followed, the court expressed the view that the order "should be" (not "was") against counsel "because that's who the problem is with."[58] And in ultimately agreeing that, despite that sentiment, he would stay with his initial ruling,[59] the court reconfirmed that he intended then—as well as when he initially ruled—that the costs would be borne by the party.

And throughout the exchange, the judge spoke in terms of directing his order against one or the other—the party or its counsel. He did not discuss requiring both to pay a penalty and does not say, or even imply, that he was using the term "defense" as code for both party and counsel. And the lack of a discussion about

[57] T(App). 32.

[58] T(App). 32.

[59] T(App). 34.

apportionment or whether the expense would be borne jointly and severally, also suggests that he never intended counsel be included in the word.

And finally, contrary to Judge Lubitz's later supposition, there is nothing in the transcript to suggest that Judge Frusciante removed "counsel" merely as an accommodation—i.e. that he was disguising the order to somehow please the very "offender" (to use Judge Lubitz's word) that he wanted to have pay the costs. It may safely be said that Judge Frusciante would not participate in a scheme to deceive someone reading the order merely to shield the Law Firm from an imagined embarrassment or the possible ire of its client. Nor does Judge Lubitz's refusal to believe that Judge Frusciante intended to have the client pay the costs square with her ruling that granted civil contempt against both counsel and the client.

By injecting this interpretation that was contrary to the plain language of the order and the transcript, Judge Lubitz broadened the order to include counsel (against the wishes of Judge Frusciante). Worse, by holding the Law Firm in

contempt, she effectively transferred the entire financial responsibility to counsel.[60] This reallocation of the obligation from the Defendant to his counsel occurred without an evidentiary hearing (just as the obligation itself had been created without a hearing). Moreover, it held counsel in contempt for failing to comply with an order that had never applied to counsel—and even if it had been intended to, did not constitute reasonable notice to the Law Firm of an obligation to pay from its own pocket.

[60] This improper shifting of financial burdens from the party to counsel is a common strategy by foreclosure plaintiffs for two reasons: 1) foreclosure defendants are often judgment proof beyond the *in rem* recovery of the home (i.e. attorneys may be able to pay when clients cannot); and 2) shifting such burdens with sufficient frequency will discourage law firms from representing homeowners in default. While both goals are unacceptable, the latter is particularly reprehensible insofar as it tends to impinge upon the foreclosure defendants' fundamental right of access to courts. Moreover, the constant threat of sanctions and contempt against attorneys also chills advocacy on the behalf of homeowners. *See Carnival Corp. v. Beverly*, 744 So. 2d 489, 494 n. 3 (Fla. 1st DCA 1999) (citing a commentator's view that the courts should "be wary of using highly coercive penalties in view of the dangers of chilling vigorous advocacy, and the difficulties of distinguishing conscientious activism from ill-motivated aggression"); *Moakley v. Smallwood*, 826 So. 2d 221, 226 (Fla. 2002) (calling for retrained use and due process in the exercise of trial court's inherent authority and contempt powers because "an appropriate balance must be struck between condemning as unprofessional or unethical litigation tactics undertaken solely for bad faith purposes, while ensuring that attorneys will not be deterred from … zealously assert[ing] the clients' interests.").

B. Judge Frusciante's order was not a negotiated compensatory payment for a continuance under *Flea Mkt., U.S.A., Inc. v. Cohen*, 490 So. 2d 210 (Fla. 3d DCA 1986).

The Bank repeatedly argued below that Judge Frusciante's order was not a sanction or penalty for improper conduct, but rather a negotiated fee—the cost of obtaining a continuance.[61] This argument was designed to make this case appear distinguishable from *Moakley v. Smallwood*, 826 So. 2d 221 (Fla. 2002) (which requires an evidentiary hearing) and more similar to *Flea Mkt., U.S.A., Inc. v. Cohen*, 490 So. 2d 210 (Fla. 3d DCA 1986) (which did not). *Flea Market*, however, is inapplicable here for several reasons, the first of which is that it applies only to costs assessed against a party, not counsel.

In *Flea Market*, the Third District held that the trial court had not abused its discretion by granting a continuance conditioned upon the payment of the attorney's fees incurred by the opposing party due to the delay. Part of its rationale was that "the appellant" had voluntarily accepted the benefits of the continuance without objection to the adverse portion. *Id*. The appellant, of course, was the party, not counsel.

In *Brake v. Murphy*, 693 So. 2d 663 (Fla. 3d DCA 1997), the Third District distinguished its own decision in *Flea Market* because "in *Flea Market USA* it was

[61] Transcript of Hearing Before Judge Breger, April 11, 2014, p. 13; Transcript of Hearing Before Judge Lubitz, June 24, 2014, pp. 29-30.

the party seeking the delay, not counsel, who was ordered to pay the costs associated with the continuance." *Brake v. Murphy*, 693 So. 2d at 666. The distinction is eminently logical given that *Flea Market* was premised on the idea that paying the opposing party's costs is the consideration for the continuance—a continuance which benefitted the party, not counsel. It also comports with the general policy that parties, not attorneys, bear the costs of litigation[62]—and that parties must often accept the consequences of their attorneys' missteps or neglect[63]—unless the attorney is specifically found to be guilty of misconduct by way of an evidentiary hearing.

Second, there was nothing voluntary or negotiated about the cost order in this case. *Flea Market* turned on the voluntary acceptance of a continuance conditioned upon payment of the fee. That voluntary acceptance may be express or in the form of a waiver—the absence of an objection to the imposition of the costs without a hearing. Here, the Defendant objected and asked for an evidentiary hearing. That request that was not granted.

---

[62] This policy is reflected in the common law doctrine of champerty and maintenance and in the ethical prohibition against attorneys paying the litigation costs of their clients. *See*, Florida Bar Ethics Opinion 96-1, issued October 1, 1996.

[63] *See Ham v. Dunmire*, 891 So. 2d 492, 497 (Fla. 2004) (reaffirming the agency theory of the attorney-client relationship to conclude that a party can bear the consequence of a dismissal as a sanction even though it did not participate in the misconduct).

And even though the court proposed a condition of sorts on the continuance—that the continuance would be denied if the Defendant insisted on an evidentiary hearing—it never gave the Defendant or his counsel an actual opportunity to choose between these alternatives. First, the court's proposal came long after it had ruled that the costs would be shifted to Defendant and only after the Defendant asked for an evidentiary hearing:

> THE COURT : Then I have an alternative, I call Mr . Brotman into this courtroom and Mr. Brotman tries the case today and right now it's 3 o'clock and we can go forward with the trial and if you want to get Mr. Brotman in here while the witness is here I'll try the case today and that's the solution, there's no costs, there's no sanctions, get Mr. Brotman into my courtroom and we'll try the case but you said that there were other priorities and I was trying to -—
>
> * * *
>
> THE COURT: …I have two things in that order that I was concerned about, not, neither one of them was a concern about the cost for the witness, that was a done deal. If you're asking me for an evidentiary hearing on that, then I will call Mr. Brotman into this courtroom right now. If he's sitting in the office as you tell me he's sitting in the office, he should be in my courtroom. So, if you want to do that, motion for continuance is denied, call in Mr. Brotman, I expect him here forthwith.[64]

But when Defendant's counsel asked to make a phone call to find out if Mr. Brotman could appear, the Bank itself insisted on the continuance:

> MR. ACKLEY: May I make a call to my office and see what's an option at this point?

[64] T(App). 33.

> MR. BERWIN [the Bank's lawyer]: Your Honor, this was scheduled for 1:30. We are now past 3 o'clock; we ask that the court sign this order. Your Honor made a decision.
>
> THE COURT: If we are not going to go to trial here let's give him the continuance. …[65]

Thus, to the extent that the court rhetorically offered the Defendant (through his counsel) a choice between a sanction without a hearing and a continuance, it was withdrawn before the Defendant could expressly indicate a preference. It was withdrawn even before the Defendant could be advised of his options.[66] Worse, it was withdrawn because, the moment that it became apparent the Defendant might opt for a hearing, the Bank prevailed on the court to remain with its original ruling that had already granted the continuance. Ultimately, therefore, the continuance (without a hearing on the cost shifting) was granted at the Bank's request and the Defendant never voluntarily accepted the condition.

Third, *Flea Market* has never been interpreted to say that a negotiated fee-shifting (i.e. as a condition for receiving continuance) obviates the need for a hearing on the amount of costs attributable to the delay. In fact, in *Brake*, the Third District distinguished its own decision in *Flea Market* for a second reason—

---

[65] T (App). 33-34.

[66] The client's options would have been to pay the Bank's costs or to begin the trial with an unprepared (or under-prepared) attorney with the hope that Mr. Ackley would complete the morning trial soon enough to be of assistance.

because "the amount to be paid, $1000, was not determined based on any evidence of the costs incurred due to the delay." *Brake v. Murphy*, 693 So. 2d at 666. *See also*, *Kay v. Kay*, 988 So. 2d 1273, 1276 (Fla. 5th DCA 2008) (court did not abuse discretion in granting continuance, but did abuse its discretion by awarding fees and costs without evidence regarding the reason for the continuance and the amount of the fees and costs).

Lastly, *Flea Market* was decided sixteen years before the watershed Florida Supreme Court case of *Moakley*. If *Flea Market*'s holding is still viable after *Moakley*, at a minimum, it must be re-evaluated and harmonized with the strict guidelines (namely a hearing and a finding of bad faith conduct) announced by the Supreme Court—especially if the costs are to be levied against counsel. While attorneys now bear a more direct[67] financial responsibility for their conduct than in the days when *Flea Market* was decided, the Supreme Court limited that shift to "very limited circumstances" involving egregious "bad faith" conduct (*T/F Sys., Inc. v. Malt*, 814 So. 2d 511, 513 (Fla. 4th DCA 2002)), and mandated that it be accompanied by the due process requirements of notice and a hearing.

[67] It was always the case that attorneys bore an indirect financial responsibility for their professional negligence in the form of malpractice suits (*see Ham v. Dunmire*, 891 So. 2d at 498) or ordinary market forces.

C. The successor judges were required to correct the erroneous ruling.

Like many foreclosure cases, this one was plagued by the "wheel of fortune" style of senior judge assignment which precludes any continuity in the court's rulings and case management. Obviously, Judge Frusciante would have been in the best position to determine what he meant by his own order. And although there is some indication that, at one point, he had not been scheduled to appear again in Palm Beach County,[68] there was no evidence that he could not be scheduled so as to address the collateral litigation that sprang from his order. *See Kirkham v. Kirkham*, 385 So. 2d 733, 734 (Fla. 2d DCA 1980) ("Unless the original trial judge is unable by reason of death, disability or other equivalent event, or is unwilling by reason of recusation to consider a motion for rehearing, that judge should review and determine the motion.")

But if Judges Breger and Lubitz felt compelled to make their own rulings on the motions before them, they were also compelled to correct the errors of law in this original interlocutory order. *Raymond, James & Associates, Inc. v. Zumstorchen Inv., Ltd.*, 488 So. 2d 843, 845 (Fla. 2d DCA 1986) ("a successor

[68] T(App). 4-6 ("THE COURT: Tomorrow [February 28th] is my last day in this circuit here and it's scheduled so I have a day in July but this is basically my last day. They haven't given me any other dates. I am all full in March and April, they haven't booked me.").

judge has the obligation to correct any error in a prior interlocutory ruling on matters of law"); *Karn v. Coldwell Banker Residential Real Estate, Inc.*, 705 So. 2d 680, 680 (Fla. 4th DCA 1998) ("A successor judge properly assigned to a case may vacate or vary interlocutory orders made earlier by another judge."); *Nationsbank, N.A. v. Ziner*, 726 So. 2d 364, 366 (Fla. 4th DCA 1999) (same). Thus, the successor judges were obligated to vacate the order, or at a minimum, provide an evidentiary hearing.

Accordingly, *Flea Market* is inapplicable to this case and the trial court abused its discretion in requiring the Defendant to pay the Bank's costs over objection and without a hearing. The "successor" judges erred failing to vacate Judge Frusciante's order and in re-interpreting it so as to hold the Law Firm in contempt for failure to comply with an order that applied only to its client.

II. The trial court erred in entering a sanction without an evidentiary hearing or finding of bad faith.

The Florida Supreme Court held in *Moakley v. Smallwood*, 826 So. 2d 221 (Fla. 2002) that "a trial court's exercise of the inherent authority to assess attorneys' fees[69] against an attorney must be based upon an express finding of

[69] *Moakley* and its progeny most often deal with shifting attorneys' fees as a sanction. Here, it was unnecessary for the Bank to seek the reimbursement of its attorneys' fees, because it was already entitled to such fees under the mortgage if it prevailed.

bad faith conduct and must be supported by detailed factual findings describing the specific acts of bad faith conduct that resulted in the unnecessary incurrence of attorneys' fees." *See also Rivero v. Meister*, 46 So. 3d 1161, 1163 (Fla. 4th DCA 2010). The attorney being sanctioned must be given notice and an opportunity to be heard—including the opportunity to present witnesses and other evidence. *Santini v. Cleveland Clinic Florida*, 65 So. 3d 22, 38 (Fla. 4th DCA 2011). Additionally, the amount of the sanction must be directly related to the costs that the opposing party had incurred as a result of the bad faith conduct. *Moakley v. Smallwood*, 826 So. 2d at 227.

A. Judge Frusciante intended that the order be punitive.

Because *Flea Market* is applicable only to costs assessed against a party and only when they are voluntarily assumed as a negotiated condition to a continuance, they could only have been levied here against counsel as a sanction under *Moakley*. Here, there is more than ample reason to believe that Judge Frusciante intended the order to be a sanction, despite the fact that his handwritten form order does not use that word.

To begin with, the court was the first, albeit tentatively, to use the word "sanction":

> THE COURT: …But I'm going to grant the continuance, but there is a sanction to whatever whether it's called a sanction or anything else -

> - maybe the choice of words are not the most artful for me, and I would hope that counsel would help on the usage of it, but at this point the cost of bringing back the witness for the -- for the Plaintiff is going to be borne by the defense. Okay.[70]
>
> * * *
>
> You have a cost. Counsel, I defer on the – on any <u>further sanctions</u> at this point in time. So if you want to prepare an order, the cost to bring your witness in is to be borne by the defense.[71]

Then, throughout the hearing, the court continued to refer to the order as a sanction (without any residual hesitancy):

- …What aspect of the order, the objection to the sanction, this [is] my position, keep it clear, you were not the attorney that I granted the continuance to. You say it's the firm.[72]
- …I'll try the case today and that's the solution, there's no costs, there's no sanctions…[73]
- How we got here other than them, in essence, paying a sanction for two attorneys being ready for trial but only one being present for trial is resolved. …[74]

By the time the court was handwriting its order, there was nothing tentative about its description of the order as a "sanction":

> THE COURT:…I am putting down no affidavit required. I don't expect this to be an issue whatever those costs are. <u>I think the record</u>

[70] T(App). 20-21 (emphasis added).

[71] T(App). 24 (emphasis added).

[72] T(App). 28.

[73] T(App). 28.

[74] T(App). 43.

> has enough information that I don't have to put down why this sanction is taking place because like I said, I think it's clear, the fact that I am dealing with one attorney today that was not the last attorney and I placed this date today because I wanted to accommodate the other trial attorney's conflicts with other dates that I had given and so all of a sudden I am now dealing with this.[75]

Judge Frusciante's entry of this sanction against counsel without an evidentiary hearing is in direct conflict with the *Moakley* case. *Rickard v. Bornscheuer*, 937 So. 2d 311, 311 (Fla. 4th DCA 2006) (reversing sanction of $750 against attorney because "[he] was not given adequate notice and an opportunity to be heard and to present witnesses or other evidence in the case against him"). Indeed, the Defendant's request to introduce evidence that neither he nor his attorneys had acted in bad faith was denied on three separate occasions by three separate judges. The order must be reversed on this ground alone.

B. Although the court intended the order to sanction what it thought was improper conduct, it did not make a finding of "bad faith."

Under *Moakley* and its progeny, a sanction must be based upon an express finding of bad faith conduct and must be supported by detailed factual findings (with a "high degree of specificity") describing the specific acts of bad faith conduct. *Moakley v. Smallwood*, 826 So. 2d at 227; *Glarum v. LaSalle Bank Nat. Ass'n*, 83 So. 3d 780, 783 (Fla. 4th DCA 2011).

[75] T(App). 40 (emphasis added).

Here, the court made no detailed factual findings of any bad faith on the part of counsel. Just the opposite, the court expressly declared that it was not attributing any intent on the part of Defendant's counsel to mislead, obfuscate or "cause problems":

> MR. ACKLEY [Defendant's Counsel]: May I proffer into the record, just with regard to that one issue, Your Honor, as I mentioned before, our clients are -- the firm handles matters on a team basis. Yes, one attorney may be speaking with Plaintiff's counsel or may appear one time for trial, but depending on who is available to do the bulk of the assignments in one particular courthouse, they can be assigned differently, like it was today. It was not an attempt to mislead or obfuscate. It was simply a matter of assigning within the firm, and without any intent to cause problems.
>
> THE COURT: I am not putting that intent on your side at this point…[76]

As this court noted in *Rivero v. Meister*, 46 So. 3d 1161, 1163 (Fla. 4th DCA 2010), the entering of a sanction without an express finding of bad faith conduct is an abuse of discretion. In that case, the defendants and their attorneys failed to appear for trial and did not notify the plaintiff and the trial court that other courts had called them to trial. The court continued the case and the plaintiff moved for sanctions. The court held a hearing on the motion in which defense counsel stated that the failure to appear was "not in bad faith; it was not deliberate." The trial

[76] T(App). 22.

court granted the sanction finding that the attorneys had been negligent. *Id*. at 1163.

This Court reversed because a finding of mere negligence, even recklessness, was insufficient. The Court expressed concern with the unfairness of the result and acknowledged that the attorneys' misconduct had cost the plaintiff and his attorney fees and costs. "And yet," said the Court, "this amount is noncompensable because the defendants' attorneys' misconduct did not rise to the level of bad faith." *Id*. 1163-64. The Court even invited the Florida Supreme Court to re-examine *Moakley*'s requirement of bad faith, certifying the following question as one of great public importance:

> DOES THE DEFINITION OF "BAD FAITH CONDUCT" IN *MOAKLEY V. SMALLWOOD*, 826 So.2d 221 (Fla.2002), INCLUDE RECKLESS MISCONDUCT WHICH RESULTS IN THE UNNECESSARY INCURRENCE OF ATTORNEYS' FEES?

Id. at 1164. The Supreme Court ultimately declined to exercise its jurisdiction. *Meister v. Rivero*, 75 So. 3d 236 (Fla. 2011).

Accordingly, while the Law Firm here was not negligent or reckless, even if it had it been, the additional expense to the Bank as a result of the continuance is simply not compensable. And while the Law Firm acknowledges that the result may be perceived as unfair—as this Court felt in *Rivero*—unnecessary litigation expenses have always been an avoidable, expected consequence of courtroom

contests—part of the give and take associated with the foibles of human nature and the legal process. *See e.g. Topp Telecom, Inc. v. Atkins*, 763 So. 2d 1197, 1200 (Fla. 4th DCA 2000) (unwarranted effort and expense insufficient for irreparable-harm test to obtain certiorari review). For instance, the record here does not show that the Defendant and its counsel were ever compensated for any unnecessary costs connected with the first continuance that was granted as a result of the Bank's tardy disclosures.

C. The mere fact that the Law Firm prepared a different attorney for the second trial setting is not sanctionable conduct.

The continuance of the second trial setting (February 27th) resulted from the unavailability of the Defendant's attorney assigned to the trial (Mr. Ackley) due to his participation in another trial which ran significantly beyond the allotted time. Both judges involved apparently agreed that the trial that had begun first would have priority.

The Bank sought to paint the picture that another attorney at the Law Firm (Mr. Brotman) could have tried the case because he was "sitting around" in the office. The underlying premise—that Mr. Brotman was prepared to try the case—was based solely on the fact that he had been present at the first trial setting over two weeks earlier. But in reality the court had continued the case the first time precisely for the reason that Mr. Brotman was **not** prepared to try the case. The

Bank had prevented him from properly preparing for trial because it had not complied with the trial order's disclosure requirements. The court continued the trial for the express purpose of providing the Defendant's counsel an opportunity to research the newly disclosed witness and to evaluate the newly delivered documents. Had it been supposed that this additional preparation could be done in a matter of minutes, there would have been no reason to postpone the first trial.

Accordingly, there was no evidence that Mr. Brotman was any more prepared at the second trial setting than he had been at the first setting. Nor was there evidence that he should have been, since that responsibility had been turned over to Mr. Ackley. It was never disputed that Mr. Ackley was the attorney from the Law Firm who had undergone the preparations for trying this case on the second setting and that, but for the prolongation of the morning trial, would have tried this case to conclusion as scheduled in the afternoon.[77] Indeed, had Mr. Brotman been assigned to, and prepared for, the two Palm Beach trials, the same conflict would have arisen.

To whatever extent the court believed its selection of a particular day to hold the rescheduled trial (February 27th rather than February 24th) was an

[77] T (App) 12 ("MR. ACKLEY: Absolutely, I anticipated moving forward today, Your Honor.").

accommodation to the Law Firm,[78] it was mistaken. The transcript of the February 10th proceedings in which the court reset the trial reveals that both days proposed by the court presented multiple conflicts for the defense firm. What the court considered to be an "accommodation" was actually the selection of a trial day where the conflicts for the Law Firm consisted (at that time) of three other trials, as opposed to a day where the conflicts consisted of two other trials and appellate oral argument.[79]

And if the court thought that it had accommodated Mr. Brotman personally so he could attend oral argument, only to learn that another attorney, Mr. Ackley, had been available to try the case on the first date proposed by the court (February 24th), this impression would also be mistaken. The February 10th transcript shows that Mr. Brotman mentioned the Law Firm's other trial conflicts for that day. First, this disproves any notion that Mr. Brotman led the court to believe that he was the only attorney at the Law Firm who could try the case. Second, when coupled with Mr. Ackley's confirmation during the February 27th hearing that he had, in fact, been in trial on the date in question (February 24th),[80] it disproves any notion that

[78] T(App.) 30.

[79] Transcript of Proceedings February 10, 2014, p. 89.

[80] T(App). 30.

either of these two attorneys were available to try the case three days earlier than the alternative date the court eventually selected.

Thus, the picture which the Bank attempts to paint of any wrongdoing on the part of the Law Firm is inconsistent with the record below even without such niceties as actual evidence. The thrust of the Bank's claim, while never clearly articulated, appears to be that the Law Firm should have prepared a second attorney (Mr. Brotman in addition to Mr. Ackley) to try the same case. But proof of that claim would turn on a determination of: 1) the foreseeability that the other trial would run over; 2) the extent that the court had accommodated the Law Firm when "double-booking" trials in the past; 3) the duties with which Mr. Brotman was tasked outside the courtroom in relation to other trials or court-imposed deadlines; and 4) the Bank lawyers' own responsibility to have inquired further into the specifics of the conflicts about which they had been informed.[81] These would need to be assessed in the context of the judicial system's response to the foreclosure backlog—an atypical, emergent, environment where the resources of all the participants—the court, the parties, and their counsel—have been under enormous strain.

[81] Recall that when the court reset the trial on February 10th, the Bank's lawyers expressly accepted the possibility that, if a Law Firm's morning trial ran into the afternoon, the trial in this case might be postponed. Transcript of Proceedings Before Judge Frusciante, February 10, 2014, pp. 92-93.

Accordingly, even without according the Law Firm an opportunity to bring evidence to disprove the allegations against it, the record demonstrates that there was no impropriety, or even the appearance of impropriety, on the part of the Law Firm.

CONCLUSION

Judge Frusciante's order granting sanctions—as modified by Judge Lubitz—must be reversed and the Bank ordered to refund the costs paid by the Law Firm. Having knowingly led the court—in fact, three different judges—into error and collected its costs without permitting the presentation of evidence, the Bank should not be allowed to continue its attempt to assess these costs. Indeed, on the issue for which it carried the burden—the amount of its costs attributable to the continuance—it presented no evidence (not even in the form of an affidavit) and should not be permitted a second bite at the evidentiary apple. *See Powell v. Barnes*, 629 So. 2d 185, 186 (Fla. 5th DCA 1993).[82]

[82] In *Diaz v. Diaz*, 826 So. 2d 229, 233 (Fla. 2002) the trial court had imposed joint and several liability for a monetary sanction against both the attorney and the client (as did Judge Lubitz here), the Court quashed the portion of the opinion awarding a sanction against counsel, and remanded only for reconsideration of the award against the client in light of the effect the decision discharging counsel from any liability may have had. Here too, the trial court may wish to reconsider, particularly since the Defendant is now deceased.

If the Court nevertheless remands for an evidentiary hearing and specific findings of fact, the instructions should specify that the hearing be held before Judge Frusciante unless it is determined that he is "unable by reason of death, disability or other equivalent event" to assume that duty.

Dated: October 28, 2014

ICE APPELLATE
Counsel for Appellant
1015 N. State Road 7, Suite C
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Designated Email for Service:
service@icelegal.com
service1@icelegal.com
service2@icelegal.com

By: 
THOMAS ERSKINE ICE
Florida Bar No. 0521655

CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby certifies that the foregoing Brief complies with Fla. R. App. P. 9.210 and has been typed in Times New Roman, 14 Point.

ICE APPELLATE
Counsel for Appellant
1015 N. State Road 7, Suite C
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Designated Email for Service:
service@icelegal.com
service1@icelegal.com
service2@icelegal.com

By: _____
THOMAS ERSKINE ICE
Florida Bar No. 0521655

CERTIFICATE OF SERVICE AND FILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this October 28, 2014 to all parties on the attached service list. Service was by email to all parties not exempt from Rule 2.516 Fla. R. Jud. Admin. at the indicated email address on the service list, and by U.S. Mail to any other parties. I also certify that this brief has been electronically filed this October 28, 2014.

ICE APPELLATE
Counsel for Appellant
1015 N. State Road 7, Suite C
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Designated Email for Service:
service@icelegal.com
service1@icelegal.com
service2@icelegal.com

By: 
THOMAS ERSKINE ICE
Florida Bar No. 0521655

SERVICE LIST

Nancy M. Wallace, Esq.
William Heller, Esq,
Eric Levin, Esq.
Victor R. Berwin, Esq.
Akerman LLP
222 Lakeview Avenue, Suite 400
West Palm Beach, Florida 33401
elisa.miller@akerman.com
michele.rowe@akerman.com
william.heller@akerman.com
lorraine.corsaro@akerman.com
eric.levine@akerman.com
victor.berwin@akerman.com
mary.wyatt@akerman.com
Appellee's Counsel