In the District Court of Appeal
Fourth District of Florida

CASE NO.

(Circuit Court Case No)

Appellant,

v.

BERNARD STRICKLAND and CASSANDRA STRICKLAND, et al.,

Appellees.

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

ANSWER BRIEF OF APPELLEES

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STATEMENT OF THE CASE AND FACTS

I. Introduction

This appeal, brought by the Mellon as successor by merger to the as Trustee for the Certificate Holders CWABS, Inc., Asset-Backed Certificates, Series 2007-8 ("the Bank"), arises from the Bank's foreclosure action against Bernard Strickland and Cassandra Strickland ("the Homeowners"). The Bank seeks review of the trial court's order granting the Homeowners' second motion *in limine* and motion for sanctions made during the nonjury trial below. The Bank argues that the trial court abused its discretion in striking its belatedly disclosed witness (even though the court had already continued the trial once so that the Homeowners could depose a different witness that the Bank had belatedly disclosed), dismissing its case (even though its newly identified witness was the only one it had brought to trial), and denying a second continuance (even though it made the request after these rulings). The issue, then, is whether reasonable minds could differ regarding these actions based on the facts present in the record.

II. Appellees' Statement of the Facts

The Bank's Statement of the Case and Facts[1] is chockfull of glaring omissions. For instance, the Bank baldly states that the trial commenced "addressing the [Homeowners] Motion in Limine and Motion for Sanctions."[2] But what the trial court was really addressing was the Homeowners' second motion *in limine*—the second time in as many trial settings that the Bank did not comply with the disclosure requirements of the trial orders.[3] The Bank does not even cite this motion in its brief even though the motion is central to each issue the Bank presents on appeal.

The Bank's Statement of the Case and Facts, therefore, violates the appellate rule's spirit of full disclosure, and thus, epitomizes the Bank's disregard for rules and court orders regarding disclosure—a continuation of the same pattern of indifference which gave rise to the order under review. Consequently, the Bank's statement of the case and facts is wholly unsatisfactory, requiring the Homeowners' to present their own Statement of the Facts. *See* Fla. R. App. P. 9.210(c).

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[1] Initial Brief, pp. 1-6.

[2] *Id*. at 4.

[3] Motion *in Limine*, February 20, 2014 (R. 583-591).

The pleadings and trial discovery; the first trial order; and the Bank's acquiescence to the Homeowners' motions for leave to amend their pleadings.

The Bank initiated this action when it filed its one count foreclosure complaint on December 4, 2009.[4] A mere thirteen days later, and before the Homeowners had even appeared in the case, the Bank filed a motion for summary judgment—which it never set for hearing in the four and a half years the case was pending in the trial court.[5]

The Homeowners filed an initial answer to the Bank's complaint,[6] and after the matter was set for trial the first time,[7] propounded pre-trial interrogatories[8] which sought the name of each person the Bank intended to use as a witness and a pre-trial request for production[9] which requested the exhibits the Bank intended to introduce as exhibits.

[4] Complaint, December 4, 2009 (R. 1-42).

[5] Motion for Summary Judgment, December 17, 2009 (R. 50-51).

[6] Answer & Affirmative Defenses, August 12, 2010 (R. 184-192).

[7] Order Setting Non-Jury Trial, October 21, 2011 (R. 226-231).

[8] Pre-trial Interrogatories, November 23, 2011 (Supp R. 1).

[9] Request for Production Regarding Pre-Trial Evidence, November 23, 2011 (Supp. R. 8).

The Homeowners also sought leave to amend their answer.[10] The Bank did not contest the motion—rather, it entered into an agreed order granting the motion, which struck the case from the trial calendar.[11]

The Bank's continued non-compliance with its discovery obligations; the Homeowners' first motion in limine; and the first continuance of trial.

The Homeowners propounded a second request for production.[12] When the Bank refused to respond, object, or move for an extension of time, the Homeowners sought an *ex-parte* order compelling compliance[13] which was granted by the court.[14] But rather than comply with the order which required it to actually produce the documents within ten days, the Bank merely filed a motion for

[10] Motion for Leave to Amend Answer and Affirmative Defenses, November 28, 2011 (R. 234-245).

[11] Agreed Order on Defendants' Motion for Leave, December 2, 2011 (R. 246-247). The Homeowners later sought additional leave to file a second amended answer. Motion for Leave to Amend Answer and Affirmative Defenses, August 17, 2012 (R. 335-347). The Bank agreed to not one, but two orders granting the Homeowners' motion. Agreed Order on Defendants' Motion for Leave, October 3, 2012 (R. 356-357); Agreed Order on Defendants' Motion for Leave, October 12, 2012 (R. 358-358).

[12] Request for Production Regarding Indebtedness, December 26, 2012 (Supp. R. 12).

[13] Motion to Compel, February 8, 2013 (R. 393-396).

[14] Order on Defendant's Motion to Compel, February 12, 2013 (R. 397-399.

extension of time[15]—another motion which the Bank never set for hearing. And because the Bank never complied with the order, the Homeowners filed a sanctions motion requesting relief under Fla. R. Civ. P. 1.380(b)(2).[16]

In the interim, the trial court entered a second trial order, which set a trial date and directed the parties to immediately exchange an exhibit and witness list or else face possible sanctions which included dismissal of the case and exclusion of evidence or witnesses.[17] The Bank, however, waited nearly a month to identify its witness by name—a mere ten days before the trial was scheduled to commence.[18]

As a result of the Bank's failure to comply with the trial order, the Homeowners served their first motion *in limine*.[19] In addition to arguing that the court should exclude the Bank's witnesses and evidence because the Bank failed to comply with the trial order's requirements, the Homeowners' motion also argued for exclusion on the grounds that the Bank initially asserted that it would make its

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[15] Motion for Extension of Time, February 21, 2013 (R. 400-402).

[16] Motion for Sanctions, February 26, 2013 (R. 406-412).

[17] Order Setting Non-Jury Trial, May 21, 2013 (R. 427-432).

[18] Witness List, June 18, 2013 (Supp. R. 18).

[19] Motion *in Limine*, Served on June 27, 2013 (R. 497-503).

witness available for deposition prior to trial but then backtracked and said that the deposition was impossible.[20]

Faced with this motion, the Bank agreed to a joint motion to continue the trial to allow the Homeowners to depose the Bank's trial witness, Michelle Words.[21]

The third trial order and the Homeowners' second motion in limine.

The trial court then issued a third trial order that again required the Bank to supply its witness and exhibit list—this time within ten days of the order—or face sanctions.[22] But the Bank once again failed to comply with the order's disclosure requirement, initially serving a witness list that stated only that it would call a "corporate representative to be determined upon verification."[23]

The Homeowners then requested the witness's name via an email sent two days after this witness list was served, but the Bank did not respond to this request

[20] *Id*. (R. 498-499).

[21] Order Granting Joint Motion for Continuance, June 28, 2013 (R. 496).

[22] Order Setting Non-Jury Trial, December 18, 2013 (R. 566-571).

[23] Plaintiff's Witness List and Exhibit List, December 31, 2013 (Supp. R. 23).

for almost three weeks—and when it did, all it represented was that it was "working on narrowing the witness names."[24]

Nearly a month after the disclosure deadline of the trial order, the Bank filed an amended witness list. Although it included eight names, it did not list the one witness the Homeowners had deposed in accordance with the joint motion to continue the first trial.[25] Significantly, the Bank served this witness list four days before it responded to the Homeowners' request for witness clarification—which means that the Bank did not know who it would call as a witness when it served this belated list.[26]

As a result, the Homeowners filed a second motion *in limine*.[27] This motion argued that the Bank violated the third trial order by failing to timely serve its witness and exhibit list because it filed its first list (with the nondescript "corporate representative upon verification") two weeks after it was due and its amended list (with eight possibilities for the single witness it planned to call) nearly a month after it was due. The motion also argued that the Bank had thwarted every

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[24] Transcript of Foreclosure Trial, February 21, 2014 (R. Vol. 5; "T. __"), at 5.

[25] Plaintiff's Amended Witness List and Exhibit List, January 16, 2014 (Supp. R. 27).

[26] T. 5 (Explaining that the Bank responded to the Homeowners email on January 20th but served its witness list on January 16th).

[27] Motion *in Limine*, February 20, 2014 (R. 583-591).

meaningful discovery attempt the Homeowners had made.[28] But most importantly, the motion argued that exclusion of the Bank's witnesses was proper because none of the witnesses listed in the Bank's most recent witness list was Michelle Words—the person the Bank previously represented would be its corporate representative at trial and the person the Homeowners had deposed based on that representation.[29]

The trial and the trial court's ruling.

The trial court considered the Homeowners' second motion *in limine* at the beginning of the trial. The Homeowners argued that the previous trial date had been continued so that they could depose Words; that the Bank failed to timely identify its witnesses as required by the trial order; and that the Bank failed to respond to the Homeowners' request for information until almost three weeks after the request was sent.[30]

The Homeowners asserted that the Bank had exhibited contumacious disregard for the trial court and that the court should not only strike the witness but dismiss the case—especially since the first trial was continued just so the

[28] *Id.* at 585-587.

[29] *Id*. at 586.

[30] T. 4-5.

Homeowners could depose Words, but after having the Homeowners undergo the time and expense of deposing the witness to determine her qualifications to testify, the Bank brought an entirely new witness to trial.[31]

The only explanation the Bank offered for Words' absence was that there was a "service transfer" which was "customary in this type of work," and because Words worked for the old servicer, she apparently could not attend the trial.[32] And according to the Bank, Words' absence could not cause any "prejudice" to the Homeowners because none of the documents the witness would testify to would change.[33]

But the trial court disagreed, finding that there could, in fact, be an enormous difference between witnesses:

> THE COURT: Okay. That's like a mathematical formula, all witnesses are equal. Is that what you're saying? And this is a main witness in the case. You're a trial lawyer. There's only going to be one witness in the case, and you don't think it's a good idea if you're going to try to take that person's deposition and find out, one, what kind of witness they're going to make; two, just how familiar they are with these records and things and what these records are? You think everyone is the same? I can tell you they are not.

[31] T. 7.

[32] T. 8.

[33] T. 11.

> Witnesses are not the same. There are some that are better than others and I mean, that's the way it is….[34]

The trial court then granted the Homeowners' motion and dismissed the case without prejudice[35] explaining that the ruling was based upon the Bank's failure to communicate with the Homeowners' counsel and the court's prior order continuing the first trial.[36]

After the court had ruled, the Bank requested a (second) continuance so that the Homeowners could (again) depose the Bank's trial witness. The trial court denied the request reasoning that there must be compliance with the trial orders.[37]

The Bank's disregard for the rules of court and court orders carries over on appeal.

Additionally, the Bank has failed to comply with the Rules of Appellate Procedure and court orders of this Court during the pendency of the appeal. Specifically, the Bank disregarded this Court's order to pay the statutorily required

[34] T. 11-12.

[35] T. 14.

[36] T. 15.

[37] T. 16-17.

$300.00 filing fee[38] which was sufficiently egregious to prompt this Court to *sua sponte* dismiss this appeal.[39]

When the Bank moved to reinstate the appeal,[40] the Homeowners pointed out that the Bank did not provide any real excuse for failing to comply with this Court's orders—particularly since it was not the first time that the Bank's counsel has had appeals dismissed for failure to pay the filing fee.[41] And although this Court ultimately did reinstate the Bank's appeal, it was later forced to issue a show cause order when the Bank failed to timely file its initial brief.[42]

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[38] Order Requiring Payment of Filing Fee, March 25, 2014.

[39] Order Dismissing Appeal, May 12, 2014.

[40] Appellant's Motion to Reinstate Appeal, May 29, 2014.

[41] Appellees' Response to Motion to Reinstate Appeal, May 30, 2014.

[42] Order Requiring Appellant to Show Cause, September 12, 2014.

SUMMARY OF THE ARGUMENT

The trial court did not abuse its discretion when it refused to continue the trial for a second time—especially since the reason for the continuance was the same reason it had continued the trial in the first instance. The Bank's own actions (and inactions) were the sole reason why a continuance was even needed.

Likewise, the trial court correctly granted the Homeowners' second motion *in limine* and excluded the Bank's witness under the controlling precedent set forth by the Florida Supreme Court and this Court. The Homeowners would have been prejudiced by this witness's testimony; there was no efficient way to cure the prejudice; the Bank acted in bad faith; and the Bank's actions fundamentally disrupted the orderly and efficient trial of the case. And since the Court should affirm the order striking its witness, the Court can also affirm the dismissal order under the tipsy coachman doctrine—especially since it was the Bank's own trial strategy (which exalted convenience over observance of court orders and rules) that led to the striking of the witness.

Therefore, the trial court's order should be summarily affirmed.

STANDARD OF REVIEW

The Homeowners agree that the standard of review for each of the Bank's issues is abuse of discretion. Therefore, in order to reverse, this Court must find that no reasonable person would take the view adopted by the trial court. *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980). In other words, if reasonable minds could differ, then the trial court's actions were not unreasonable and there was no abuse of discretion. *Id*.

ARGUMENT

I. There was no abuse of discretion in denying a second continuance of the trial

The Bank's first argument summarily fails because it assumes a proposition that is not supported by the record—namely, that "[a]ll continuances were a result of [the Homeowners'] request or actions up to the February 21, 2014 trial."[43] In fact, all continuances were a result of the Bank's own actions or, worse, its own inactions and malfeasance.[44] Therefore, the trial court properly denied the Bank's motion to continue the trial, which, in any event, was only made after the court had already dismissed the case without prejudice.[45]

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[43] Initial Brief, p. 10.

[44] The Bank also derisively claims that the "Defendants attempted to even have the [second] trial continued by way of filing it[s] Notice of Conflict" and that this "request was denied due to the failure of the Defendants to advise the Court of all the necessary information." (Initial Brief, pp. 9-10). In reality, the Notice of Conflict did not request a continuance—it was simply a notice to the court that counsel is required to give under Fla. R. Jud. Admin. 2.550. That rule requires the judges or their designees to confer and undertake to avoid the conflict (which may not result in a continuance of this particular case). The court's ruling that additional information was needed, despite the absence of any such requirement under the rule, is not challenged here by cross-appeal, but to the extent it is relevant to the Bank's argument, the Homeowners contend that the ruling was error. It is also disingenuous for the Bank to characterize the notice—which counsel for the Homeowners was required to file—as some tactic designed to continue trial.

[45] T. 15 (granting the Homeowners' motion *in limine*); T. 16-17 (request and denial of motion to continue).

A. All continuances were due to the Bank's acquiescence, nonfeasance, or malfeasance.

Three trial orders were rendered in this case.[46] As the Bank correctly points out, the first trial date was properly struck when the trial court granted the Homeowners' motion for leave to amend their pleadings since the cause was no longer at issue.[47] *Nystrom v. Nystrom*, 105 So. 2d 605, 608 (Fla. 2d DCA 1958). But the Bank conveniently leaves out a salient fact: that it did not oppose the Homeowners' motion and actually entered into an agreed order granting the motion.[48] Because the Bank agreed to entry of the order, it cannot complain about it on appeal.[49]

But even more importantly, the first continuance (that seeking to postpone the date set by the second trial order) was directly attributable to the Bank's failure

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[46] Order Setting Non-Jury Trial, October 21, 2011 (R. 226-231); Order Setting Non-Jury Trial, May 21, 2013 (R. 427-432); Order Setting Non-Jury Trial, December 18, 2013 (R. 566-571).

[47] Initial Brief, p. 9.

[48] Agreed Order on Defendants' Motion for Leave, December 2, 2011 (R. 246-247).

[49] This argument holds true in opposition to the Bank's assertion regarding the Homeowners' second motion for leave to amend the answer (Initial Brief, p. 9). Indeed the Bank entered into not one but two agreed orders with respect to that motion. *See* Agreed Order on Defendants' Motion for Leave, October 3, 2012 (R. 356-357); Agreed Order on Defendant's Motion for Leave, October 12, 2012 (R. 358-358).

to comply with the trial order's disclosure requirement and its failure to produce the trial witness for deposition as it previously agreed to do.[50] Rather than face potential sanctions, the Bank agreed to a joint motion continuing the first trial date so that the Homeowners could depose its trial witness.[51]

And remarkably, the Bank seeks review here of the denial of a second continuance which it requested for exactly the same reason it needed the first—so that the Homeowners could depose the Bank's new trial witness.[52] Thus, the trial court could not have abused its discretion in denying the Bank a second continuance to address the same problem—a problem of its own creation. *Wash-Bowl v. Wroton*, 432 So. 2d 766, 767 (Fla. 2d DCA 1983) ("Here, the court had previously granted two continuances, and we find no abuse of its discretion in denying a third, especially since second and third continuances are looked on with disfavor.").

B. The Bank's reliance on *Fleming* is misplaced because the circumstances surrounding its request were its own making.

The Bank cites this Court's opinion in *Fleming v. Fleming*, 710 So. 2d 601 (Fla. 4th DCA 1998) to support its argument that the trial court abused its

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[50] Motion *in Limine*, Served on June 27, 2013 (R. 497-503).

[51] Order Granting Joint Motion for Continuance, June 28, 2013 (R. 496).

[52] T. 16-17.

discretion in denying its motion to continue. But in *Fleming*, the request for a continuance arose because the appellant's first attorney, who had been disbarred, had not competently prepared the case for trial, which left her new attorney insufficient time to prepare. *Id*. at 602. In contrast, the Bank here does not claim that its trial lawyer was incompetent and that it would need time for new counsel to prepare the case for trial. In fact, apparently happy with its counsel and the trial decisions made on its behalf, the Bank has continued with the same counsel in post-trial proceedings and even in this appeal.

Additionally, the Bank's "need" for a new witness was purportedly precipitated by the Bank's decision to change servicers midstream, apparently without making any arrangements for its pending cases where witnesses had already been identified and deposed. Thus, any "emergency" created below was the Bank's own making and a trial court does not abuse its discretion in denying a motion to continue when the emergency is the litigant's creation. *See Ryan v. Ryan*. 927 So. 2d 109, 111-12 (Fla. 4th DCA 2006) and the cases cited therein.

And the Bank's further argument that the Homeowners did not suffer prejudice is also unavailing. First, in what is actually an indictment of all that is wrong with the Bank's approach to evidence and its attitude towards the judicial system generally, the Bank unabashedly argues that all bank witnesses are

"interchangeable."[53] The extraordinary notion that bank witnesses in foreclosure trials are fungible arises from the fact that most have no personal knowledge about how the documents they are testifying from are created and kept. *See e.g. Hunter v. Aurora Loan Servs., LLC*, 137 So. 3d 570, 573 (Fla. 1st DCA 2014) (finding witness unqualified where the witness lacked particular knowledge of a prior servicer's record-keeping procedures and "[a]bsent such personal knowledge, he was unable to substantiate when the records were made, whether the information they contain derived from a person with knowledge, whether [the previous servicer] regularly made such records, or, indeed, whether the records belonged to [the previous servicer] in the first place."); *Burdeshaw v.* [redacted] *Mellon*, 148 So. 3d 819 (Fla. 1st DCA 2014) (reversing and remanding for dismissal because bank failed to establish any foundation qualifying the exhibit as a business record or its witness "as a records custodian or person with knowledge of the four elements required for the business records exception"); *Lacombe v. Deutsche Bank Nat. Trust Co.*, 149 So. 3d 152 (Fla. 1st DCA 2014) (reversing and remanding for dismissal because the bank's witness was not a records custodian for the current servicer or any of the previous servicers); *Holt v. Calchas, LLC*, 155

[53] Initial Brief, pp. 11-12.

So. 3d 499, 506 (Fla. 4th DCA 2015) (witness was not qualified to introduce bank's payment records over hearsay objection).

Thus, rather than presenting an argument as to why the Homeowners would not be prejudiced by a last-minute substitution of its witness, the Bank presents what is, in effect, an admission that its witnesses are uniformly unqualified to testify. Indeed, if its new witness was no more qualified to testify than its first (Michelle Words), then the Homeowners submit that, if there was an absence of prejudice here, it is the Bank that was not prejudiced by the striking of the new witness.

Nor does *voir dire* of the witness during trial without proper discovery and investigation resolve the lack of advance notice as the Bank claims in its Brief.[54] Such cross-examination will not be as fruitful without the proper background information, even if the witness is exceedingly forthright. If the Bank's position were sound, then there would never be a need for disclosure. *See Binger v. King Pest Control*, 401 So. 2d 1310, 1314 (Fla. 1981) ("Requiring reasonable compliance with a pretrial order directing witnesses' disclosure will help to eliminate surprise and avoid trial by 'ambush.'").

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[54] Initial Brief, p. 12.

Next, the Bank argues that the Homeowners somehow possessed "alternatives" they did not take.[55] But this argument fails on its face because the Homeowners began diligently preparing for trial as far back as November 2011 (over two years before the trial even occurred) when they propounded their pre-trial interrogatories[56] and requests for production[57] on the Bank. And, as the Bank readily admits in its brief,[58] the Homeowners deposed the individual they were told would be the Bank's trial witness. Thus, it was the Bank who stymied and obfuscated the trial process and it was the Bank who ultimately paid the price for its actions.

Finally, the Bank argues that dismissing the case without prejudice was somehow "inequitable" when it was the party that disregarded its discovery obligations and willfully failed to comply with trial orders.[59] But since the Bank seeks equity on appeal, it must prove that it actually "did" equity below. *Williamson v. Williamson*, 367 So. 2d 1016, 1018 (Fla. 1979) ("[H]e who seeks

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[55] Initial Brief, pp. 12-13.

[56] Pre-trial Interrogatories, November 23, 2011 (Supp R. 1).

[57] Request for Production Regarding Pre-Trial Evidence, November 23, 2011 (Supp. R. 8).

[58] Initial Brief, p. 9.

[59] Initial Brief, pp. 13-14.

equity must do equity.") (Citations omitted). The Bank, however, did not "do" equity in the trial court. Rather, it obfuscated, evaded, and attempted to thwart the Homeowners' defense of this case.[60] Thus, the trial court did not abuse its discretion when it denied the Bank's motion to continue.

II. The trial court did not abuse its discretion when it excluded the Bank's witness.

A. Each element necessary to exclude the Bank's witness was present below.

In *Binger v. King Pest Control*, 401 So. 2d 1310 (Fla. 1981), the Florida Supreme Court approved of this Court's reasoning in *King Pest Control v. Binger*, 379 So. 2d 660 (Fla. 4th DCA 1980) which opined that ultimate control over witness disclosure made pursuant to pretrial orders is left to the broad discretion of the trial judge and focuses on prejudice in the preparation and trial of a lawsuit. *Binger*, at 1312. And because trial judges are afforded this deference, it necessarily follows that the trial court can exclude testimony of a witness who is

[60] The Bank's argument that the Homeowners would receive a windfall by the delay of a continuance is so patently false that it insults the intelligence of the reader. Obviously, if the Bank is eventually entitled to a judgment, it will make sure to include any interest that would accrue or any insurance or taxes that it might pay, during a continuance. Likewise, if the Bank is entitled to judgment either upon remand or upon filing another foreclosure case, it will include any accrued interest and escrow reimbursements. The point of the judgment will be to make the plaintiff whole without any windfall to either side.

not disclosed in accordance with pretrial orders. *Id*. at 1314. This discretion is guided by four principal factors: 1) prejudice—in the sense of surprise in fact—to the objecting party; 2) the objecting party's ability to cure the prejudice; 3) the calling party's intentional, or bad faith, noncompliance with the pretrial order; and 4) the possible disruption of the orderly and efficient trial of either the case or other cases. *Id*.

Because all four *Binger* factors are present here, the trial court did not abuse its discretion when it struck the Bank's trial witness.

The Bank's actions unduly prejudiced the Homeowners.

The Bank's initial, half-hearted attempt to comply with the third trial order's witness disclosure requirements was to simply state that it would call an undetermined "corporate representative."[61] And when the Homeowners requested the witness's name via an email sent just two days after the Bank served this witness list, the Bank did not respond for almost three weeks—and when it did, all it represented was that it was "working on narrowing the witness names."[62]

When the Bank amended its witness list, it included eight names, none of whom were the trial witness the Homeowners had deposed in accordance with the

[61] T. 4-5.

[62] T. 5.

joint motion to continue the previous trial setting.[63] And importantly, this witness list was served four days before the Bank responded to the Homeowners' request for witness clarification.[64] In other words, when the Bank served its amended witness list, it did not even know what witness it would call since it was "narrowing" its field. If the Bank did not know what witness it would call at that time, there is simply no way the Homeowners could have known—and therefore no way the Homeowners could have prepared for the witness's testimony.

But even more egregious is the fact that none of the witnesses listed was the witness the Homeowners deposed. Not only had the Bank agreed to present its trial witness for a deposition (when faced with the Homeowners' first motion *in limine*),[65] but the parties had gone to the time and expense of actually deposing the witness. The Homeowners were thus "surprised in fact" by the presence of a witness who was ultimately selected the day before the trial[66] and who was not even the witness they had deposed.

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[63] T. 5-6.

[64] T. 5 (Explaining that the Bank responded to the Homeowners' email on January 20th but served its witness list on January 16th).

[65] Order Granting Joint Motion for Continuance, June 28, 2013 (R. 496).

[66] T. 6. The Bank claims that the Homeowners had a month to do a background investigation on the witness (Initial Brief, p. 22). Apparently, the Bank means that the Homeowners should investigate all eight of its "potential" witnesses and that it

There was no ability to cure the prejudice efficiently since the Bank clearly did not intend to comply with the trial orders.

In order for the prejudice to have been cured, the trial court would have had to continue the trial for a second time to allow the Homeowners to conduct an entirely new deposition of an entirely new witness (because the Bank had, by changing witnesses, made the first deposition a pointless exercise). But this would not have cured the prejudice "efficiently" which is what this Court requires when considering the second *Binger* factor:

> Certainly, if prejudice can be cured <u>efficiently</u>, then it should. But the plaintiff takes his own risk in adopting an ambush strategy and should not profit from his own wrongdoing.... The wrongs of the attorney should not harm the innocent defendant who in good faith engaged in discovery and conducted the trial by the rules.

Grau v. Branham, 626 So.2d 1059, 1062 (Fla. 4th DCA 1993). *See also Department of Health and Rehabilitative Services v. J.B.*, 675 So.2d 241 (Fla. 4th DCA 1996)

The Bank clearly did not intend to comply with its discovery obligations or the trial court's orders so a continuance would have been futile. And even if a continuance had been granted and the witness's deposition taken, there was no guarantee that the newly deposed witness would have appeared on the newly

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would have provided all eight for deposition, even though it could not even say which one was the actual witness.

appointed date since "service transfers" were "customary" in the witness's line of work.[67] Therefore, there was no adequate way to efficiently cure the prejudice.

The Bank's witness lists were made in bad faith.

Further, the Bank's witness lists were made in bad faith because they articulated numerous possible witness groups without identifying any witness names or addresses.[68] This was done solely to create the illusion that the Bank was complying with the trial orders when it was not.

And this aversion to full and accurate disclosure actually bleeds over into the Bank's initial brief. Specifically, the Bank represented (without citation to any evidence in the record) that the assertions of its counsel and its "business records" reveal that it did not receive the trial court's order until December 31, 2013 (four days after its witness list was due) and that it filed its first witness list (which did not list a single name) on the same day it received the order.[69]

But its trial counsel never asserted that the law firm received the trial court's order on December 31, 2013. In fact, the Bank's lawyer specifically stated, under penalty of perjury, that December 31st was the day the order was first

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[67] T. 8.

[68] T. 5-6.

[69] Initial Brief, pp. 10, 16-17.

"acknowledged" and that he did not mean to "suggest" or even "imply" that the order was not received prior to that day.[70]

Moreover, the Bank's argument that the trial court must find "serious misconduct" before striking a witness[71] is not an accurate statement of the law. The case it cites (three times) for this proposition actually held that, prior to striking a witness, the trial court should find "serious misconduct" or "a violation of an appropriate court order." *Premark Intern., Inc. v. Pierson*, 823 So. 2d 859, 860-61 (Fla. 5th DCA 2002). Thus, under the very authority cited by the Bank in its brief, the trial court need not find that the party committed "serious misconduct" or other acts worthy of contempt before striking a witness. The court need only find that an appropriate order had been violated. And since the Bank conceded that it violated the trial order,[72] that finding was made below.

The Bank's reliance on *Cooper v. Lewis*, 719 So.2d 944 (Fla. 5th DCA 1998) is also misplaced. In *Cooper*, the appellate court reversed an order striking a witness from the witness list and levying monetary sanctions against an innocent party due to the misconduct of its witness. *Vega v. CSCS Int'l N.V.*, 795 So. 2d

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[70] Verified Motion to Vacate Dismissal, March 1, 2014, ¶ 10 (R. 647).

[71] Initial Brief, p. 15.

[72] T. 11.

164 (Fla. 3d DCA 2001) is also inapposite. It simply holds that the treatment of injuries is not spoliation of evidence. In these cases, despite the Bank's characterization, the courts were not commenting on the severity of the misconduct that merits the striking of a witness, but simply acknowledging that the sanctioned party was not guilty of any misconduct. Here, the Bank has admitted its misconduct—the repeated violation of the disclosure requirements of the trial orders (although it has falsely suggested on appeal that it did not have the opportunity to comply with one of the orders).

The Bank's actions clearly disrupted the orderly and efficient trial of the case since the trial had originally been continued solely so the Homeowners could depose the Bank's witness.

The trial was originally continued so that the Homeowners could take the deposition of the Bank's witness. After undergoing the time and expense of deposing the Bank's witness, the Bank made an eleventh-hour decision to name an entirely different witness for trial.

The Bank implies that this was necessitated by the fact that the note owner changed servicers a month before the court reset the trial.[73] But presumably, all the information to which the previous witness would have testified remained the

[73] *Id*. at 4.

same during the three months before trial would take place, with the exception perhaps of a small amount of additional interest or other fee. Conceivably, those small changes might require a witness to supplement the testimony of its earlier-named witness and that such a supplementary witness may have to be supplied by the new servicer.

But the Bank never explained why the mere change of its servicing agent would require an entirely different third-party witness to testify on its behalf regarding every element of its case. Indeed, an employee from the new servicer would be even further distanced from the recordkeeping policies and practices of the previous servicer than the person who had been deposed.

It is equally, if not more plausible, that the Bank was dissatisfied with the performance of its original witness at deposition and hoped to substitute another. And if it could do so without giving the Homeowners an opportunity to depose or otherwise prepare to impeach the new witness, all the better. But whether the Bank's shell game with its trial witnesses was prompted by strategy or convenience, it disrupted the orderly and efficient conduct of the trial by threatening to force yet another continuance for the same reason that had once before delayed the trial. Worse, the Bank's unilateral actions had made the prior

continuance pointless and squandered the parties' time and money spent deposing the original witness.

Thus, the court's order excluding the witness should be affirmed.

B. The dismissal of the case should also be affirmed under the *Binger* analysis.

The dismissal can be affirmed under the tipsy coachman doctrine.

The Bank's final argument relies heavily on the trial court's alleged failure to consider the factors set forth in *Kozel v. Ostendorf*, 629 So. 2d 817 (Fla. 1983) prior to dismissal.[74] However, before reaching this issue the trial court had to decide whether to strike the Bank's witness—an issue that is controlled by *Binger*. Because each *Binger* factor is present, the trial court did not abuse its discretion when it struck the Bank's only witness.

And since the Bank did not bring any other witnesses to trial (including the one who the Homeowners deposed in anticipation of trial), there was nothing left for the court to do but dismiss the case because the Bank failed to prove a *prima facie* case. *Wolkoff v. America Home Mortg. Servicing, Inc.*, 153 So. 3d 280, 283 (Fla. 4th DCA 2014). But because the dismissal was without prejudice, it had no different effect than if the Bank had simply taken a voluntary dismissal—a tool

[74] Initial Brief, pp. 18-23.

that was available to the Bank and that seems designed for this very situation, especially because the situation was of the Bank's own making.

Therefore, the dismissal without prejudice can be affirmed as the "right result" even if it was perhaps reached for the "wrong reasons" since there is a clear (and quite appropriate) basis in the record for exclusion of the only witness the Bank brought to trial. *See Applegate v. Barnett Bank*, 377 So. 2d 1150, 1152 (Fla. 1979) ("The written final judgment by the trial court could well be wrong in its reasoning, but the decision of the trial court is primarily what matters, not the reasoning used. Even when based on erroneous reasoning, a conclusion or decision of a trial court will generally be affirmed if the evidence or an alternative theory supports it."); *Firestone v. Firestone*, 263 So. 2d 223, 225 (Fla. 1972) ("[T]he findings of the lower court are not necessarily binding and controlling on appeal, and if these findings are grounded on an erroneous theory, the judgment may yet be affirmed where appellate review discloses other theories to support it."); *Direct Oil Corp. v. Brown*, 178 So.2d 13, 15 (Fla. 1965); *Cohen v. Mohawk, Inc.*, 137 So. 2d 222, 225 (Fla. 1962) ("[T]he judgment of the trial court reached the district court clothed with a presumption in favor of its validity. Accordingly, if upon the pleadings and evidence before the trial court, there was any theory or principle of law which would support the trial court's judgment in favor of the

plaintiffs, the district court was obliged to affirm that judgment."); *Chase v. Cowart*, 102 So. 2d 147, 150 (Fla.1958).

This is often referred to as the "tipsy coachman" rule and courts have consistently followed this principle. *See e.g.*, *Green v. First American Bank & Trust*, 511 So. 2d 569, 573 (Fla. 4th DCA 1987); *Poller v. First Va. Mortgage & Real Estate Inv. Trust*, 471 So. 2d 104, 107 (Fla. 3d DCA 1985); *Wassil v. Gilmour*, 465 So. 2d 566, 567 n. 2 (Fla. 3d DCA 1985); *McPhee v. Dade County*, 362 So. 2d 74, 80 (Fla. 3d DCA 1978); *Board of County Comm'rs v. Lowas*, 348 So.2d 13, 16 n. 5 (Fla. 3d DCA 1977); *First Nat'l Bank v. Morse*, 248 So. 2d 658, 659 (Fla. 2d DCA 1971).

That the striking of a single, third party witness, hamstrung the Bank's case is a function of its own trial strategy based on convenience.

But perhaps the most appropriate reason for affirmance of the dismissal is because the Bank itself tied the trial court's hands. Both the record below and the Bank's actions on appeal evince a complete disdain for procedural and evidentiary rules as well as court orders.

Specifically, the Bank chose, for its own convenience, to bring a single witness to testify about every element of its claim. It chose not to list several witnesses such that each of the various elements of its claim could be addressed by

a witness with personal knowledge of that area of the business. The set of such witnesses with actual personal knowledge would include, for example:

- an employee or manager from the servicer's department that accepts payments to identify and interpret a payment history;
- an employee with hands-on or managerial experience in processing tax and insurance payments from escrow to testify concerning those expenses.
- an employee whose familiarity with acceleration notices comes from actual operational involvement with the customary practices of the division or company that prepares and sends such notices.

It also chose not to bring declarations of such witnesses under § 90.902, Fla. Stat. despite the fact that Florida courts, including this Court, have already suggested this statute as a means for foreclosing banks to meet the hearsay exception requirements. *Holt*, 155 So. 3d at 506; *Mazine v. M & I Bank*, 67 So. 3d 1129, 1132 (Fla. 1st DCA 2011).

Instead, the Bank's deliberate trial strategy was to bring a single witness who it had trained to profess knowledge about all these different areas—the typical "robo-witness" which this court expressly prohibited in *v. Calloway*, __ So. 3d __, 2015 WL 71816 * 7 (Fla. 4th DCA January 7, 2015). It is

the intentional disregard for the age-old prohibition against hearsay testimony (the requirement that testimony must come from a witness with personal knowledge) that informed the Bank's decision to bring only one witness to testify about the many disparate aspects of its foreclosure case. It is this same strategy that informed its thinking that witnesses are fungible and there can be no prejudice to opposing parties in substituting one robo-witness for another. And it is this same strategy that became its undoing when the court struck this solitary, all-encompassing, "omni-witness" after the Bank repeatedly flouted the order requiring what would seem to be a fairly simple task—disclosing the name of this single witness.

Thus, although the Bank was left without a case when the trial court enforced the disclosure provision of its trial order—a result that may seem harsh at first blush—in reality, that outcome is attributable to the Bank's own actions (in placing its entire case on the shoulders of a single omni-witness), not those of the judge. Neither the trial court, nor this Court, should be asked to allow trial orders to be repeatedly ignored with impunity merely because the Bank chose a strategy of convenience that backfired.

To the extent that this Court disagrees, and rules that the dismissal may only be supported as a sanction, rather than the simple failure on the part of the Bank to

prove its case, then it is apparent from the record that the order of dismissal does not address the *Kozel* factors. In that event, the Court should remand for an evidentiary hearing and a written order detailing the trial court's consideration of those factors. *See e.g. Portofino Professional v. Prime Homes*, 133 So. 3d 1112, 1114 (Fla. 3d DCA 2014) (reversing dismissal and remanding for consideration of *Kozel* factors in written order after consideration of the factors).

* * *

In summary, reversing the trial court would require judicial approval of the Bank's actions below and mandates that no reasonable judge would have ever excluded the Bank's witness. But most importantly, reversing the trial court requires an explicit holding that the Bank's argument is correct—that trial orders and rules of procedure and evidence do not apply to it. There was no abuse of discretion and the trial court's order should be affirmed.

CONCLUSION

The Court should affirm the order under review.

Dated: March 23, 2015

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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.

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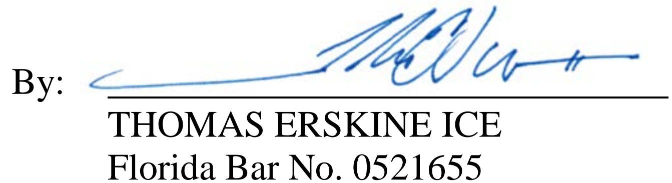
By: 

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CERTIFICATE OF SERVICE AND FILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this March 23, 2015 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 March 23, 2015.

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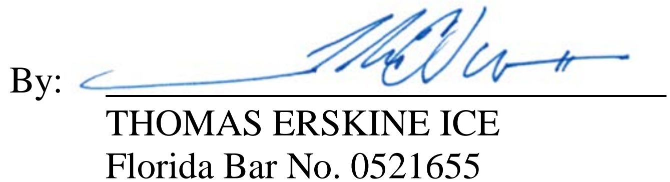
By: 
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