In the District Court of Appeal
Fourth District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted]

[redacted] P.A.,

Appellant/Intervenor,

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

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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 were arranged chronologically in the Appendix filed with the consolidated non-final appeal (Case No. 4D14-2358). Specifically, the pages were re-arranged 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.)__."

For the Court's convenience, this Initial Brief (for Case No. 4D14-1484) will continue to employ the "T(App)." references such that the Appendix will serve both cases, but will also include the appropriate references to the record.

STATEMENT OF THE CASE AND FACTS

I. Introduction

This is a final appeal arising from a sanction imposed by the trial court without an evidentiary hearing.

Appellant/Intervenor, [redacted] P.A. ("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 this appeal from the final judgment entered against him before his death. After his death, the Law Firm intervened in this appeal as a subrogee, having paid the sanction that is the subject of this appeal.[1]

[1] Order of this Court dated December 5, 2014, permitting intervention and consolidating the appeals in Case Nos. 4D14-1484 and 4D14-2358 for all purposes.

I. Appellant's Statement of the Facts

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 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

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[2] Order Setting Residential Foreclosure Non-Jury Trial and Directing Pretrial Procedures, December 5, 2013 (R. 563).

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

[4] Plaintiff's Witness and Exhibit List, served January 21, 2014 (R. 653).

[5] Plaintiff's Amended Witness and Exhibit List, served January 30, 2014 (R. 665).

[6] Plaintiff's Second Amended Witness and Exhibit List, served February 6, 2014 (R. 698).

[7] Defendant, David E. Wodehouse's, Motion for Sanctions and Motion in Limine, served February 10, 2014 (R. 968).

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:

> …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]

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[8] *Id*. at 3.

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

[10] *Id*. at 27 (Supp. R. 27).

[11] *Id*. at 81, 85 (Supp. R. 81, 85).

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 day and that the Law Firm had two other trials in Miami.[13] The court suggested another trial date an additional 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,

[12] *Id*. at 80-89 (Sup. R. 80-89).

[13] *Id*. at 89 (Supp. R. 89).

[14] *Id*. at 91 (Supp. R. 91). 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 (Supp. R. 149-150)).

[15] Transcript of Proceedings Before Judge Frusciante, February 10, 2014, pp. 92 (Supp. R. 92); Order Granting Continuance of Trial dated February 10, 2014 (R. 992).

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?
>
> 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]

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[16] Transcript of Proceedings Before Judge Frusciante, February 10, 2014, pp. 92 (Supp. R. 1).

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

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 before Judge Frusciante and explained that he was prepared to try the case, but that he was still in the midst of morning 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]

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[18] Defendant, David E. Wodehouse's, Notice of Conflict, served February 26, 2014 (R. 987).

[19] T(App). 3, 15; (Supp. R. 127, 139) (*See*, Note About Transcripts for February 27, 2014, p. iv, *supra*.)

[20] T(App). 4; (Supp. R. 128).

[21] T(App). 11-13; (Supp. R. 135-137).

[22] T(App). 9, 11-12; (Supp. R. 133, 135-136).

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 (Judge Frusciante) 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 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 (Judge Frusciante) entered the sanction without an evidentiary hearing.

The Defendant objected to the entry of a sanction without an evidentiary hearing.[26] The court replied that, if the Defendant was insisting on an evidentiary

[23] T(App). 14; (Supp. R. 138).

[24] T(App). 20-21; (Supp. R. 171-172).

[25] T(App). 22; (Supp. R. 173).

[26] T(App). 28; (Supp. R. 142).

hearing, then he would deny the continuance and would expect Mr. Brotman to appear for the trial "forthwith."[27] When Mr. Ackley offered to call the 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."[28] 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.[29] 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.[30] In doing so, Judge Frusciante 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

[27] T(App). 33; (Supp. R. 147).

[28] T(App). 34; (Supp. R. 148).

[29] T(App). 35; (Supp. R. 149).

[30] T(App). 40, 41; (Supp. R. 154, 155).

> 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.[31]

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.[32]

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

The Defendant's motion to strike was heard by a different judge (Judge Breger) who was concerned that it would be inappropriate "to play appellate court for another judge."[33] 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."[34]

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[31] T(App). 40; (Supp. R. 154) (emphasis added).

[32] 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 (R. 1000).

[33] Transcript of Proceedings Before Judge Breger, April 11, 2014, p. 4, 13 (Supp. R. 183, 192).

[34] *Id*. at 10 (Supp. R. 189).

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."[35] He did grant the Defendant a ten day reprieve to pay the fine.[36]

The trial of the foreclosure case took place as scheduled three days later and the court entered judgment against the Defendant. Mr. Wodehouse took this appeal from the judgment in order to challenge evidentiary errors at trial as well as the entry of the sanction order which he had not paid.[37]

The Bank agreed to a stay of proceedings pending the appeal.[38]

E. The Law Firm pays the fine on behalf of Mr. Wodehouse and intervenes in this appeal.

As established in the briefing of the consolidated appeal, a successor judge held both Mr. Wodehouse and the Law Firm in contempt for failure to pay the

[35] *Id*. at 16 (Supp. R. 195).

[36] 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 (R. 1011).

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

[38] Agreed Order on Defendant's Motion to Stay Pending Appeal, May 6th, 2014 (R. 1039).

sanction,[39] over objections that included the fact that the court had not conducted a hearing to determine whether Mr. Wodehouse had the financial means to comply with that order.[40] Because the contempt order did not apportion the sanction between the Law Firm and its client, the effect of the ruling was to compel the Law Firm to pay the sanction itself.

Accordingly, after Mr. Wodehouse's death, the Law Firm sought to intervene in this appeal on the grounds that it had become subrogated to his right to contest the propriety of the Frusciante order.[41] The Court granted invention and consolidated this appeal with the appeal the Law Firm had filed on its own behalf challenging the subsequent contempt order on the grounds that it had recast the Frusciante sanction order as having been levied against the Law Firm.[42]

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[39] Initial Brief of [redacted] P.A. in Case No. 4D14-2358, pp. 12-14 and record citations therein.

[40] *See State, Dep't. of Health & Rehabilitative Servs. v. Maxwell*, 667 So.2d 980 (Fla. 4th DCA 1996) (concluding that trial court failed to make express finding in order that HRS had ability to comply with court's directives).

[41] Motion to Intervene, Motion to Consolidate and Response to Appellee's Motion to Dismiss, dated October 17, 2014.

[42] Order of this Court dated December 5, 2014, permitting intervention and consolidating the appeals in Case Nos. 4D14-1484 and 4D14-2358 for all purposes.

SUMMARY OF THE ARGUMENT

The Bank seeks to have the order requiring payment of its costs construed simply as the price of a continuance that the Defendant voluntarily accepted. However, the transcript establishes that the Defendant never voluntarily agreed to the cost-shifting as a negotiated price 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. 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); *Rivero v. Meister*, 46 So. 3d 1161, 1163 (Fla. 4th DCA 2010).

ARGUMENT

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

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

The Bank 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.[43] 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 pertains to negotiated compensatory payments rather than punitive awards.

Flea Market, however, is inapplicable here for several reasons. First, *Flea Market* pertains to an agreed or negotiated payment of costs as a condition of a continuance. The Third District in *Flea Market* found that the trial court had not abused its discretion in granting a continuance conditioned upon the payment of the attorney's fees incurred by the opposing party due to the delay. Its rationale for

[43] Transcript of Hearing Before Judge Breger, April 11, 2014, p. 13 (Supp. R. 192).

doing so was that the appellant had voluntarily accepted the benefits of the continuance without objection to the adverse portion. *Id*.

Here, neither Mr. Wodehouse, nor his counsel on his behalf, accepted the continuance without objecting to the payment of the costs. When the court first announced that it would grant a continuance, but also enter a "sanction" (the cost of bringing back the witness), defense counsel immediately asked to "proffer into the record" that there had been no "attempt to mislead or obfuscate" and no "intent to cause problems."[44] The court responded, "I am not putting that intent on your side at this point."[45]

Later, when the hearing reconvened, defense counsel again protested that costs were being shifted as a punishment "for something that is truthfully beyond our control and I would ask … at the very least to allow us to have an evidentiary hearing if counsel can't reach an agreement on the amount."[46] Instead, the court responded that the only option was to go to trial:

> 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.

[44] T(App). 22; (Supp. R. 173).

[45] T(App). 22; (Supp. R. 173).

[46] T(App). 28; (Supp. R. 142) (emphasis added).

> 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: …And so, all I am saying is, hey, you've got your continuance, I'll accept your position here and let's watch it in the future but you're going to pay for the witness for coming in today. That's all.[47]
>
> * * *
>
> THE COURT: …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.[48]

At this critical juncture, Defendant's counsel asked to make a phone call to find out if Mr. Brotman could make himself available to try the case. The Bank itself, however, insisted on the continuance:

> MR. ACKLEY [Defendant's attorney]: May I make a call to my office and see what's an option at this point?
>
> 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. …[49]

[47] T(App). 32; (Supp. R. 146).

[48] T(App). 33; (Supp. R. 147).

[49] T (App). 33-34; (Supp. R. 147-148).

Thus, the court never offered the Defendant an evidentiary hearing. The court responded to the request for a hearing with the option of either a sanction (without a hearing) or trial. Even that option was withdrawn before the Defendant could expressly indicate a preference. It was withdrawn even before the Defendant could be advised of his options.[50] Worse, it was withdrawn because, the moment that it became apparent the Defendant might opt for going to trial, 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. Without a voluntary acceptance of the penalty, *Flea Market* is inapplicable.

The court intended the award to be punitive.

Second, the fact that the court intended the award to be punitive contradicts the notion that it was a negotiated cost of the continuance. Here, the transcript establishes that the court intended the order to be a sanction, despite the fact that the handwritten form order does not use that word.

[50] The client's options would have been to pay the Bank's uncapped 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.

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.[51]
>
> * * *
>
> You have a cost. Counsel, I defer on the – on any further sanctions 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.[52]

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.[53]
- …I'll try the case today and that's the solution, there's no costs, there's no sanctions…[54]
- 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. …[55]

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[51] T(App). 20-21; (Supp. R. 171-172) (emphasis added).

[52] T(App). 24; (Supp. R. 175) (emphasis added).

[53] T(App). 28; (Supp. R. 142).

[54] T(App). 28; (Supp. R. 142).

[55] T(App). 43; (Supp. R. 157).

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. 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.[56]

Judge Frusciante's entry of this sanction 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").

Flea Market did not hold that the amount of the award could be unilaterally determined by an opposing party.

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 v. Murphy*, 693 So. 2d 663 (Fla. 3d DCA 1997), the Third District distinguished its own decision in *Flea Market* because "the amount to be paid, $1000, was not

[56] T(App). 40; (Supp. R. 154) (emphasis added).

determined based on any evidence of the costs incurred due to the delay." *Id.* at 666. *See also, Kay v. Kay*, 988 So. 2d 1273, 1276 (Fla. 5th DCA 2008) (the 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).

Flea Market predates Moakley.

Last, but not least, *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.

B. *Moakley* requires a hearing and detailed findings that a party or its counsel was guilty 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 fees as a punishment must be based upon an express finding of 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 those fees. *See also Rivero v. Meister*, 46 So. 3d 1161, 1163 (Fla. 4th DCA 2010). The party 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. And "[a]lthough *Moakley* involved the imposition of fees against an attorney, the procedures described in the case are equally applicable to the assessment of fees against a party." *T/F Sys., Inc. v. Malt*, 814 So. 2d 511, 513 (Fla. 4th DCA 2002).

Additionally, 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).

Here, although the court intended the order to sanction what it thought was improper conduct, the court made no detailed factual findings of any bad faith on the part of the Defendant or his 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."[57]

[57] T(App). 22; (Supp. R. 173).

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 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 neither the Defendant nor his counsel were negligent or reckless in this case, even if they had been, the additional expense to the Bank as a result of the continuance is simply not compensable. And while 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. 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. Nor does the record demonstrate that the Bank did not itself obtain some benefit from the postponement that would have offset the witness expense.[58]

[58] *See,* Letter from the Chair of the Local Rules Committee to the Clerk of the Supreme Court of Florida re: Fifteenth Judicial Circuit's Administrative Order 3.314-4/14, dated December 9, 2014 and now filed in Case No. SC14-2387, acknowledging that the foreclosure backlog may be attributable to "a reluctance of both mortgagor and mortgagee to proceed when it may not be to the economic advantage of either to do so." (excerpt in Addendum); Foreclosure Backlog Reduction Plan for the State Courts System, Recommendations of the Foreclosure Initiative Workgroup, April 10, 2013, p. 16 stating that one of two fundamental problems causing delays is that "plaintiffs do not appear to be inclined to seek disposition of pending foreclosure cases in an expeditious manner." (Available at: http://www.flcourts.org/core/fileparse.php/251/urlt/RecommendationsForeclosureInitiativeWorkgroup.pdf.)

C. The mere fact that the Defendant's counsel 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.[59] 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 accommodation to the Law Firm,[60] 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

[59] T (App) 12; (Supp. R. 136) ("MR. ACKLEY: Absolutely, I anticipated moving forward today, Your Honor.").

[60] T(App.) 30; (Supp. R. 144).

opposed to a day where the conflicts consisted of two other trials and appellate oral argument.[61]

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),[62] it disproves any notion that 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

[61] Transcript of Proceedings February 10, 2014, p. 89 (Supp. R. 89).

[62] T(App). 30; (Supp. R. 144).

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.[63] 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.

Accordingly, even without affording the Defendant an opportunity to bring evidence to disprove the allegations against his counsel, the record demonstrates that there was no impropriety, or even the appearance of impropriety, on the part of the Defendant or his counsel.

[63] 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 (Supp. R. 92-93).

D. The successor judge was 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 the judge to reconsider, interpret or enforce 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,[64] 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.")

If Judge Breger felt compelled to make his own rulings on the motion to strike Judge Frusciante's order, he was also compelled to correct the errors of law in that order. *Raymond, James & Associates, Inc. v. Zumstorchen Inv., Ltd.*, 488 So. 2d 843, 845 (Fla. 2d DCA 1986) ("a successor judge has the obligation to

[64] T(App). 4-6; (Supp. R. 128-130) ("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.").

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 judge was obligated to vacate the order, or at a minimum, provide an evidentiary hearing.

Of course, Judge Breger's opportunity to correct the error was frustrated by the Bank's representation at that hearing 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."[65] As shown above, Judge Frusciante never offered an evidentiary hearing. His response to the request was to threaten a denial of the continuance.[66] Even that option—between a sanction or trial—was withdrawn upon the Bank's own request.

The Bank, therefore, led the successor judge into error. Nonetheless, the court (by way of the successor judge) erred in failing to vacate Judge Frusciante's order and the sanction should be reversed.

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[65] *Id*. at 10; (Supp. R. 189).

[66] T(App). 33; (Supp. R. 147).

CONCLUSION

Judge Frusciante's order granting sanctions must be reversed and the Bank ordered to refund the costs paid by the Law Firm. Having knowingly led the court 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).

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: December 18, 2014

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ADDENDUM

DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA
TALLAHASSEE
32399-1850

December 9, 2014

The Honorable John Tomasino
Clerk of Court
Supreme Court of Florida
500 South Duval Street
Tallahassee, FL 32399-1900

Dear Mr. Tomasino:

Re: AO 3.314-4/14, Fifteenth Judicial Circuit

As you are aware, any member of The Florida Bar who believes that an administrative order promulgated under subdivision (b)(2) of Florida Rule of Judicial Administration 2.215 is a "local rule as defined in rule 2.120, rather than an administrative order, may apply to the Supreme Court Local Rules Advisory Committee for a decision on the question." Fla. R. Jud. Admin. 2.215(e)(2). Thomas Erskine Ice, Esq., a member of The Florida Bar, (now "assisted" by Thomas Hall, Esq., and the Mills firm) has made such an application regarding Administrative Order 3.314-4/14, entered by the Chief Judge of the Fifteenth Judicial Circuit on April 14, 2014.

The Supreme Court Local Rules Advisory Committee has concluded that Administrative Order 3.314-4/14 does amount to a local rule and should be so considered by the Supreme Court of Florida. All six of the eight committee members who were able to participate shared this view.

The petitioner urged us to consider a standing order entered in conjunction with Administrative Order 3.314-4/14 (although not by the Chief Judge), which we have in fact read (and included in Appendix A). While we agree with the Chief Judge that an order entered by another judge, considered alone, does not fall within the language of Florida Rule of Judicial Administration 2.215(b)(2), we believe the contemporaneous, standing order in question illuminates the reach of Administrative Order 3.314-4/14 in important ways.

Both orders are addressed to the backlog of mortgage foreclosure cases that all parties seem to agree exists in the Fifteenth Circuit. At bottom, of course, the backlog can be attributed to a reluctance of both mortgagor and mortgagee to proceed when it may not be to the economic advantage of either to do so. In any event, whether as cause or effect, motions have been filed in mortgage foreclosure cases that, not having been called up for hearing and decision, prevent the foreclosure cases' being at issue and, as a practical matter, prevent the cases from being set for trial.

Administrative Order 3.314-4/14 requires that such motions be set for hearing within ten days of filing, unless otherwise ordered by the judge assigned to the foreclosure division. (The effect on cases in which such motions were filed before the administrative order was entered is not entirely clear.) Administrative Order 3.314-4/14 also provides that such motions shall be deemed abandoned (by the judge assigned to the foreclosure division), if they have not been heard within 90 days of filing.

Administrative Order 3.314-4/14 superseded Administrative Order 3.314-3/14, which deemed such motions denied, rather than abandoned. Petitioner Ice sought a ruling from the Supreme Court Local Rules Advisory Committee on Administrative Order 3.314-3/14, but the Chief Judge entered the present, superseding administrative order, rather than respond to the original petition otherwise, as the Committee had given him an opportunity to do.

After Mr. Ice filed the present petition with the Supreme Court Local Rules Advisory Committee, he filed a petition for review of administrative order under Fla. R. Jud. Admin 2.214(e)(2) in the District Court of Appeal, Fourth District, challenging Administrative Order 3.314-4/14 there in Katz v. Chief Circuit Judge, Fifteenth Judicial Cir., Case No. 4D14-1691. On October 30, 2014, the Fourth District denied the petition for review of administrative order under Fla. R. Jud. Admin 2.214(e)(2) on grounds that the petition did not "demonstrate [Administrative Order 3.314-4/14 was] a departure from the essential requirements of law"; and held that the court did not have jurisdiction to review the divisional standing order; but "without prejudice to an aggrieved party seeking appropriate review of a trial court's

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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CERTIFICATE OF SERVICE AND FILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this December 18, 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 December 18, 2014.

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