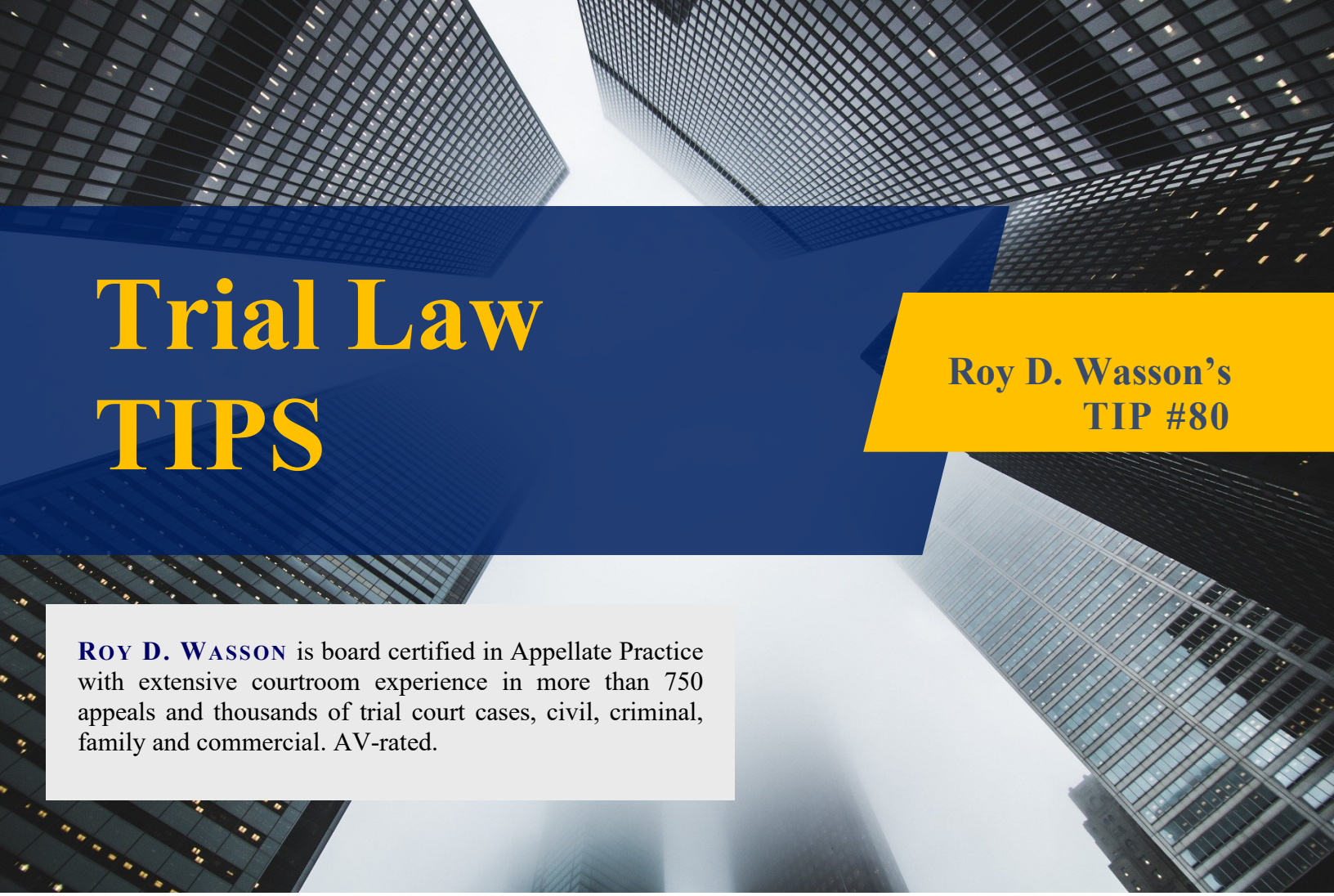

Trial Law TIPS

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Striking Defendant's Pleadings as a Sanction for Obscuring Evidence and Discovery Misconduct

Introduction and Overview

More and more frequently, courts are entering the ultimate sanction of dismissal of plaintiff's cases based upon misstatements in discovery and other circumstances frequently labelled by defense counsel as "fraud upon the court." Although defendants−including manufacturers of defective products, large insurance companies, and other skilled litigants−engage in obstreperous discovery tactics as much or more than plaintiffs, the courts have not been as willing to enter dispositive sanctions such as striking the defendants' pleadings and entering a default on liability. However, in the appropriate case, dispositive sanctions such as those are

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necessary and proper to rectify defense misconduct such as concealment or destruction of evidence, presentation of false testimony, and violation of orders compelling discovery.

This outline, provides the plaintiff's attorney with authorities and arguments for seeking dispositive sanctions (known generically as "death penalty" sanctions, whether entered against defendants or plaintiffs) that will be upheld on appeal.

Death Penalty Sanctions Based on Material Misrepresentations

Where defense counsel makes statements in discovery that documents do not exist or otherwise responds with answers to discovery that seem false, the first order of business is to obtain sworn testimony−either in the form of deposition or answers to interrogatories−embodying the misrepresentation.

The cases are legion in which the appellate courts have upheld orders entering the ultimate sanction against a party who engaged in material misrepresentations under oath. *See Austin v. Liquid Distribs., Inc.*, 928 So. 2d 521 (Fla. 3d DCA 2006) (dismissing complaint for material misrepresentations and omissions in deposition); *Romero v. Harbin*, 876 So. 2d 1 (Fla. 3d DCA 2004) (same); *Long v. Swofford*, 805 So. 2d at 884 (same); *Leo's Gulf Liquors v. Lakhani*, 802 So. 2d at 343 (dismissing complaint for repeated lies under oath concerning issues material to claim and defendant's affirmative defense); *Babe Elias Builders, Inc. v. Pernick*, 765 So. 2d 119, 121 (Fla. 3d DCA 2000)(affirming trial court's order striking defendant's pleadings for "perpetrat[ing] a fraud on the court"); *Metro. Dade County v. Martinsen*, 736 So.2d at 795 (Fla. 3d DCA 1999) (reversing trial court for failing to dismiss case where "the plaintiff gave many false or misleading answers in sworn discovery that either appear calculated to evade or stymie discovery on issues central to her case"); *Figgie Int'l v. Alderman*, 698 So. 2d 563 at 566-68 (Fla. 3d

DCA 1996)(entering default against defendant for concealing evidence and false deposition testimony); *Mendez v. Blanco*, 665 So. 2d 1149 (Fla. 3d DCA 1996)(dismissing complaint for plaintiff's "repeatedly lying under oath during a deposition); *O'Vahey v. Miller*, 644 So. 2d at 551 (dismissal for plaintiff's "repeated lies under oath concerning his personal background and education"). *See also Ramey v. Haverty Furniture Co., Inc.*, 993 So. 2d 1014, 1018 n.2 (Fla. 2d DCA 2008)("striking the defendant's answer and defenses[] may be employed against a defendant who has perpetrated a fraud on the court"); *Tramel v. Bass*, 672 So.2d 78, 83 (Fla. 1st DCA 1996)(affirming trial court's order striking defendant's answer and affirmative defenses as a sanction for defendant's fraud on the court).

Necessity of Violation of Order Compelling Discovery

Trial courts are much more likely to impose death penalty sanctions upon defendants for concealment of evidence and other misconduct where there has been an order compelling disclosure of such evidence that was violated. Fla. R. Civ. P. 1.380(b)(2) provides that "if a party or an officer, director or managing agent of a party fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make . . . ***an order striking out pleadings*** or part of them or staying further proceedings until the order is obeyed, . . . or ***rendering a judgment by default against the disobedient party***." (Emphasis added).

However, it is not absolutely necessary that you catch the defendant in a violation of an order compelling discovery in order to obtain death penalty sanctions. "Although the rule only speaks of a party who fails to obey an order to provide or permit discovery, ***even in the absence of an order that evidence must be preserved or produced, a trial court has the inherent power to impose sanctions*** on a party who destroys evidence or perpetrates a fraud on the court." *Babe Elias*

Builders, Inc. v. Pernick, 765 So. 2d 119, 120 (Fla. 3d DCA 2000).

Where the defendant willfully destroys or conceals evidence, the ultimate sanctions of striking pleadings may well be appropriate even though no discovery order was violated. In *Tramel v. Bass*, 672 So. 2d 78 (Fla. 1st DCA 1996), the plaintiff sought discovery of a videotape of the event that gave rise to the lawsuit, and the defendant produced a tape which it had intentionally altered to delete a damaging segment. The trial court found the alteration of the videotape was an intentional attempt to mislead the plaintiff, the defendant's own attorney and the court. *Id*. at 82. Although no specific discovery order was violated, the trial court held that it had the inherent authority to impose the most severe of sanctions to remedy that fraud upon the court. The First District agreed and affirmed the default judgment and order striking the defendant's answer and affirmative defenses.

Death Penalty Sanctions Based on Attorney Misconduct

The general rule for imposing the most severe sanctions requires some action or complicity by the client, not just attorney misconduct. The Supreme Court has held that a litigant should not ordinarily be "unduly punished" for counsel's actions. *Kozel v. Ostendorf*, 629 So. 2d 817, 818 (Fla. 1993)(cautioning that dismissal based solely on the attorney's misconduct in a manner that unduly punishes the litigant "espouses a policy that this Court does not wish to promote").

However, the Florida Supreme Court "has long recognized the existence of circumstances where it may be appropriate to dismiss a litigant's action based upon an attorneys' neglect." *Ham v.* Dunmire, 891 So. 2d 492, 497 (Fla. 2004). In determining whether the trial court has abused its discretion imposing the most severe of sanctions based on

the actions of counsel, the six factors the court must consider are:

> 1. Whether the attorney's disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience;
>
> 2. Whether the attorney has been previously sanctioned;
>
> 3. Whether the client was personally involved in the act of disobedience
>
> 4. Whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion;
>
> 5. Whether the attorney offered reasonable justification for noncompliance; and
>
> 6. Whether the delay created significant problems of judicial administration.

Ham, 891 So. 2d at 496; *Kozel*, 629 So. 2d at 818.

In short, it will be easier to convince a trial court to impose death penalty sanctions upon a defendant who engages in discovery misconduct, apart from the actions of counsel, but the acts and omissions of counsel may be sufficient if direct involvement by the defendant cannot be established.

Sanctions Based on Dilatory Objections Where Documents Nonexistent

Nothing is more frustrating than a defendant who files multiple objections to producing discovery of all types and ultimately claims that the materials being requested did not exist in the first place. Either the defendant is playing games with the court and needlessly delaying proceedings or has concealed or destroyed the evidence that once existed. In *Continental Cas. Co. v. Morgan*, 445 So. 2d 678 (Fla. 4th DCA 1984), the plaintiff served the defendant with a request for production. The defendant "responded and objected to many of the requests. In due course a hearing was held and the trial

court sustained some objections and overruled others." *Id.* at 679. The defendant filed a petition for certiorari with the district court. *Id.* "In seeking a stay pending the certiorari review, [the defendant] assured opposing counsel and the trial court that, if certiorari was denied, it would comply with the order." *Id.* When certiorari was denied, however, the defendant responded "'None' to all but one of the requests." *Id.* The plaintiff then "filed a motion for contempt and sanctions based upon Florida Rule of Civil Procedure 1.380(b) and the inherent power of the court." *Id.*

The trial court granted the motion for contempt, stating that it found:

> the pattern of behavior of the Defendant . . . in this matter to constitute contempt of this Court and the Defendant's conduct to be an outrageous abuse of the discovery process. Accordingly, this Court imposes upon the Defendant . . . as a sanction, an assessment of reasonable attorneys' fees and reasonable expenses incurred by the Plaintiff for all matters and efforts required of the Plaintiff with respect to the Request to Produce including the Plaintiff's effort with respect to the Defendant's petition for Writ of Certiorari.

Id.

On appeal, the defendant argued that contempt was inappropriate because Rule 1.380(d) did not provide for contempt where the party actually complies with the discovery order, 445 So. 2d at 679, as it ultimately did by responding "None" after certiorari was denied. The plaintiff responded by arguing that the defendant "misled the court when it applied for and obtained a stay of the discovery order on the promise that it would immediately furnish the requested material." *Id.* at 679-80. The Fourth District affirmed, holding that "[u]nquestionably" the trial court found that the defendant had misled it by promising it would produce the records if

certiorari was denied, and that there was an adequate basis in the record for the trial court's actions. *Id.* at 180.

Morgan makes clear that it is improper for a party to object to discovery, only to later respond "none" when its objections are overruled. *Morgan* further makes clear that it is even more improper for a party to seek a stay of a discovery order on the promise that documents exist and will be produced if appellate review of the order is unsuccessful. Finally, *Morgan* provides that, at a minimum, an award of attorneys' fees and costs are justified for all work a party that engages in such a pattern of behavior and discovery abuse causes an opponent to undertake as a result.

The Fourth District has continued to make clear in the years since that it is discovery abuse to object to a request for production, only to respond "none" when the objections are overruled. In *Greenleaf v. Amerada Hess Corp.*, 626 So. 2d 263 (Fla. 4th DCA 1993), the court observed that "[s]uch actions constitute discovery abuses and improper delaying tactics." *Id.* at 264 n.1. The defendant in *Greenleaf* did not seek certiorari review of the order overruling its objections, however, and the appeal itself only involved the premature entry of summary judgment before discovery was completed, using that discovery abuse as an example; the discovery order itself was not a matter disputed on appeal.

Later, however, in *First Healthcare Corp. v. Hamilton*, 740 So. 2d 1189 (Fla. 4th DCA 1999),[1] the court noted that the *Greenleaf* court's comment was dicta, but it "is not dicta here and we affirm that view." *Id.* at 1193 n.2. In *Hamilton*, the plaintiff requested production of various incident reports involving the decedent from a nursing home in discovery. *Id.* at 1192-93. The defendant raised various boilerplate

[1]*Disapproved on unrelated grounds, Florida Convalescent Ctrs. v. Somberg*, 840 So.2d 998 (Fla. 2003) (damages available in wrongful death actions under Chapter 400).

objections that the district court deemed "stonewalling tactics," *id.* at 1193 n.1, and the trial court found were made in bad faith, awarding attorneys' fees and ordering the records to be produced for an *in camera* inspection with a privilege log. *Id.* at 1193. The defendant then filed a notice of compliance, stating "for the first time, that defendant did not have in its possession" any of the requested incident reports. *Id.* The Fourth District held that "such action constituted discovery abuse and improper delaying tactics." *Id.* at 1193 n.2 (citing *Greenleaf*).

Ultimately the plaintiff filed a motion for sanctions, *id.* at 1194, including a request to strike the defendant's pleadings. *Id.* at 1192. While the trial court denied that relief, it did give the jury a pre-emptive instruction that the defendant "was deemed to be on notice that [the decedent nursing home resident] would frequently leave the premises and that upon leaving he was a danger to himself and others." *Id.*

Hamilton also involved the later revelation that, although the defendant responded "none" when ordered to produce incident reports, it actually did have responsive records, *id.* at 1193 & 1194. But what is clear from that case is that the district court determined that the simple act of responding "none" after objecting to discovery was itself discovery abuse and improper delaying tactics. The trial court found that the defendant's "persistent discovery abuse during the course of the case was egregious and, coupled with the obvious prejudice to plaintiff's preparation of his case, justified the imposition of sanctions." *Id.* at 1192. The district court agreed, stating:

> [w]e have no difficulty in concluding that . . . that there was no abuse of discretion. The record shows conduct on the part of the defendant from which the court could fairly and reasonably find that, ***from the outset, the defendant deliberately engaged in a pattern of discovery abuse***. That conduct included making frivolous objections and

> misrepresentations to the court, refusing to comply with both the letter and spirit of the court's orders, and concealing of relevant requested materials.

Id. (emphasis added).

In affirming the pre-emptive instruction imposed by the trial court on liability issues, the district court held "we do not find the sanction disproportionate to the discovery abuse. We not only agree with the court's finding that the conduct was egregious, but we also note that the sanction was well within the ***range of sanctions*** that we think would have withstood successful attack on appeal." *Id.* at 1194 (emphasis added). Thus, *Hamilton* not only confirms that objecting to discovery then responding "none" is discovery abuse, but it also affirms that trial courts have a broad array of sanctions available to punish it and other discovery misconduct, and because the pre-emptive instruction was "well within the range" of sanctions the district court would have affirmed, the trial court could have properly gone further, presumably up to and including striking the defendant's pleadings as requested by the plaintiff.

Sanctions Based on "Playing Games" With the Court

In *HZJ, Inc. v. Wysocki*, 511 So. 2d 1088 (Fla. 3d DCA 1987), the trial court struck a defendant's pleadings and dismissed its counterclaim because it acted in "deliberate and contumacious disregard of the Court's authority by thwarting the discovery process and this Court's Orders requiring the production of documentation and witnesses in this cause." *Id.* at 1089. The trial court found that the defendant "embarked upon and travelled down a path of intentional delay and abuse of the judicial system in clear violation of Florida Rules of Civil Procedure and in particular this Court's Orders." *Id.*

The district court affirmed, agreeing that "the defendant engaged in bad faith 'games playing' with the court and opposing counsel in delaying and thwarting the orderly process of discovery in this cause. The sanctions complained

of were imposed after fair warning to the defendant and were fully justified in the record." *Id.* *HZJ, Inc.* stands for the eminently reasonable proposition that intentional misconduct which thwarts the discovery process and causes delay and abuse of the judicial system amounts to "games playing," justifying the striking of a defendant's pleadings, particularly where the defendant is given fair warning about its conduct.

> "[A] trial court has the inherent authority to impose severe sanctions when fraud has been perpetrated on the court." *Tramel v. Bass*, 672 So.2d 78, 83 (Fla. 1st DCA 1996) (affirming the striking of a defendant's pleadings for a fraud upon the court) (citations omitted). The elements of fraud, of course, are "(1) a false statement of fact [that the Defendant had and would eventually produce records of adverse medical incidents]; (2) known by the defendant to be false at the time it was made [*see* footnote 6, *supra*]; (3) made for the purpose of inducing [one] . . . to act in reliance thereon; (4) action . . . in reliance on the correctness of the representation [the entry of stays and the First DCA's order to show cause]; and (5) resulting damage . . . [to the courts' authority, to the Plaintiffs by a year and a half of delay in trying their case, and the time and expense to their counsel]."

Poliakoff v. National Emblem Ins. Co., 249 So. 2d 977, 978 (Fla. 3d DCA 1971) (citations omitted).

Thus, where a defendant engages in improper games-playing, striking of the pleadings is warranted pursuant to the court's inherent powers "to conduct its business in a proper manner, . . . to protect the court from acts obstructing the administration of justice," *Levin, Middlebrooks, Mabie, Thomas, Mays & Mitchell, P.A. v. United States Fire Ins. Co.*, 639 So. 2d 606, 608-09 (Fla. 1994), "to perform efficiently its judicial functions, [and] to protect its dignity, independence and integrity," *Tramel v. Bass*, 672 So. 2d at 83.

Abuse of Discretion Standard Applies

If your trial judge seems inclined to strike the defendant's pleadings but is afraid of reversal, you can provide the judge with some level of comfort by informing him or her that the ruling on your motion will be subject to a very deferential standard of review. A trial court's "death penalty" order striking pleadings or dismissing a case because of misconduct is reviewed under an abuse of discretion standard of review. *See Ham v. Dunmire*, 891 So. 2d 492, 495 (Fla. 2005).

That standard means that the appellate court must affirm the sanctions imposed unless reasonable persons could not differ with the conclusion that the sanctions selected by the trial court were unreasonable. *Mercer v. Raine*, 443 so. 2d 944 (Fla. 1983).

Evidentiary Hearing Required

If the defendant contests any of the factual basis for your motion to strike pleadings, it will be necessary to conduct an evidentiary hearing to establish those facts. In *Medinas v. Florida East Coast Ry.*, 866 So. 2d 89 (Fla. 3d DCA 2004), the plaintiff brought a personal injury action alleging that an accident caused injuries to his left knee and back. Following discovery, the defendant moved to dismiss the plaintiff's complaint on the grounds that he had repeatedly lied under oath concerning prior workers' compensation claims, a prior motor vehicle accident, and prior medical and psychological treatment. A hearing was conducted at which the court heard arguments regarding the motion for sanctions. At that hearing the plaintiff requested an opportunity to conduct an evidentiary hearing. That request was denied and the trial court found that the plaintiff "gave false, misleading and incomplete answers during discovery of such severity that he [had] committed a fraud upon the court." *Id*. at 90. The court dismissed the

plaintiff's claim with prejudice. However, on appeal, that order was reversed.

The Third District held that, "due to the severity of dismissal as a sanction, it should only be employed in extreme circumstances . . . and only after the plaintiff has been given fair notice and an opportunity to be heard." *Id*. (citing *Sklandis v. Walgreen Co.*, 832 So. 2d 942, 943 (Fla. 3d DCA 2002)). The court explained that, although the plaintiff received fair notice of the hearing, "under the circumstances, the court abused its discretion by imposing the ultimate sanction without first taking the additional step of granting Medina's request for an evidentiary hearing, so as to give him the opportunity to appear in person and possibly explain the discovery violations which were the basis for the dismissal." *Id*.

Because the imposition of death penalty sanctions requires "clear and convincing evidence of a scheme calculated to evade or stymie discovery of facts central to the case," such a motion for sanctions "will almost always require an evidentiary hearing." *Bologna v. Schlanger*, 995 So. 2d 526, 528 (Fla. 5th DCA 2008).

In planning for such an evidentiary hearing, it should be noted that affidavits ordinarily are not admissible in evidence because they are hearsay. *E.g., Roggemann v. Boston Safe Deposit & Trust Co.*, 670 So. 2d 1073, 1075 (Fla. 4th DCA 1996)(over objection, a trial court cannot rely on affidavits at an evidentiary hearing since they are hearsay).

Attorneys become accustomed to relying upon affidavits at many hearings, such as summary judgment hearings. Affidavits are admissible in summary judgment proceedings because there is an express rule of civil procedure permitting them to be used. Even though many of us frequently use them in other types of hearings where no objections are raised, in any evidentiary hearing before a trial judge the rules of evidence apply just as they do before a jury. Therefore, you will be required to call your witnesses to testify

live to establish the facts warranting imposition of death penalty sanctions.

Specific Factual Findings of Misconduct Required

When the court rules in your favor on a motion for death penalty sanctions, make certain that the order contains specific findings of fact. Reversal is required when a trial judge dismisses a case because of misconduct, without making requisite and express findings of fact:

> The dismissal of an action based on the violation of a discovery order will constitute an abuse of discretion where the trial court fails to make express written findings of fact supporting the conclusion that the failure to obey the order demonstrated willful or deliberate disregard.

Ham v. Dunmire, 891 So. 2d 492, 495-96 (Fla. 2005).

The best example of a trial court's findings of fact that will support striking a defendant's pleadings is the trial court's order quoted verbatim in *Figgie Int'l v. Alderman*, 698 So. 2d 563 (Fla. 1997), a case handled by the speaker.

Watch What You Ask For– You Just Might Get It (and Lose Coverage)

Before filing a motion seeking death penalty sanctions, an attorney should consider the possible effect of winning that motion on the collectability of a judgment entered against the defendant. Where the striking of pleadings is the result of actions by the defendant, as opposed to the actions of insurance defense counsel, the defendant's liability insurance carrier is likely to raise the argument that coverage has been vitiated due to the insured's violation of the "cooperation clause" within the policy.

In *Scott Technologies, Inc. v. Reliance Ins. Co.*, 746 So. 2d 1136 (Fla. 3d DCA 1999), the Third District Court of

Appeal considered the effect on coverage of the insured's misconduct that led to the striking of pleadings affirmed by the Third District in the undersigned's case of *Figgie Int'l., Inc. v. Alderman*, 698 So. 2d 563 (Fla. 3d DCA 1997). After the affirmance of the sanctions ruling, the parties settled for $22 million. *Figgie's* liability insurer then filed a declaratory judgment actions seeking a declaration that it was not obligated to provide coverage for the settlement.

The trial court granted summary judgment on the issue of coverage in favor of Reliance, and that decision was affirmed on appeal as follows:

> In affirming the trial court's final order of summary judgment on the issue of coverage, we need look no further than Judge Goldman's meticulous recitation of Figgie's many willful discovery violations, and his observation that "In the more than thirty- five years that the Court has been on the bench and engaged in the practice of law, the facts of the present case present the most egregious case of discovery abuse this court has ever seen." *Figgie Int'l*, 698 So. 2d 563, 564. ***When Figgie's intentional discovery fraud caused the entry of the default judgment on liability, Figgie breached its duty of cooperation as a matter of law.*** *See Ramos v. Northwestern Mut. Ins. Co.*, 336 So. 2d 71 (Fla. 1976); *Rustia v. Prudential Property & Cas. Ins. Co.*, 440 So. 2d 1316 (Fla. 3d DCA 1983).[1] In breaching its duty to cooperate, Figgie forfeited any right to coverage that may have existed under its policy with Reliance.

746 So. 2d at 1136 (emphasis added). It should be noted that our entire team of plaintiff's counsel debated the issue long and hard of whether to seek death penalty sanctions against

[1] There is no indication anywhere in the record that Reliance played any role in the discovery abuses or was even aware of them until well after the default judgment was entered.

Figgie. Only after satisfying ourselves that *Figgie* was financially secure enough to satisfy a multi-million dollar judgment did we proceed with the sanctions motion.

If you do decide to proceed with a motion for death penalty sanctions notwithstanding the possibility that insurance coverage will be lost, it may be helpful to attempt to establish the knowledge and complicity of insurance defense counsel engaged by the liability insurer. If the insurer itself is engaged in the actions that lead to death penalty sanctions, that would be an argument against the loss of coverage through non-compliance by the insured with the cooperation clause of the policy.

Proof of Prejudice Where Discovery Ultimately Provided

Frequently in proceedings seeking death penalty sanctions, the discovery being sought miraculously appears on the eve of the evidentiary hearing in which the court is expected to strike the defendant's pleadings. The plaintiff will undoubtedly be met with the argument that death penalty sanctions cannot be imposed because the plaintiff has not been prejudiced by the delay in obtaining discovery. However, it is possible to establish the requisite level of prejudice from the fact of delay alone.

In *Garlock v. Harriman*, 665 So. 2d 1116 (Fla. 3d DCA 1996), the trial court struck the defendant's pleadings in numerous consolidated asbestos cases due to a mere delay in compliance with discovery orders rather than presentation of false testimony or destruction of evidence. Although the Third District reversed the ruling as to those cases that had not yet been set for trial, it affirmed the death penalty sanction as to those cases which were set for trial.

Another case providing ammunition for death penalty sanctions where the discovery was ultimately provided is *Kranz v. Levan*, 602 So. 2d 668, 669 (Fla. 3d DCA 1992). In that case, the appellate court affirmed dismissal where the

"plaintiffs withheld for years other vital documents which, when finally produced, irreparably prejudiced the defendants from obtaining from third parties vital documents in the case."

Although there are cases containing language that death penalty sanctions always require prejudice to the party seeking sanctions, there are cases upholding such sanctions even without actual prejudice. For example, in *Tramel v. Bass*, 672 So. 2d 78 (Fla. 1st DCA 1996), the First District affirmed the striking of the defendant's pleadings based upon the intentional alteration of a videotape. The plaintiff could not have been prejudiced at all from the defendant's alteration of the evidence, because the plaintiff already had obtained an unedited copy of the tape from another source. Although the plaintiff could not have been misled by the alteration of the evidence, the most severe of sanctions was warranted to remedy the fraud upon the court. *Id*. at 82.

Similarly, in *U.S. Fire Ins. Co. v. C&C Beauty Sales, Inc.*, 674 So. 2d 169 (Fla. 3d DCA 1996), the court affirmed a default based upon persistent false denials that a document existed and refusals to produce it, even though the defendant finally produced the document. In short, the more egregious the defendant's misconduct, the less showing of prejudice that should be required to support death penalty sanctions.

Establishing Prejudice Where Discovery Never Provided

Defendants engaging in discovery misconduct usually argue that death penalty sanctions are too severe because the material that would have been provided was relatively unimportant to the case and the prejudice to the plaintiff is too insignificant to warrant severe sanctions. The argument against that position should be that the court cannot accept the defendant's representation concerning the harmlessness of the discovery misconduct. Instead, the court should presume the relevance of the withheld discovery and the harm caused to the plaintiff.

In *Wm. T. Thompson Co. v. General Nutrition Corp*., 593 F. Supp. 1443 (C.D. Cal. 1984) the court made findings that documents destroyed by GNC "were relevant, at a minimum, to Thompson's defenses and counterclaims" and concluded that the "destruction resulted in prejudice to Thompson," holding that "GNC's conduct ***creates a presumption that the missing data would have permitted Thompson to prove the . . . claims*** that lie at the heart of its complaint." *Id*. at 1455 (emphasis added).

Likewise, in *Telectron, Inc. v. Overhead Door Corp*., 116 F.R.D 107, 133 (S.D. Fla. 1987), the Court stated that "the bad-faith destruction of a relevant document, by itself, "gives rise to a strong inference that production of the document would have been unfavorable to the party responsible for its destruction."

The defendant's unsupported assertion that the destroyed documents would not have materially advanced the plaintiff's case is insufficient to rebut the permissible finding of prejudice from their destruction. The plaintiffs should not have to rely on the assertions of the defendant, who destroyed documents and lied about it. *See In the Matter of the Estate of Soderholm*, 469 N.E.2d 410, 418 (Ill. App. 1984)("Because no one other than the plaintiffs has seen the original [documents], the plaintiffs ask us to simply take their word that they deleted nothing relevant. We decline to do so."). Where "the relevance of and resulting prejudice from the destruction of documents cannot be clearly ascertained because the documents no longer exist . . . [the culpable party] can hardly asset any presumption of irrelevance as to the destroyed documents." *Alexander v. National Farmers Org*., 687 F.2d 1173, 1205 (8th Cir. 1982).

Defendant's arguments of no prejudice are precisely the kind of "Catch-22" and "Gotcha!" tactics repeatedly and strongly condemned by the courts. *E.g., Salcedo v. Association Cubana, Inc.*, 368 So. 2d 1337 (Fla. 3d DCA

1992); *Heimer v. Travelers Ins. Co.*, 400 So. 2d 771 (Fla. 3d DCA 1981).

> [W]e will not tolerate a result which rewards parties for their recalcitrance . . . and which burdens an innocent party seeking discovery and sanctions . . . It is painfully obvious that a party who is, purportedly, to be punished for willful misconduct should not reap benefits from that misconduct.

400 So. 2d at 773.

Conclusion

In summary, death penalty sanctions are available in appropriate cases to strike the pleadings of a defendant who engages in discovery misconduct. In the best possible case, the defendant will be caught lying under oath, violating express discovery orders, caught playing games by objecting to discovery and later claiming that no such documents exist, and engaging in willful misconduct independent of the actions of defense counsel. However, in an appropriate case an order striking pleadings will be affirmed even without one or more of those circumstances being established.

The author of these materials wishes to thank the many members of the Florida Justice Association Appellate Practice Section who have assisted him in compiling these materials including Lincoln Connolly, Barbara Green, Andrew Harris, and John Mills. Remember . . .

Keep Tryin!

Roy