IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT

PETIA B. TENEV, ESQUIRE,

Appellant,

v.

FREDERICK D. THURSTON, D.M.D., THURSTON DENTAL ASSOCIATES, P.A., THURSTON AND ACOSTA DENTAL ASSOCIATES, P.L.,

Appellees.
_____/

CASE NO.:2D14-4566
L.T. Case No. 2011CA-000348

APPELLANT'S AMENDED REPLY BRIEF

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I. APPELLEE'S ANSWER BRIEF IMPROPERLY RELIES ON IRRELEVANT AND ERRONEOUS ALLEGATIONS

The issues for the instant appeal, as stated in the Appellant's Initial Brief were: did the Judge below abuse his discretion when he granted sanctions while failing to make adequate findings of fact; did the Judge below abuse his discretion when he granted sanctions based upon the events surrounding a request to strike a juror for cause; and did the Judge below abuse his discretion by assessing sanctions by failing to apply the "Lodestar method" and failing to specify how Appellant's conduct required counsel for Appellee to perform extra work? As argued in the Initial Brief, the Appellant believes the Judge below indeed abused his discretion in these matters. As explained below, the Appellant further contends that the Appellee's Answer Brief fails to overcome her arguments.

Regarding the lower Court's failure to make specific findings of fact to support sanctions, the Appellees rely primarily[1] upon language from the Order Granting in Part Plaintiffs' Motion for Sanctions (hereinafter referred to as the "Order") stating:

> [The Court] specifically finds that her bad faith conduct leading up to, during and even subsequent to the Jury Trial which began on May 5, 2014, and which

[1] Appellees apparently concede that the Appellant's inadvertent failure to silence her cellular telephone during the May 6, 2014 hearing was "not central" to their argument. Answer Brief of Appellees, p. 35

> mistried on May 6, 2014, reflects an intentional, consistent, deliberate, and contumacious disregard for this Court's authority. In particular, the conduct of Defendants' counsel pertaining to her May 6, 2014, request to disqualify a juror for cause after the jury was sworn on May 5, 2014, well establishes her unethical and willful disregard of or gross indifference to the authority of the Court. As clearly reflected in the transcript, in the history of this case, and as asserted in Plaintiffs' Motion for Sanctions, Ms. Tenev's actions, including her admitted dishonesty to the Court's direct questioning, mandates sanctioning.

[R. at Page 701-703].

This paragraph, however, in no way makes specific findings, instead relying on generic language such as "bad faith conduct"; "intentional, consistent, deliberate, and contumacious disregard"; and "unethical and willful disregard". While this language is descriptive, it is **not** specific in such a manner as to make appellate review possible. The Appellant therefore urges that the decision below be reversed.

Perhaps because the Appellees lack specific examples of concrete findings in the Order, the bulk of the Answer Brief contains irrelevant and/or erroneous allegations. For example, the Appellees cite Appellant's "continuous reargument of settled matters"[2] which is clearly irrelevant to this appeal as such alleged reargruments appear nowhere in the Order. The Appellees also refer to a prior proceeding before the Honorable Judge Hofstad which ended in a *sua sponte*

[2] Answer Brief of Appellees, p. 8. See also Answer Brief of Appellees, p 9.

mistrial[3]. Again, this previous bench trial was not referenced in the Order under consideration here, and indeed is irrelevant to the question at hand, given that Judge Hofstad ordered the mistrial without any request from the Appellant.

Regarding the mistrial in the instant case, it remains the Appellant's opinion that this mistrial was unnecessary. Alternate jurors were available, and the parties were prepared to proceed to trial. Principles of judicial economy would suggest that proceeding with the trial would have been advisable.

Appellees point to Appellant's filing of a Suggestion of Bankruptcy for Defendants as support for the Order[4]. This too must be rejected as irrelevant as it was not referenced in the Order, and in fact it is a proceeding in an entirely different Court which occurred after the non-jury and jury trials, and Dr. Acosta has a right to file for bankruptcy.

The Appellees allege a "cover up", alleging that "Attorney Tenev, contrary to her oath, engaged in artifice and false statement to obscure her conduct and that of others which was prejudicial to the judicial process"[5]. The Appellees go on to state that this prejudiced the integrity of the jury and mandated a mistrial. Again, this allegation is nowhere to be found in the Order. As noted in the Appellant's Initial Brief, the mistrial was completely avoidable. Further, this allegation assumes facts not brought into evidence, and the Appellant respectfully submits

[3] Answer Brief of Appellees, p. 9.
[4] Answer Brief of Appellees, p. 15.
[5] Answer Brief of Appellees, p. 18.

that the language used does not rise to the level of professionalism expected by this tribunal. Given the above, the Appellant respectfully requests that this court reverse the Order.

Turning to the question of whether the Judge below abused his discretion by failing to apply the Lodestar method and failing to specify how Appellant's conduct required counsel for Appellee to perform extra work, Appellant has already argued that the Judge below did abuse his discretion in this matter. Specifically, Appellant argues that Appellees seek, and the Judge below granted, fees and costs which are beyond the scope of the Order and the alleged misconduct.

The relevant portion of the Order states that "Plaintiff's are awarded all reasonable attorney's fees and costs incurred for preparation for and attendance at the Jury Trial on May 5 and 6, 2014, together with the necessary prosecution of the Motion for Sanctions. " However, as argued in Appellant's Initial Brief, the Court below awarded fees and costs incurred by the Appellees for activities irrelevant to these matters, including bankruptcy research, meetings with their client and witnesses, work done in the preparation for the non-jury trial, pre-trial conferences, and fees for witnesses who were supposed to testify during the non-jury trial only.

While Appellant's Answer Brief argues that the lower Court correctly applied the Lodestar method, it fails to make any argument that fees and costs awarded for

these irrelevant and superfluous legal activities were justified under the terms of the Order. The Appellant therefore respectfully submits that these fees and costs are indeed improper, and therefore requests that this Court reverse the subject Order.

In closing, the Appellant would like to note to this Court that Appellees list various irrelevant reasons for the Judge to award such outrageous sanctions. For example, Appellees reference an (unspecified) bench mistrial, successive motions to disqualify judges, "frivolous" appeals, re-argumentation of issues, interruptions of the trial judge, evidence proffers, and bankruptcy filings[6].

However, since none of these events are mentioned in the Judge's Order, they are irrelevant. Nevertheless, since Appellees found it appropriate to go on for number of pages, in a very derogatory and disrespectful manner, regarding these irrelevant matters, the Appellant feels obligated to provide some response without having to write a full blown appeal regarding the underlined case. Therefore, the Appellant believes that her closing argument provides the most succinct explanation of her position of the matters that took place before Judge Durrance:

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>
> 4 Your Honor, Mr. Mullins' report says that he
> 5 recommends that each partner restore their capital

[6] Answer Brief of Appellees, p. 34.

account deficit by contributing, respectively, Dr. Thurston $10,124 and Dr. Acosta $79,133. The truth is that that is not based on the contract or on the law. That 79,000 is called capital gain restoration and also qualified income offset, and that is covered by 26 CFR 1.704-1, which says clearly that upon a dissolution no partner is required to restore that capital gain to the account unless the contract provides for it, and there is no such provision in the contract that provides for that.

So what Mr. Mullins is saying is that he just feels that's what should be done, but that's not based on the law or on the contract. The law is clear. 1.74-1, 26 CFR, says that no partner should restore the capital gain unless the contract has a provision on it for qualified income offset. The contract has no such provision.

So what does that mean? All that means is that 79,000 and the 10,000 for Dr. Thurston, that's a tax

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consequence, and that's exactly what Mr. Mullins is; he's a tax accountant. So he's not -- he doesn't really have any experience with partnerships or LLCs and how they're treated differently. That $79,000 has to be reported by Dr. Acosta separately on his tax returns and he really would just pay more taxes, but by no means does he have to return that to TADA and specifically to -- especially to Dr. Thurston. That's against the law and the contract.

Mr. Mullins goes on. "This will give the partnership sufficient cash to return the $89,644 liability to Dr. Thurston." Now, that's a question. What is this number? Why does TADA owe $89,000 to Dr. Thurston? And my opinion of that is that this is a jury question, and I will address this issue, but with the jury, to prove that actually that $89,000 is incorrect, because what happened was he purchased -- his new company purchased the equipment

19 from TADA in February while this case was pending in
20 litigation, without Dr. Acosta's consent, and then
21 later reclassed that payment when the bank tried to
22 repossess the equipment as if that never happened.
23 The books do show that, but, again, that is a jury
24 question. So I will address that.
25 So I would ask you to not rule on this until

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1 it's all over, because I do intend to prove to the
2 jury that actually the documents that Mr. Mullins
3 looked at are incorrect.
4 Now I'm going to go about his methodology.
5 What he did was, first of all, met with only one
6 party. And he's court-appointed. He has a duty to
7 be neutral, a duty to this Court, to the judge. He
8 never went to the judge and stated, "Hey, I've only
9 met with one of the parties. I've never talked to
10 the other party." He determined his scope of
11 engagement from opposing counsel, Mr. Campbell, and
12 the accountant for Dr. Thurston, Guerry Jones.
13 Again, my client wasn't present there. He only
14 received documents from the opposing side. My
15 client was never involved on what documents
16 Mr. Mullins was reviewing.
17 Now, when we go to the lab bills, again, that
18 is a jury question about the lab bills, but I am
19 just going to mention briefly that what he did was
20 like, "Hey, why don't you just send me some
21 representative lab bills," and, "Yeah, okay, those
22 look good." So he really didn't look at all the lab
23 bills. He just trusted that Ms. Barbara Scott,
24 which is the -- I guess the financial person that is
25 in charge at TADA that works for Dr. Thurston, to

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1 just send him 10 or 15 invoices and he thought, oh,
2 yeah, I feel that's fine, that looks good.

He trusted the taxes completely, although there are numerous mistakes on them, which I will prove during the jury trial when we bring Mr. Guerry Jones, who actually did prepare those taxes, that those taxes are filled with mistakes, especially they do not list the assets correctly, and also the partnership distribution, the 50/50 percent which should be, which is not.
Then he looked at the annual production compensation sheets. Really he just looked at the last one, which was in 2010. That's all he did. In my cross-examination, he did testify to that, that that's all, really, what he did, and he looked at the last number, trusted it, and said, "Yeah, I feel that that number should be restored."
But the law is against that. The law says that that capital account deficit should not be restored unless there is a provision in the contract specifically addressing that, and there is no such provision.
So really what needs to happen is Dr. Thurston should report the $10,000 in his tax return as extra money he made and Dr. Acosta should report that in

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his tax return and that would be the end of that.
Mr. Mullins failed to consider any of the assets of TADA. TADA in 2009 made two point -- about $2.5 million, and somehow that money has disappeared by the end of 2010. And, again, I will address that with the jury since that is a jury question what happened to the assets of TADA, but just the point right now is that he didn't consider any of the assets, only the liabilities. He did not consider the Matsco loan at all and how that should be handled. He did not consider the unpaid distributions to Dr. Acosta. He didn't even look into that, whether Dr. Acosta had any distributions that he was supposed to be paid.
Really what he did was just a substandard job

for this Court. Very one-sided. He did call Dr. Thurston his client. He was not aware, really, of his duty to this Court to be neutral. He only billed the other party until he met with me and I said, "Why are you billing just the one party?" So he started billing us too, but it was too late. He's already -- it's been a year since he submitted his report. Never addressed the issue with the Court, "I've only spoken to one side. Let's do something about this."

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And so his report is one-sided and his conclusion is incorrect. It's just a touchy-feely thing, yeah, I feel that's what happened. Again, I'm telling you that's not what the law says. The law says that there has to be provision in the contract, which it's not in there.

Okay. With the limited evidence that we were allowed to show here to this Court, we did prove some things that were very important. We did prove that Dr. Acosta was ousted. Dr. Thurston admitted to that, that he was the one that made the decision and notified the staff of TADA while Dr. Acosta was not present.

Then also we did show to the Court, at the very least that, Mr. Mullins' work and data is unreliable on many grounds, especially that he was not neutral and he was very much one-sided, billing only one party, and also the information that he looked at, the taxes, do not match the paperwork, and to him that felt like that wasn't alarming, in his cross-examination. He didn't consider any of the assets. He didn't consider, again, the goodwill. I will just include that in my closing argument, although I've promised that I would no longer bring this up. He didn't consider the unpaid

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distributions and he didn't consider the accounts

receivables that were still coming in. He didn't look into see why was TADA paying salaries throughout 2010 while another entity operated at the same building, which is called Thurston Comprehensive Dental Center. He didn't question that. He didn't question to see, hey, is TCDC actually its paying bills through TADA's account. He didn't question that. He didn't question what happened to the patient charts of TADA, which those are assets. He didn't question what happened to the patients of TADA, which, in effect, they were being seen by TCDC and completely transferred, and that's why TADA wasn't really getting any accounts receivables throughout 2010. Okay. Now, additionally, we did show the Court that the patients were not transferred. The patient charts were not transferred. The equipment was not transferred and remained in the building. Another entity took on, created by Dr. Thurston, and continued to operate at the same building. Dr. Thurston actually cancelled the lease for TADA in direct breach of the agreement, because the agreement states that he cannot do that without Dr. Acosta's consent, and he did that while this

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case was pending. And, again, we did show the Court that Dr. Thurston must pay -- must buy out Dr. Acosta half of the assets, because he is a 50 percent owner, so we are asking for this Court to rule that Dr. Thurston has to buy out 50 percent of the assets. And we're not talking about intangible, we're only talking about, since we've discussed that issue, but we're talking about the tangible assets. Fifty percent. We showed you the appraisal which was done exactly at the time of the separation, which shows that there are about $330,000 worth of assets at TADA. So we are asking for the half of

that.
We showed to this Court that Dr. Acosta settled with Matsco and is continuing to make payments, which relieve TADA and Dr. Thurston of any potential liability regarding that loan, although he was also a co-debtor on it and also had an obligation to make that payment.
And I would like to make a specific, as a final thing, a specific objection for the record to let the Court know that actually we did ask for a jury trial and **the Court did deprive us from our constitutional right to a jury.** The case law is

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clear that "When there are jury issues that are sufficiently similar or related to the issues not triable to a jury and where the determination by the first fact-finder would necessarily bind the later fact-finder, such issues may not be tried non-jury by the Court, because to do so would deprive the litigant of his constitutional right to a jury trial." And I'm reading off of *Chenery vs. Crans, 497 So.2d 267*, from the Second District.[7]
Basically what this case says, when the facts are so interrelated, you cannot have a non-jury trial, that everything has to go to the jury. And if -- there is another case that I did find later on. If you're going to do that, you have to have the jury trial first and then the non-jury trial.
So what's really happened right now, **we kind of had a full-blown mini version of the jury trial before Your Honor without the jury being present here**. So we do object to that, and we are saying that Dr. Acosta was deprived of his constitutional right to a jury.
We did -- we are again objecting that you have

[7] Chenery v. Crans, 497 So.2d 267, 11 Fla. L. Weekly 1963 (Fla.App. 2 Dist., 1986)

23 **not ruled on our motion to appoint a receiver**. You
24 stated at the beginning of this that you actually
25 would issue a ruling, and you still haven't done so.

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1 It's been **months and months at this point now that**
2 we are trying to get Your Honor to rule on our
3 motion to appoint a receiver. By failing to rule on
4 it, you have **deprived us of our right to an**
5 interlocutory appeal on that motion and also to
6 argue that in the appellate court.
7 You also **interpreted the contract without the**
8 jury, although you never ruled that the contract was
9 ambiguous, which that was your duty to rule that the
10 contract was ambiguous, and then you could have
11 interpreted the contract. You never held that. You
12 just went on to say goodwill was not an issue.
13 That's just how we feel. We do feel we were
14 deprived, again, of our constitutional right to a
15 jury trial on that issue.
16 That's all I have, Your Honor. Thank you.[8]

[R. at Page 1203-1212].

As noted, the Appellant has at all times relevant to this inquiry striven to zealously represent the interests of her client.

[8] Transcript of Non-Jury Trial Proceedings, Volume III, p. 331-340

Respectfully submitted on February 19, 2015.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 19, 2015, I electronically filed the foregoing with the Clerk of the Court using Florida Courts E-Filing Portal system which will send a notice for electronic filing to **Henry B. Campbell, Esq., Robert Aranda, Esq.** and **William T. McKinley, Esq.** (attorneys for the Thurston Parties), 1701 South Florida Ave., Lakeland, Florida 33803 via e-mail at h.campbell@vcttalawyers.com, r.aranda@vcttalawyers.com, and b.mckinley@vcttalawyers.com.

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I certify that this brief was typed in 14-point Times New Roman font.

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