IN THE SECOND DISTRICT COURT OF APPEAL
LAKELAND, FLORIDA

PETIA B. TENEV, ESQUIRE,

Appellant,

v.

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

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

Appellees.
_____/

ANSWER BRIEF OF APPELLEES

On Appeal from the Tenth Judicial Circuit Court in and for Polk County, Florida

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PREFACE

In this Answer Brief, Appellees, FREDERICK D. THURSTON, D.M.D., individually; THURSTON DENTAL ASSOCIATES, P.A.; and THURSTON AND ACOSTA DENTAL ASSOCIATES, P.L., will be referred to as Plaintiffs, or "Dr. Thurston." Appellant, PETIA B. TENEV, Esq. will be referred to as Appellant or "Attorney Tenev."

Citations to the Record on Appeal will be designated by the letter "R," followed by the volume number of the record, followed by the page number of the document when possible. For added clarity, however, page numbers will be preceded by the letter "p." (e.g. R#-p#).

Citations to the Initial Brief filed by Appellant on or about November 13, 2014 will be designated by the letters IB," followed by the page number of the Initial Brief. Once again, for added clarity, page numbers will be preceded by the letter "p." (e.g. "IB-p#).

STATEMENT OF THE CASE AND FACTS[1]

In this case, Appellant appeals the Final Judgment entered in Dr. Thurston's favor following the trial court's Order Granting in Part Plaintiffs' Motion for Sanctions against Attorney Tenev for her conduct resulting in a second mistrial in this matter. Although the Initial Brief only argues for reversal of the Order and fails to mention the Final Judgment or request its reversal, the Notice of Appeal does reference the Final Judgment. Accordingly, this Answer Brief will answer Attorney Tenev's arguments against the underlying Order, and to the extent this Court applies such arguments to the Final Judgment, will address those arguments as well.

As set forth in this Answer Brief, a trial judge's decision to impose sanctions is considered in light of the trial court's superior vantage point and will not be disturbed unless the record shows no reasonable man could have reached the same determination as the trial court. The record in this matter shows the trial court's

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1 Because Attorney Tenev's Statement of the Case and Facts contains an incomplete and inaccurate recitation of the facts and proceedings, Plaintiffs have elected to supplement Appellant's Statement of the Case and Facts with their own in accordance with Rule 9.210, Florida Rules of Appellate Procedure. Indeed, more unsupported assertions can be found in the facts section of the Initial Brief than actual record facts. As such, Appellant's brief fails to comply with Rule 9.210. See *Island Harbor Beach Club, Ltd. v. Department of Natural Resources*, 471 So.2d 1380 (Fla. 1st DCA 1985).

determinations in the Order and Final Judgment were reasonable, well supported, and should not be disturbed.

In her Initial Brief, Attorney Tenev asserts the Trial Court erred in granting sanctions against her because the trial court judge 1) "abused his discretion…because he failed to make adequate findings of fact;" 2) "abused his discretion…based on the events surrounding her request to strike a juror for cause;" and asserts the lower court erred in determining the amount of the sanction, because 3) the "amount of the attorney's fees assessed is excessive and did not comply with the 'Loadstar [sic] method.'" (IB-pp26,39,41).

The record shows, contrary to Attorney Tenev's arguments, that the "events surrounding" her motion to strike a juror mandated a mistrial and that the trial court made more than sufficient findings based on ample evidence in support of its determinations of sanctions and their amount. The court found Attorney Tenev had violated her oath as an attorney in making three separate mispresentations to the trial court (R6-p954), that she did not instruct her client or respond properly as an officer of the court to her client's and his wife's improper conduct in investigating seated jurors and instructing Attorney Tenev to strike a juror, that she failed to timely, properly, or completely disclose the untoward conduct and circumstances to the trial court, and that she had further wasted court time in reargument of

previously determined matters. (R6-p955). In granting Plaintiffs' Motion for Mistrial, the trial court found that Attorney Tenev's conduct was prejudicial to Plaintiffs. (R6-p956). The court incorporated these findings by reference in further finding that Attorney Tenev's conduct was outrageous, willful, intentional, contumacious, unprofessional, unethical, that such conduct prevented a fair trial, and thus resulted in a mistrial. (R10-p1597). The court further found that Attorney Tenev's conduct throughout the proceedings did not show proper respect for court protocol (R10-pp1594-1595). As to the question of the propriety of the amount of the sanction and the method used to determine the sanction amount, the trial court made specific findings regarding the hours expended, hourly rates and associated costs, and determined they were reasonable. (R11-pp1776-1777; R10-p1654).

These findings and conclusions were fully supported in the record. The superior vantage point of the trial court allowed consideration, not only of Attorney Tenev's admitted misrepresentations (R10-pp1559 -1561) and conduct related to a second mistrial in this matter (R5-pp884-934;R6-pp935-971), but of counsel's actions throughout the litigation.

<u>The Second Mistrial and Related Events</u>

The record of the events leading to the second mistrial shows Attorney Tenev made three distinct representations concerning her basis for requesting the

trial court strike a juror for cause; the first was that she went on Facebook to investigate the juror, the second was that she did not, and the third was that she had tried to do so unsuccessfully. (R5-pp903-904; R5-pp910-911; R6-pp939-940). Attorney Tenev initially represented she went on Facebook herself to investigate the juror, stating "I was on Facebook and I found out" twice. (R5-p904). When the court inquired further, and noted that such action was contrary to the instructions given to jurors, asking Attorney Tenev whether she had been doing her own research into the jurors to make this determination, she apologized in response and said she "wasn't aware" and she "could retract that." (R5-pp904-905). Later, in her second version, Attorney Tenev admitted she was changing her representation to the court from having accessed Facebook to now say she "did not go on Facebook" and that she had moved to strike a juror solely based on her client's wife's representation in a text. (R5-pp907-910). In the third version, Attorney Tenev represented to the court that her research showed "nothing" on the topic in Florida law, that she found opinions from two states suggesting to her that an attorney investigating jurors online was acceptable under certain conditions, and then partially renewed her admission to doing online research of the jurors by stating she had "tried to go on Facebook…[but] just gave it up." (R6-p949).

Ms. Katherine Loh, Defendant Acosta's wife, was a witness under trial

subpoena. (R6-p935). Ms. Loh testified she sent the following text at 7:59 p.m. to Attorney Tenev the evening prior Attorney Tenev's mid-morning motion to strike a juror:

> You can take out Kristen Coker. She is Facebook friends with a hygienist who temps for our Auburndale office.

(R6-pp936-937). The following morning at 7:21 a.m., Attorney Tenev sent a text to Witness Loh to ask "[w]hat is the name of the hygienist?" (R6-p937). Witness Loh responded within minutes. (R6-p937). Later that morning, after further argument before the court, the trial judge announced he was ready to bring the jury in and Attorney Tenev announced "I would like to strike a juror for cause before we do that." (R5-p903). The juror, Ms. Coker, testified that she knew the hygienist but was unaware of any connection with the Defendant. (R6-pp943-945). Defendant Acosta's wife, Ms. Loh, stated she had procured a piece of paper from the Defendant's coat pocket, confirmed with him that it was a list of jurors, and with his knowledge, investigated all of the jurors on Facebook. (R5-pp920-922). She further testified that she had the Defendant confirm the juror's and the hygienist's identities during her investigation, and that the Defendant recommended they tell Attorney Tenev. (R5-pp924-926). She also testified she never talked with Attorney Tenev by phone about the investigation, and had no conversations with anyone except the Defendant regarding her investigation or the

text. (R5-pp928-930). Ms. Loh purged the texts on her phone before she came to court the following morning to give testimony. (R5-pp933-934.)

The trial judge, in granting a mistrial, found that Attorney Tenev's conduct had impaired and impugned the justice system. (R6-956). In addition to the findings listed above, the judge further noted that Attorney Tenev had made three different misrepresentations, violated her oath as an attorney, noted that no attorney should ever conduct herself as Attorney Tenev had, and stated he could not know what the truth was regarding her conduct, or her client's and her client's wife's conduct in investigating the juror and moving to strike her. (R6-pp954-956). The trial judge stated he would have the transcript forwarded to the Florida Bar for its investigation. (R6-pp954-957).

At the sanctions hearing, Attorney Tenev stated that the reason she "wasn't so straightforward was because [she] wasn't sure whether [she] would be infringing attorney/client privilege." (R10-p1561). At no point did Attorney Tenev invoke attorney/client privilege relative to communications with Loh or the motion to strike. The trial court heard argument and reviewed the record regarding Attorney Tenev's conduct leading to the mistrial, including the juror investigation, motion to strike the juror, and her misrepresentations to the court. (R10-pp1574-1583). The trial court also heard argument and reviewed Attorney Tenev's

conduct throughout the history of the case, including re-argumentation of settled issues, successive attempts to proffer on settled issues after assurances from the court regarding preservation, the first mistrial, the disqualifications motions, successive interlocutory appellate filings, and the recent bankruptcy filings on behalf of the Defendants. (R10-pp1556, 1564-1566, 1572). The trial court had access to (R11-pp1723-1742) and referenced the record from the May 6, 2014 proceedings during the sanctions hearing. (R10-p1595). During Plaintiff's counsel's argument at the hearing, Attorney Tenev's phone rang (R10-p1575). The judge noted the incident, that he had not interrupted the proceedings, but stated that the incident was "rude and disrespectful," and noted Attorney Tenev's continuing attitude for protocol was "lackadaisical." (R10-pp1594-1595). The judge further noted that the trial court had provided Attorney Tenev "ample opportunity….to be heard…even…listening to immaterial, irrelevant, already ruled on, res judicata matters, not interrupting [her] but letting [her] be fully heard." (R10-pp1595-1596). The judge again referenced the transcript of May 6, 2014, the record and findings therein in support of his further findings that Attorney Tenev's conduct, finding her behavior as an

> attorney who is an officer of the court was just simply outrageous. It was willful. It was intentional. It was contumacious. It was unprofessional, and it was unethical, and it did, as a result of all of that, it ended, resulted in a mistrial because the Court did make a

finding that there could not be a fair trial.

(R10-p1597*).* The trial court awarded fees and costs to Plaintiffs/Appellees and against Attorney Tenev as a result. (R10-p1597). The Order Granting in Part Plaintiffs Motion for Sanctions included the above findings stating in pertinent part that the trial 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 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.

(R4-p702). The Order further provided the award to Plaintiffs would include "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, against Defendants/Counter-Plaintiffs' counsel, Petia Tenev, Esquire." (R4-pp702-703).

<u>Attorney Tenev's Approach to the Trial Court over the Course of this Matter</u>

Based on the history of this matter, including the first bench mistrial and Attorney Tenev's continuous reargument of settled matters, Plaintiffs' counsel had

requested the trial court's assistance in avoiding a second mistrial in this matter. (R7-p1217). Attorney Tenev's pattern of conduct throughout this matter includes her involvement in the above mistrial, a bench mistrial, continued re-argument of previously ruled upon and settled issues with the trial court, attempted introduction of precluded evidence, motions to disqualify judges, successive appeals, and bankruptcy filings.

Concerning the first mistrial, during a bench trial in 2013 limited to an accounting and related issues before the Honorable Judge Hofstad, Attorney Tenev renewed her argument that the accounting should include testimony regarding the meaning of the term "goodwill." (R12-p1853). Goodwill was not part of the pleadings (R12-1846) and the court had stated there would be no testimony on goodwill (e.g. R12-1848). After substantial further argument, Judge Hofstad stated that any valuation issue would have to be left for the jury trial, and that absent such an approach the case would be mistried. (R12-p1858). Attorney Tenev insisted that if the accounting did not include a valuation of the assets and valuation were left for the jury, that would be a "huge error that would be committed here today. It would impede my ability to appeal, so -- because the law has to be filed on what the winding up is, what a bifurcation is, and what an accounting is." (R12-p1859). The trial judge declared a mistrial. (*Id.*). Attorney Tenev responded "[t]hen we can

do a mistrial and we can start all over again." (*Id.*). Within a week, Attorney Tenev filed a motion to disqualify the trial judge for "age bias against [Defendant's] attorney" (R11-pp1670; 1681). The Honorable Judge Durrance was subsequently assigned the case. (R11-p1707).

Attorney Tenev has challenged the trial court's authority within the courtroom on a number of occasions. In March of 2014, after hearing lengthy argument (R8-pp1495-1528), the trial court granted summary judgment having determined that "the purchase of goodwill…is not part of the separation of the practice." (R2-p394). On May 5, 2014, during the trial court's attempts to complete the non-jury trial, Attorney Tenev renewed her attempts to proffer the live testimony of expert Saxonhouse on the question of goodwill. (R7-pp1141-1193). According to Attorney Tenev, she had "to be allowed to proffer his testimony. Otherwise, I won't be able to appeal it." (R7-pp1143-1144). After the court noted the issue had been determined in a prior summary judgment ruling, was preserved, and stated that goodwill wasn't an issue at this stage in the case (R7-pp1144-1145), Attorney Tenev resumed her argument, stating:

> Actually, he's going to give the value of the goodwill, which that's very important, since that wasn't discussed, and I have to preserve his testimony in order for the appellate court to rule on it. So let's say there's two things that they have to rule on. Did you make an error for excluding the goodwill completely. Then also did you make an error excluding the witness that was going to – the expert witness that was

going to testify.

(R7-p1145). For a second time that day, the trial judge reassured Attorney Tenev the issue of goodwill was preserved for appellate review, and sustained the objection to a proffer of testimony on goodwill. (R7-p.1147). Attorney Tenev inquired "[a]nd if the witness is not available by then, what do we do?" *Id.* The trial court repeated the ruling denying the proffer and noted for the third time that day the issue had been preserved for appellate review. (R7-pp1148-1150). The trial judge informed counsel of a recess, at which point Attorney Tenev interjected that she "would like to make specific objections for the preservation of the record on different issues, especially the way the jury and the non-jury has been determined by Your Honor to proceed." (R7-p1150). The following representative exchange occurred:

> THE COURT: As soon as we can finish the non- jury, I'll allow you all to make your short arguments as to - -
>
> MS. TENEV: And I do have the offer of proof for the other excluded evidence that you excluded. Your Honor, and I have more offer of proof. It's not just Dr. Saxonhouse. You did limit the testimony of my other two witnesses , and I have those questions that they were not allowed to answer, I have the answer for that as an offer of proof, and I also have some of the exhibits that you decided not to include in the evidence . I also would like to offer as proof those, proffer those exhibits.
>
> THE COURT: Okay. We'll try to address whatever it is you've got whenever I come back. Y'all take about 10 minutes or so, and then we'll come back and try to get started.

(R7-pp1151-1152).

Later that morning, as the trial court sought to have closing arguments in the bench trial and get to the jury panel, Attorney Tenev again attempted to proffer, over objection, evidence on the question of goodwill in the form of affidavits which had only been shown to opposing counsel moments earlier. (R7-pp1182-1189). As stated by the trial judge during the course of the argument regarding the propriety of the affidavits, and the repeated attempts to place evidence in the record over the court's prior rulings, "I always want you to be able to proffer the things that you need and want to proffer." (R7-p1186). The trial court then inquired why Attorney Tenev had brought expert Saxonhouse and why she was making an attempt to proffer his testimony despite the previous ruling he could not testify. (R7-p1190). The court inquired:

> THE COURT: Do you remember my ruling?
>
> MS. TENEV: Yes, I do.
>
> THE COURT: What was my ruling?
>
> MS. TENEV: You said that he's not going to be allowed to testify.
>
> THE COURT: Why did you bring him back today? My ruling was I sustained their objection to him testifying because his testimony was limited for the purpose of goodwill, and I had already ruled on goodwill, as I've already explained now again today, and I said that it was res judicata in that case. Why did you bring him back today to try to attempt to bring him back

in?

(R7-p1191). The trial court also reminded Attorney Tenev that it did not need an affidavit on the question of goodwill from expert Johnson, because he had previously testified before the court, and because the court had ruled on the issue of goodwill. (R7-1192). After this series of events, the trial court then specifically found that this attempt was the second time Attorney Tenev had failed to honor the court's prior rulings on an issue, stating:

> THE COURT: So you're again trying to submit something today on an issue this Court has ruled on. So now this is not the first time that you've attempted to do it. Now I 'm finding this is the second time you've tried to do it.
>
> MS. TENEV: Right.
>
> THE COURT: How many times are you going to attempt to put into this case the issue of goodwill whenever this Court has ruled on it?
>
> MS. TENEV: Until you assure me that I have preserved the issue. Then I will no longer try.
>
> THE COURT: Did you not hear me say that for the record today?
>
> MS. TENEV: Yes, today. Today you did that.
>
> THE COURT: Okay.
>
> MS. TENEV: Yes, you did. And I would no longer try, because I preserved. That is my only concern is I don't want to get a decision back from the appellate court saying, well, you failed to preserve the issue, because, to me, that would be devastating.

> THE COURT: We've clearly recognized the issue. It was clearly recognized on March the 27th when I said it was res judicata. So there's really no reason for you to continue to bring that up.

(R7-p1193). Days after these rulings and this lengthy discussion with the trial judge, Attorney Tenev filed expert Curtis Johnson's affidavit in the record in contravention of both the trial court's rulings regarding evidence on goodwill and regarding this specific proffer in particular (R11-pp1710-1715), requiring the filing of a response from Plaintiffs. (R11-pp1743-1754).

Appellant has filed three motions to disqualify judges in this matter. (R11-pp1668-1705; R4-pp640-645; R4-pp654-659). The first, as noted above was filed against Judge Hofstad. (R11-pp1668-1705). The second, which was subsequently amended, was filed against Judge Durrance six days after the second mistrial; both the second and third motions contained an attached affidavit stating the trial judge "intended to file a bar complaint against my attorney." (R4-p643). Judge Durrance noted on the record that he did not file such a complaint and that his instructions that the transcript of the events of May 6, 2014 be forwarded to the Florida Bar for its review was only to fulfill his duty as a judge. (R10-1596).

Attorney Tenev has sought appellate relief and requested that this Court intervene in the trial court's rulings or determinations on three occasions to date; the current appeal, a petition for a writ of mandamus (denied, see Case No. 2D14-

1577) and an appeal of a nonappealable nonfinal order (dismissed, see Case No. 2D14-2571). In the Emergency Petition for Writ of Mandamus and a Request for Stay, Attorney Tenev stated that she "specifically demanded a ruling on the motion" from the trial court but the court ignored her demand. (R3-p407). She requested this Court issue a "writ of mandamus compelling Judge Durrance to rule upon Defendants' Motion to Appoint a Receiver and to compel Judge Durrance to sign and enter his orders within a reasonable amount of time prior to the closing of the case on all pending motions before him." (R3-p409).

Most recently, Attorney Tenev suspended the trial court's ability to complete the matter in the trial court below after the second mistrial by filing a Suggestion of Bankruptcy for Defendants three days prior to the hearing on Plaintiff's Motion for Sanctions, set for June 6, 2014. (R10-pp1556;1596).

Determination of the Sanction Amount

At the hearing to determine the amount of fees and costs, presided over by the Honorable Judge Spoto, the evidence in support of the award of fees and costs included an affidavit with supporting billing records (R11-pp1760-1775), live testimony from a partner involved in performing the work (R10-pp1642-1649), the court file, and live testimony from an expert as to the reasonableness of the hours incurred, hourly rates charged and costs incurred. (R10-pp.1624-1641). The expert

testified that the hourly rates, hours expended, and costs, after a downward adjustment, were reasonable. (R10-pp1624-1630). Robert Aranda, a partner involved in performing the work gave live testimony regarding the hours incurred and costs expended. (R10-pp1642-1649). The judge made specific findings in the hearing that the testimony provided was credible, and that the hours expended, hourly rates charged, and the associated costs, after the downward adjustment recommended by the expert, were reasonable. (R10-p1654). In accordance with these findings, the trial court then entered Final Judgment in favor of Plaintiffs and against Attorney Tenev, and Attorney Tenev timely appealed. (R11-1776-1778). In the Final Judgment, the trial court made specific findings the regarding the reasonableness of attorney's fees and costs incurred, including hours expended, hourly rates and associated costs. (R11-1776-1777). The award of fees and costs included fees and costs incurred for both the preparation for and attendance at the May 5th and 6th jury trial and the necessary prosecution of the Motion for Sanctions. (R11-p1777).

SUMMARY OF THE ARGUMENT

The Order on Appeal, titled "Final Judgment Granting Sanctions Against Counsel Petia Tenev," was entered against Attorney Tenev after the second mistrial in this matter. The grant of the mistrial was due to the prejudice caused to Dr. Thurston by Attorney Tenev. Attorney Tenev ratified her client's and her client's wife's (a subpoenaed witness) improper jury investigation and deceitful motives when she acted on their instructions and cooperated in their scheme to strike a seated juror. She then made three separate and mutually exclusive representations to the trial court concerning her own, her client's, and his wife's conduct and later admitted that at least two of them were not true.

Attorney Tenev's clear strategy since her appearance in this matter has been to delay, obstruct, obfuscate and derail this case by any means possible. The trial court had a superior vantage point from which to view these events over the course of the litigation. However, even with precautions taken by the trial court and counsel to attempt to successfully try this case to conclusion, including a bifurcation to separate issues, two mistrials have occurred in this matter. The motion to strike a juror on the second day of trial after the jury had been sworn was simply another example of Attorney's ongoing campaign and improper tactics. The motive behind the motion to strike is at its clearest in the unvarnished language of

the text itself; “you can take out Kristen Coker.” Once Attorney Tenev received the instruction, she did not falter or ask for clarification. She moved to strike the juror. The motive was clear; change the jury.

Next came the cover up. 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. Based on the three misrepresentations, the actual language of the text, testimony of the Defendants’ involvement in the matter, Attorney Tenev’s prior litigation tactics, the purging of phone records before coming to court, it seems unlikely the actual truth will ever come to light. It was clear, however, that the conduct was intentional and the misrepresentations material. Both prejudiced the integrity of the jury. Under the circumstances, a mistrial was mandatory, and because of the prejudice to Dr. Thurston, sanctions were warranted.

Moreover, the trial court’s award of fees and costs was supported by competent, substantial evidence, showing that that the hours incurred, hourly rate, and costs were reasonable and necessary. In the case at bar, the trial court correctly found Attorney Tenev actions resulted in a mistrial and properly sanctioned her for the resulting attorney’s fees. For these reasons, Dr. Thurston contends the Final Judgment should be affirmed.

STANDARD OF REVIEW[2]

The standard of review of an order granting sanctions for attorney misconduct is abuse of discretion. *Rivero v. Meister*, 46 So.3d 1161, 1163 (Fla. 4th DCA 2010)(citation omitted). An "appellate court must fully recognize the superior vantage point of the trial judge and should apply the "reasonableness" test to determine whether the trial judge abused his discretion." *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980)("discretion is abused only where no reasonable man would take the view adopted by the trial court" *Id.*(citation omitted)). The reasonableness test applies to the discretionary power of a trial judge to impose sanctions. *Mercer v. Raine,* 443 So.2d 944, 946 (Fla.1983). The "trial judge is granted this discretionary power because it is impossible to establish a rule of law for every conceivable situation which could arise in the course of a trial." *Id.* Further, a trial court must be accorded considerable latitude in dealing with serious abuses of the judicial process. *Id.*("[i]f reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion." *Id.)*

Concerning attorney's fees, the "award of attorney's fees is a matter committed

2 Appellant's references to Fla. R. Civ. P. 1.730 (imposition of sanctions related to completion of mediation) as authority are incorrect and the rule is inapplicable in this matter.

to sound judicial discretion which will not be disturbed on appeal, absent a showing of clear abuse of discretion." *DiStefano Constr., Inc. v. Fidelity & Deposit Co. of Md.*, 597 So.2d 248, 250 (Fla.1992).

ARGUMENT

This Court should affirm the Final Judgment entered in favor of Dr. Thurston because the record supports the trial court's express finding of bad faith, supported further by the requisite detailed factual findings of bad faith conduct that resulted in the unnecessary incurrence of attorney's fees. The trial court further made the necessary findings that the hours, rate, and resulting fees and costs in the award amount were both reasonable and necessary. Under the very unique and suspicious circumstances presented, the trial judges (Durrance and Spoto) reasonably exercised judicial discretion to manage the courtroom and to fulfill their obligations to the judicial process, the jury, and the injured party in this matter. As set forth above, this Court must give due consideration to a trial judge's superior vantage point in making the discretionary determination to sanction an attorney for her bad faith conduct. In this matter, despite Attorney Tenev's arguments, protestations, and quite inaccurate personal account, her pattern of conduct since her appearance in this litigation has been intended to delay, obstruct, and derail this case. The prejudice on the second day of the jury trial below mandated a mistrial, and the record fully supports the trial court's findings and sanctions against her. As noted previously, the "facts" asserted in support of Attorney Tenev's arguments are in the main, without record support. As stated by this Court, "unsworn

statements do not establish facts." *Arnold v. Arnold*, 889 So.2d 215, 216 (Fla. 2d DCA 2004)(citation and quotation omitted). This Answer Brief is based on the record below and does not directly address the unsupported and erroneous personal narrative provided by Attorney Tenev in her Initial Brief.

In essence, this appeal involves two issues: (1) whether the trial judge properly exercised his authority to protect the judicial process and control the courtroom when he concluded Attorney Tenev's conduct, including her admitted dishonesty to the court, resulting in a second mistrial in this matter, was bad faith conduct that resulted in the unnecessary incurrence of attorney's fees; and (2) whether the award of attorney's fees and costs in the Final Judgment entered against Petia Tenev, Esq. was supported in the judgment and record with sufficient evidence and findings as to a reasonable hourly rate, number of hours expended, and costs incurred. The first two points Attorney Tenev has raised are addressed in the first issue, i.e., whether the attorney's conduct supported sanctions, and the third point Attorney Tenev has raised is limited to the sanctions amount issue which is addressed through a review of the supporting record evidence and findings.

I. THE TRIAL COURT'S IMPOSITION OF SANCTIONS ON ATTORNEY TENEV WAS PROPERLY BASED ON HER MISCONDUCT AND DISHONESTY WHICH RESULTED IN A MISTRIAL AND INCLUDED CONSIDERATION OF HER CONDUCT IN DISREGARD FOR THE COURT'S AUTHORITY THROUGHOUT THE LITIGATION

Attorney Tenev's Initial Brief asserts the trial court erred because it 1) "failed to make adequate findings of fact" and abused its discretion 2) "based on the events surrounding her request to strike a juror for cause." (IB-pp26, 39). These assertions, however, are not supported in the record, and more importantly, avoid the key fact that Attorney Tenev's conduct resulted in the mistrial through her disregard for the trial court's authority, consistent with her expressions of disrespect for the court throughout, her failure to uphold her duty as a court officer, and her express misrepresentations to the trial court.

A party's attorney's deliberate and contumacious disregard of a court's authority provides the court with authority to impose sanctions, including striking a party's pleadings. *Adams v. Barkman*, 114 So.3d 1021 (Fla. 5th DCA 2012)(affirming trial court's sanction in striking pleadings for repeated attempts to interject previously excluded issues in trial. *Id.* at 1023). A trial court may impose sanctions of attorney's fees resulting from an attorney's conduct and intentional false representations to the court. *Lathe v. Florida Select Citrus, Inc*., 721 So.2d 1247, 1247 (Fla. 5th DCA 1998)(upholding imposition of attorneys' fees against an

attorney who lied to the trial court after he failed to appear for a deposition). Trial courts have the inherent authority to impose sanctions of attorney's fees for bad faith conduct. *Moakley v. Smallwood*, 826 So.2d 221, 224 (Fla. 2012); *U.S. Savings Bank v. Pittman*, 80 Fla. 423, 86 So. 567 (Fla.1920). Such sanctions against an attorney for conduct taken in litigation 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 attorneys' fees...predicated on a high degree of specificity in the factual findings."). *Moakley*, 826 So. 2d at 227*; see Hahamovitch v. Hahamovitch*, 133 So. 3d 1020 (Fla. 4th DCA 2014).

A. Attorney Tenev's Behavior, including Her False Statements to the Court, Was the Central Cause of the Second Mistrial

In her Initial Brief, Attorney Tenev argues the trial court "failed to make adequate findings of fact" in granting sanctions against her. (IB-p26). This assertion, however, like much of the Initial Brief, is erroneous. Ample findings were made in support of the sanctions Order. First, the Order Granting in Part Plaintiffs' Motion for Sanctions clearly states the trial 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 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.

(R4-p702). The Order 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, against…Petia Tenev, Esquire." (R4-pp702-703). As can be seen above, the Order expressly references the findings and record facts found in the transcript from the second mistrial, in the history of the case, in Plaintiffs' Motion for Sanctions, and the transcript of the hearing on Plaintiffs' Motion for Sanctions. As found by the judge on the record on the day of the mistrial, the trial court then found Attorney Tenev had violated her oath as an attorney in making three separate mispresentations to the trial court (R6-p954), that she did not instruct her client or respond properly as an officer of the court to her client's and his wife's improper conduct in investigating seated jurors and instructing Attorney Tenev to strike a juror, that she failed to timely, properly, or completely disclose the untoward conduct and circumstances to the trial court, and that she had further wasted court time in reargument of previously determined matters. (R6-p955). The trial court specifically found that Attorney Tenev's conduct was prejudicial to Plaintiffs. (R6-p956). At the hearing on

Plaintiffs' Motion for Sanctions, the court incorporated the findings from the day of the second mistrial by reference in finding the conduct was outrageous, willful, intentional, contumacious, unprofessional, unethical, that such conduct prevented a fair trial, and that the conduct thus resulted in a mistrial. (R10-p1597). The court further found that Attorney Tenev's conduct throughout the proceedings did not show proper respect for court protocol (R10-pp1594-1595). These findings were based on the history and record in this matter demonstrating that Attorney Tenev had 1) violated her oath in lying to the court (R5-pp903-904; R5-pp910-911; R6-pp939-940), 2) failed in her duties as an officer of the court through her participation in the conduct, acting on the conduct and not immediately and fully disclosing the conduct and circumstances to the court, (R5-pp903, 928-930;936-937), 3) a history of failing to respect the trial court and its rulings. (see pp. 8-15, *Supra*). The trial court included detailed factual findings in the Order and the record which describe the conduct that resulted in the unnecessary incurrence of attorney's fees. See *Moakley,* 826 So.2d at 227. Thus, the Order should not be disturbed on appeal.

1. Misrepresentations, Omissions, and Untruths

Attorney Tenev's Initial Brief admits the misrepresentations, calling them "misstatements." (IB-p39). She incorrectly credits herself in the Initial Brief for

having "rectified the statements immediately." (IB-p. 39). Attorney Tenev did not misspeak, the record shows she intended to mislead the trial court. At the very least, her first version intentionally omitted her contact with a subpoenaed witness and other important information related to the motion. The initial statement – that she went on Facebook and found out - was repeated twice under direct questioning from the trial judge (R5-p904). The court then asked Attorney Tenev directly: "you were doing your own research…and discovered that one of these jurors is friends with an employee of your client?" In response, Attorney Tenev did not change her statement, but apologized twice (for going on Facebook) and stated she "wasn't aware." (R5-pp904-905). Later, after opposing counsel's argument in response to the motion and startling revelation, the trial judge asked "[d]o you want to explain for the record just how you came about discovering this last night, Ms . Tenev?," and she responded with the second version, which was that she did not go on Facebook, but had received a text from her client's spouse. (R5-pp907-911). The next "rectification" occurred in the third version unveiled much later in the proceedings that day, when after doing some research on the question, Attorney Tenev argued to the trial court that researching jurors online was acceptable, stating at that point she had actually tried to go on Facebook that morning to look up the name. (R6-p949). It is unclear which of the subsequent two revisions is the

"immediate rectification." She later asserts that she "strove to exercise complete candor" with the trial court at all times. (IB-p.40). At which of the above times was she being completely candid, if any? As stated by the Supreme Court of Florida:

> Attorneys who make misrepresentations to a court create "an erosion of confidence on the part of the judiciary and the public in lawyers' honesty." *Florida Bar v. Corbin,* 701 So.2d 334, 336 (Fla.1997). This Court has found that "[t]here is no more serious impact upon the integrity of our judicial system." *Id.* We reaffirm this assertion today. Lathe's blatant misconduct poses a serious threat to the integrity of the justice system, and cannot be dealt with lightly.

The Florida Bar v. Lathe, 774 So.2d 675, 679 (Fla. 2000). "It takes chutzpah to admit to lying to a court and yet still seek review of an order imposing sanctions." *Lathe v. Florida Select Citrus, Inc.* 721 So.2d 1247, 1247 (Fla. 5th DCA 1998)(denying petition for writ of certiorari of trial court's award of attorney's fees as sanction). An attorney is "first an officer of the court, bound to serve the ends of justice with openness, candor and fairness to all." *Ramey v. Thomas*, 382 So.2d 78, 81 (Fla. 5th DCA 1980); see also *State ex rel. Florida Bar v. Murrell*, 74 So.2d 221, 226 (Fla.1954). "Dishonest conduct demonstrates the utmost disrespect for the court and is destructive to the legal system as a whole." *Fla. Bar v. Head*, 27 So.3d 1, 8–9 (Fla.2010). Dishonesty is prohibited in various provisions of the Rules Regulating the Florida Bar, i.e. Rule 4–3.3(a)(1) (prohibition against knowingly making a false statement of fact or law to a tribunal); Rule 4–8.4(c) (prohibition

from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 4–8.4(d) (prohibition against conduct prejudicial to the administration of justice).

As in *Lathe v. Florida Select Citrus, Inc* above, Attorney Tenev has admitted, on the day of the mistrial, at the sanctions hearing, and in her Initial Brief, that she was not honest with the court. Her justification for lying to the court is that she was engaged in zealous representation and confused regarding the scope of attorney-client privilege related to her client's wife. Her argument, in essence, is that lying to the court is justifiable; however, no authority supports her position. See e.g. *The Florida Bar v. Lathe*, 774 So.2d at 679; *Corbin*, 701 So. 2d at 336.

Regarding the question of privilege, Attorney Tenev has never asserted privilege, and has never asserted that Defendant Acosta's wife is her client. *Southern Bell Telephone & Telegraph Co. v. Deason*, 632 So.2d 1377 (Fla. 1994)(burden is on party asserting privilege to show a matter is privileged). Furthermore, under the facts herein, no analysis would convey privilege on the communication between witness Loh and Attorney Tenev See *State v. Rabin*, 495 So.2d 257, 260 (Fla. 3d DCA 1986)(privilege protects only those confidential communications which are between an attorney and a "client."*Id.*). There is no

support for her assertion of privilege, she provides no authority to suggest support for her argument, and the facts herein would not support such an argument if it were cogently made. Thus, no heed should be given to statements in the Initial Brief with regard to privilege as an excuse for her misrepresentations.

In this case, the corrosive effect described in the above authority may be seen in the effect Attorney Tenev's untruths had on the trial court's ability to determine her conduct, as well as her client's and his wife's conduct leading up to the mistrial. The second mistrial and the resulting prejudice to Dr. Thurston and the judiciary are the exact reasons such rules and case law prohibit lying to the court. As in in *Lathe v. Florida Select Citrus, Inc.* above, the sanctions against Attorney Tenev were completely justified and should be affirmed. 721 So.2d at 1247.

2. The Gravity of the Circumstances

Attorney Tenev glosses over the serious harm inflicted by the conduct that led to the mistrial, characterizing it as the "events surrounding her request to strike a juror for cause." (IB-p39). Her approach is belied by the record. Simply taking the testimony from the day of the mistrial at face value, and sifting through Attorney Tenev's shape-shifting representations of facts, the following facts and representations are clear from the record:

- the jury had been sworn;
- Defendant Acosta took the names of the jurors home;

- Subpoenaed trial witness and Defendant's wife Loh acquired the names of jury members from Defendant Acosta;
- witness Loh investigated the jury online with Defendant Acosta's knowledge;
- witness Loh and Defendant Acosta verified online the identities of juror Coker and a person who worked at their office and a Facebook connection between them;
- witness Loh texted Attorney Tenev to say "you can take out Kristen Coker;"
- Attorney Tenev acted on the text without verification of any facts it represented;
- there was no basis for the motion - the juror was unaware of any connection with Defendant;
- Attorney Tenev persisted and never withdrew the motion to strike juror Coker;
- Attorney Tenev did not assert she made any inquiry into the necessity or propriety of altering the jury;
- Attorney Tenev did not report the conduct of her client or of her client's wife to the trial court when she came to court;
- Attorney Tenev did not counsel her client Defendant Acosta or witness Loh against their conduct;
- Witness Loh purged the texts on her phone in less than 24 hours and prior to coming to court to testify;
- Attorney Tenev misrepresented her conduct and omitted critical information regarding her client, Defendant Acosta's and witness Loh's conduct in her representations to the trial court;
- Attorney Tenev represented to the trial court that 1) she had researched the juror, that 2) she had not researched the juror or gone online to do so, and that 3) she did go online to research the juror but stopped;

Under the above circumstances, the trial court's action in holding a hearing to determine the nature and scope of the conduct was mandated. *Del'Ostia v. Strasser*, 798 So. 2d 785, 788 (Fla. 4th DCA 2001)(a party's contact with a juror

during trial, even if innocent and purportedly unrelated to the issues in the case, is presumed to prejudice the other party). This mistrial, the wrongful investigation by a party and a witness, the intent to alter the composition of the jury, the misrepresentations and the cover up were all on the record and there for the court to consider in reaching its multiple conclusions of wrongful conduct by Attorney Tenev, her client and a witness as well. *Id.* The gravity of the circumstances were further aggravated, when despite proper effort by the trial judge, the obfuscation of an officer of the court, and perhaps a witness, prevented the trial court from reaching the truth regarding the conduct. See *Lathe v. Florida Select Citrus,* 721 So.2d at 1247*; Corbin,* 701 So.2d at 336.

Attorney Tenev's glib characterization of the conduct as simply seeking to avoid the potential of bias does not hold up to scrutiny. The grave potential of jury tampering is more in keeping with her other conduct in this matter, which has, in the main, obstructed the judicial process and attempted to derail this case. Beyond the trial court's conclusions above, certain minimal inferences are unavoidable from the available facts – Attorney Tenev ratified the egregious conduct of her client and a subpoenaed witness 1) in taking the juror's names home to investigate them, 2) in investigating the jury and the jury's contacts, and 3) in seeking to alter the composition of the jury without justification. The trial court's grant of a

mistrial and its conclusions were in keeping with the gravity of the situation and with the Florida Supreme Court's statement that:

> any attempt to influence the results of jury trials by improper means, or acts which have a tendency to enable a person to make certain the result of a litigated case involving a trial by jury, are justly regarded as acts tending to interfere with the due administration of justice, and are punishable as contempts.

Baumgartner v. Joughin, 105 Fla. 335, 141 So. 185 (1932). Courts routinely, and quite seriously, instruct lawyers and parties to avoid contact with jurors to avoid prejudice. As stated in pertinent part of Rule 4-3.5(d) of the Rules Regulating the Florida Bar, "a lawyer shall not communicate or cause another to communicate with any member of the jury. R. Regulating Fla. Bar 4-3.5(d). Further, as stated by Rule 4-8.4(d) a lawyer shall not "engage in conduct in connection with the practice of law that is prejudicial to the administration of justice." R. Regulating Fla. Bar 84-8.4(d). In these dire circumstances, Attorney Tenev did not attempt to mitigate the damage to the judicial system or ensure that no communication had occurred, but instead intentionally sought to take advantage of the process by changing the composition of the jury while misrepresenting the truth directly to the trial judge. The above authority makes clear Attorney Tenev's conduct was prejudicial to Dr. Thurston, caused a mistrial, and resulted in needless attorney's fees.

B. <u>Attorney Tenev's Conduct and False Statements Continued Her Pattern of Obstructive and Egregious Conduct in this Matter</u>

The second mistrial was not an isolated incident, but the logical outcome of Attorney Tenev's win-at-all-costs approach in this matter. This bizarre event and cover up lies at the end of a trail in this case of delay, obfuscation, trampled authority and bent or broken rules of professional conduct. Since her appearance, Attorney Tenev's posture towards the trial court and the judicial process has been disrespectful, willful and unprofessional. Her actions to evade and frustrate the trial court's authority and the judicial process consist of multiple attempts to derail this case, including a bench mistrial, successive motions to disqualify judges, frivolous appeals, re-argumentation of settled and even unplead issues in this case, interruptions of the trial judge, successive evidence proffers in disregard of the court's rulings, and bankruptcy filings to help her clients avoid the trial court's jurisdiction.

In her Initial Brief, Attorney Tenev has attempted to justify these litigation tactics under a screen of "zealous" representation (IB-pp28,31, 35, 36,47); but time and again, such 'defenses' and repeated arguments have been shown, by this Court's own dismissal of appeals or denial of certiorari, and by the trial court's multiple rulings below, to be without basis.

Consistently, and as can be seen in the record, the trial court was exceedingly patient, giving the benefit of the doubt to Attorney Tenev's hours of

re-argument without squelching or muting Attorney Tenev's ability to argue and act on behalf of her client, even allowing repeated argument suggesting the trial court had erred and the record needed to be preserved. The trial court also repeatedly and patiently explained its rulings, while also endeavoring to move this matter towards eventual resolution. (e.g. R7-pp1141-1193) At the sanctions, hearing the trial judge noted its efforts throughout the proceedings to allow Attorney Tenev to be fully heard even listening to "immaterial, irrelevant, already ruled on, res judicata matters." (R10-pp1595-1596).

Appellant's Initial Brief repeatedly mentions that her cell phone rang during the sanctions hearing, citing it as the main reason sanctions were imposed upon her. (IB 5,6,26,36,37,47). As is clear from Honorable Judge Durrance's comments at the conclusion of the sanctions hearing, while not central, the incident was indicative of Attorney Tenev's pattern of behavior of lack of respect to the court and its officers. (R10-pp1594-1595).

In *Adams* in which the sanctions included striking the pleadings for improper attorney conduct, the trial judge noted he had never been involved in a similar case, with behavior leading to a mistrial including repeated attempts to contest the court's rulings, and further noted the court had given the benefit of the doubt to an attorney the court considered to be acting inappropriately. 114 So.3d at 1023-

1024. Similarly, here, the trial judge here noted that he had never been in such circumstances in 34 years, with three different misrepresentations, and noted the ongoing pattern of Attorney Tenev's reargument of previously ruled on matters as well as the trial court allowing her to be fully heard.

Other incidents and actions are consistent with the overall pattern of obstruction and disregard for the court's authority. As noted on the facts section above, among the examples in the pattern are the bench mistrial due to Attorney Tenev's insistence that the unplead matter of goodwill be considered, in contravention of the court's prior rulings; the motion to disqualify Judge Hofstad days later; the petition for writ of mandamus and request for stay to compel the trial court to appoint a receiver and to sign and timely enter orders; the appeal of the partial final judgment from the bench-tried accounting portion of this matter; subsequent attempts at proffers after the trial court ruled that it would not allow them; filings of such items on the record in contravention of the court's rulings; consistent interruptions of the trial judge and mentions of her plan to appeal; the second mistrial and conduct noted previously; the second and third motions for disqualification of Judge Durrance; and filing bankruptcy for her clients to avoid court authority prior to the sanctions hearing. Consistent with Attorney Tenev's approach to the trial court's authority is her statement in the Initial Brief that she

"feel[s] that the Judge was more concerned with finding wrongdoing on my part…the judge's statements has caused unnecessary stress and humiliation to my client and his wife….[m]y client, his wife, and I…are just looking forward to the appeal of the underlying case, which will address all the issues pertinent to the original case." (IB-p49.).

The trial court had a superior vantage point from which to observe Attorney Tenev's conduct throughout the course of this matter, and especially during the specific events leading to the mistrial. See e.g. *Canakris*¸ 382 So.2d at 1203. The behavior noted above and as reasonably found by the court, required a mistrial and justified the imposition of sanctions. See *Adams*, 114 So.3d 1021; *Moakley*, 826 So.2d at 224; *Lathe*, 774 So.2d at 679.

In summary, Attorney Tenev's conduct causing the mistrial was unethical, deceitful, unprofessional, prejudicial, and sanctionable. As the trial court knew from firsthand observation and interaction, it was part of a larger pattern and practice showing willful disrespect to the trial court's authority, and it was well within the trial court's authority to control its courtroom and discipline the attorney before it for such conduct.

II. THE FEE AWARD WAS SUPPORTED BY THE EVIDENCE AND THE COURT'S FINDINGS IN THE ORDER AND ON THE RECORD

Appellant's argument the Fee Award was not supported is incorrect and does not comport with the Final Judgment entered, the transcript of the fee hearing, or the evidence before the trial court. The trial court heard sufficient competent evidence and made sufficient findings to support the award of fees and costs as a sanction of Attorney Tenev. As required by case law on this point (see e.g. *Pridgen v. Agoado*, 901 So.2d 961, 962 (Fla. 2d DCA 2005)(citation omitted), the Final Judgment in this matter contains the hours reasonably expended, the hourly rate, and the costs incurred. (R11-1776-1778); the evidence supporting the findings included testimony from the attorneys who performed the services in the form of live testimony and an affidavit, supporting documentation, and testimony by an expert who considered the *Rowe* factors in making his determination the fees and costs incurred, after a downward adjustment, were reasonable and necessary. (R10-pp1624-1630; 1642-1649;R11-pp1760-1775). The court found the testimony of the expert and testifying attorney credible and awarded fees and costs on that basis. (R10-p1654). Accordingly, the Final Judgment and the record in this matter demonstrate the determination herein was completely and amply supported. See *Kusick v. Kusick*, 944 So.2d 1081, 1083 (Fla. 2d DCA 2006)*(*citing *Sutton v. LeBeau*, 912 So.2d 327, 328 (Fla. 2d DCA 2005)("appellate court can look to the record" if the written order does not contain the requisite findings *Id.*).

Here, the court heard evidence in the form of expert and performing attorney testimony, reviewed an affidavit as to the fees and costs with supporting documentation, reviewed the court file and heard argument of counsel, reduced the award as recommended by the expert, and in the Final Judgment identified the precise hourly rate as well as the amount of hours reasonably expended, finding the resultant fees and costs were reasonable. The evidentiary record, findings of the trial court, both in the Final Judgment and at the hearing, properly supported the award of fees and costs as a sanction against Attorney Tenev. Thus, the trial court's findings and Final Judgment should be upheld on appeal.

CONCLUSION

For all of these reasons, Plaintiffs contend that the Trial Court correctly entered Final Judgment in favor of Plaintiffs and against Attorney Petia Tenev based on sufficient findings and record evidence, fully supporting the decision to enter sanctions and the reasonableness of the amount of such sanctions. Therefore, Plaintiffs respectfully request that this Court affirm.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 2nd, 2015 I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to: PETIA B. TENEV, ESQ., tenevlaw@gmail.com, *Pro Se* Appellant.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this Answer Brief complies with the type-volume limitations set forth in Rules 9.100(1) and 9.210(a)(2), Florida Rules of Appellate Procedure.

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