IN THE SUPREME COURT OF FLORIDA

STACEY ROBINSON, and
ROBERT ROBINSON,
Petitioners,

CASE NO. SC03-1670

v.

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,
Respondent.
_________________________________/

PETITIONERS' INITIAL BRIEF ON THE MERITS

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PREFACE

In this brief the Petitioners, Stacey and Robert Robinson, will be referred to as the Plaintiffs and the Respondent, Nationwide Mutual Fire Insurance Company, will be referred to as Nationwide. The Record on Appeal (R.) will be referred to by volume number (in Roman numerals) followed by the page number. The Appendix to this brief, containing the Fourth DCA's opinion and significant trial court orders entered in the case, will be referred to as (App.).

ISSUES PRESENTED

I. WHETHER THE OPINION OF THE FOURTH DCA FINDING THE 90 DAY WAITING PERIOD IN FLA. R. CIV. P. 1.442 TO RENDER VOID A PROPOSAL FOR SETTLEMENT MAILED A FEW DAYS EARLY, EVEN IF RECEIVED AFTER 90 DAYS, EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE THIRD DCA IN KUVIN v. KELLER LADDERS, INC.?

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STATEMENT OF THE CASE AND FACTS

This case involves the Fourth DCA's opinion quashing the trial court's entry of sanctions (striking of pleadings) against Nationwide for multiple discovery violations, even after the Fourth DCA found that the trial court committed no abuse of discretion by imposing sanctions since "The record is rife with instances of Nationwide's stonewalling tactics and efforts to thwart discovery sought by the Plaintiffs." (App. "A"). Nationwide v. Robinson, 851 So2d 888 (Fla. 4th DCA 2003).

The underlying case involved an automobile accident that went to trial and resulted in a verdict substantially exceeding the Plaintiffs' pre-trial proposal for settlement. (R. I/597-600; App. "B"). Nationwide is the Plaintiffs' uninsured motorist carrier. The tortfeasor, Zuckerman, was an uninsured driver who was highly intoxicated when he rear-ended the Plaintiffs' vehicle and then fled from the scene. The action was filed in 1997. After Nationwide rejected the Plaintiffs' proposal for settlement very early in the case, this has become a protracted and contentious case for the last seven years. It has spawned, so far, nine appellate proceedings including another one presently pending before this court on its merits. [1] The amount of

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[1] Robinson v. Zuckerman & Nationwide, SC03-1100 (certified question on punitive damages); Zuckerman v. Robinson, 4D02-1346 (same punitive damage issue at 4th DCA level); Robinson v. Nationwide, SC03-1670 (the present case before this court involving sanctions against Nationwide); Nationwide v. Robinson, 4D01-4894 (the present case before the 4th DCA involving sanctions against (cont.)

attorney time devoted to the case, after the proposal for settlement was rejected, has been enormous. Likewise for the amount of court time.

The Plaintiffs' proposal for settlement was for $35,000. (App. "B"). Less than 30 days later, Nationwide made a counter-offer of $20,000 without saying anything about the timeliness of the Plaintiffs' $35,000 offer. (See App. "F". p. 5.) The jury's verdict was for $243,900 in compensatory damages. (R. I/597-600). The jury also awarded $250,000 in punitive damages due to Zuckerman's extreme intoxication and subsequent lack of remorse. (R. I/603).

After the verdict, the Plaintiffs moved for an award of attorney's fees pursuant to the proposal for settlement. (R. I/647-48, 658-66). It was then that Nationwide took the position that the proposal was void because the certificate of service showed it was mailed out 84 days after the Complaint had been served on Nationwide, contrary to the 90 day waiting period provided for by Fla.R.Civ.P. 1.442. (R. I/846-49).

The Plaintiffs then sought discovery to show that the proposal for settlement

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Nationwide); Nationwide v. Robinson, 4D01-977 (Nationwide's appeal of fees and costs consolidated with present appeal); Nationwide v. Robinson, 4D01-4557 and Robinson v. Nationwide, 4D01-4556 (two simultaneous appeals after order granting new trial); Nationeide v. Robinson, 4D01-2765 (petition for certiorari from post-trial discovery order); Nationwide v. Robinson, 4D01-4209 (petition for writ of prohibition to disqualify the trial judge after post-trial discovery order). There is also a bad faith action now pending in circuit court on the excess award (case no. CA 02-11281 AE).

was not actually placed in the mail until the week after the date stated on the certificate of service, which would likely have been received by Nationwide after the 90 day waiting period, and that Nationwide had actual notice of the lawsuit being filed at least ten days before it was formally served. (R. I/812-14, 863-70; IV/165-66, 168-69, 177-79, 471-82). The trial court permitted this area of discovery to be pursued. (R. I/844-45).

Nationwide repeatedly resisted and refused to comply with multiple orders of the trial court, even after Nationwide unsuccessfully sought certiorari review (case no. 4D01-2765) and even after the trial court initially entered less drastic sanctions in the form of limited attorney's fees. (R. I/1065-66, 1247-50; App. "D"). At his deposition, Nationwide's adjustor refused to look at his own claims file in order to answer any questions. (R. I/944-52, 957-64). After the trial court denied Nationwide's objections to discovery , Nationwide attempted (post-trial) to recuse the trial judge. (R. I/1182-93). Finally, after several more months of hearings on the same issues that had already been ruled on and after wasting many hours of court time, the trial court's patience wore thin. [2]

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[2] The Plaintiffs' brief filed with the Fourth DCA below spends its first 15 pages setting out a chronology of Nationwide's discovery misconduct, which need not be repeated herein since it is no longer an issue for this court. For ease of (cont.) reference, we have incorporated this portion of the Plaintiffs' district court brief into the Appendix to this supreme court brief, as it has now been noted by both the trial

The trial court granted the Plaintiffs' motion to strike Nationwide's pleadings in response to the motion for attorney's fees as a sanction for Nationwide's unrelenting discovery misconduct. (App. "E"). In that order, the trial court made an express finding that Nationwide exhibited a "deliberate and contumacious disregard of its discovery obligations after the court had ordered discovery." (App. "E").

After a later evidentiary hearing, the trial court entered a detailed order granting attorney fees and costs against Nationwide. (App. "F"). In that order, the trial court found that even though the lawsuit was filed July 17, 1997 but was not formally served on Nationwide until September 3, 1997, Nationwide learned on August 21, 1997 that the suit had already been filed. (App. "F", pp. 1-2). The trial court noted that Nationwide obstructed the Plaintiffs' discovery attempts for over six months. (App. "F" at p. 3). The trial court noted that Plaintiffs' attorneys spent over 630 hours on the case after Nationwide rejected the $35,000 proposal for settlement. (Id. at 3). Nationwide's attorneys billed Nationwide for more than 1,750 hours. (Id. at 12). The trial court noted the case was one of clear liability, clear causation, substantial damages, and that Nationwide was provided with substantial medical documentation before the lawsuit was filed (Id. at 4, 6-7), but Nationwide offered only $5,000 to

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court and the Fourth DCA to demonstrate a pattern of conduct designed to stonewall and thwart the Plaintiffs' attempted discovery. (App. "C").

settle before the suit was filed. (Id. at 5). The trial court also found that Nationwide should forfeit the right to challenge the claim for a contingency multiplier for the same reasons that led to its pleadings being stricken; i.e. its contumacious disregard for the court's numerous discovery orders. (Id. at 17).

A final judgment for attorney's fees and costs was entered against Nationwide in the amount of $444,535. (App. "G"). Nationwide appealed that order to the Fourth DCA as being an abuse of discretion.

The Fourth DCA found that the trial court did not abuse its discretion to enter sanctions against Nationwide after noting that the record was replete with instances of Nationwide's stonewalling tactics and efforts to thwart the Plaintiffs' attempted discovery. (App. "A"; See also App. "C"). However, the Fourth DCA nevertheless quashed the sanctions entered by the trial court based on the reasoning that the proposal for settlement was void on its face (due to the date shown on the certificate of service) and that no amount of misconduct by a party can "breathe new life into a void claim." (App. "A"). With all due respect, that reasoning is not only at odds with holdings from other district courts and from this court, but it emasculates the intent behind the rule of procedure authorizing the striking of pleadings for egregious misconduct and, for the first time ever in Florida jurisprudence, it creates an irrebuttable presumption regarding the date typed into a certificate of service.

SUMMARY OF ARGUMENT

The Fourth DCA's opinion expressly and directly conflicts with the Third DCA in the Kuvin v. Keller case (Point I, infra), as well as with this court in Mercer v. Raine (Point III, infra), as well as with a line of district court cases holding a certificate of service to create a rebuttable presumption rather than a conclusive presumption (Point II, infra).

ARGUMENT

I. WHETHER THE OPINION OF THE FOURTH DCA FINDING THE 90 DAY WAITING PERIOD IN FLA. R. CIV. P. 1.442 TO RENDER VOID A PROPOSAL FOR SETTLEMENT MAILED A FEW DAYS EARLY, EVEN IF RECEIVED AFTER 90 DAYS, EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE THIRD DCA IN KUVIN v. KELLER LADDERS, INC.?

The Fourth DCA below cited and expressly followed its own prior decision in Grip Devl'p., Inc. v. Coldwell Banker Residential Real Estate, Inc., 788 So2d 262 (Fla. 4th DCA 2000), and held that the 90 day waiting period in Fla.R.Civ.P. 1.442 renders void a proposal for settlement that is mailed out before 90 days has elapsed after the defendant is served with the complaint. The Fourth DCA interprets "service" of the complaint as occurring when the defendant receives delivery of the complaint

and summons, but interprets "service" of the proposal for settlement as occurring on the date it was mailed regardless of when it was received. That was also the holding of the Grip case which inspired a vigorous dissent by Judge Farmer (which was later expressly adopted by the Third DCA in Kuvin, supra.).

The majority of the Fourth DCA in Grip expressly rejected the notion that a premature proposal for settlement should be treated any differently than one that is served too late (i.e. less than 45 days before the date set for trial). In his dissent, Judge Farmer noted that the proposal for settlement in that case, although mailed out 87 days after service of process, was apparently received after the 90 day waiting period expired. Judge Farmer opined that the 90 day provision merely imposes a condition precedent to delay settlement offers until after the defendant has a reasonable time to evaluate the claim and its defenses. Judge Farmer cited this court's opinion in Gulliver Academy, Inc, v. Bodek, 694 So2d 675 (Fla. 1997) which held the time limits for serving proposals for settlement are not to be deemed inflexible and can be adjusted by the trial court under appropriate circumstances. Judge Farmer also discussed several other district court cases that considered certain variances from Rule 1.442 to be harmless and insignificant enough so as not to void the proposal for settlement. Judge Farmer noted that the goal behind setting a rigid deadline ending 45 days before trial is completely different than the purpose behind the 90 day waiting

period and that "too early" should not be treated the same as "too late".

Judge Farmer also cited a litany of cases holding premature filings to "remain in limbo" or to be subject to temporary abatement rather than dismissal based on voidness of the premature filing. Judge Farmer noted the illogic of considering a settlement offer to be made before it is received and of allowing a defendant to spring a "catch 22" defense after trial when it is too late for the plaintiff to cure the technical defect by serving the proposal again after 90 days has expired.

The Third DCA has expressly rejected the reasoning of the majority of the Fourth DCA in Grip, supra, and instead has expressly agreed with the dissenting opinion of Judge Farmer in Grip. See Kuvin v. Keller Ladders, Inc., 797 So2d 611 (Fla. 3d DCA 2001). The Third DCA held that a violation of the 90 day waiting period in Rule 1.442 may be considered "a harmless technical violation which does not affect the rights of the parties." Although the Kuvin case involved a defendant who was too early in serving a proposal for settlement, rather than a plaintiff being too early as in the Grip case, the Third DCA stated:

> It is obvious that our approach to the issue is entirely contrary to that of the majority in Grip and entirely in accordance with Judge Farmer's dissent. If this renders us in conflict with Grip, we are pleased to acknowledge it.
> Kuvin, supra at 613.

The Kuvin case, although acknowledging a probable conflict with Grip, was never brought to this court to resolve the conflict. The Fourth DCA has now, in the

present case, reaffirmed its erroneous position in the Grip case and, in doing so, has perpetuated the conflict that exists on this issue between the Third and Fourth Districts. That conflict will apparently continue until it is resolved by this court.

When this case was before the trial court, Nationwide advised the trial judge that the Third District in the Kuvin case was in conflict with the Fourth District in the Grip case, and Nationwide argued that the trial judge was geographically bound to follow the Fourth District's opinion. See Nationwide's Initial Brief filed with the Fourth DCA at p. 20, footnote 8. However, now Nationwide seeks to challenge this court's jurisdiction by arguing there really is no conflict because the Kuvin case involved a defendant who prematurely served a proposal for settlement, whereas the Grip case involved a Plaintiff who prematurely served the proposal for settlement. That is a distinction without a difference, as the Third DCA expressly noted in Kuvin. Fla.R.Civ.P. 1.442 was not intended to apply any differently to a plaintiff than it does to a defendant who prematurely serves a proposal for settlement.

In its original jurisdictional brief, Nationwide also sought to distinguish the Grip case by arguing that in Grip there was apparently some evidence that the prematurely mailed offer of judgment was received after the 90 day waiting period had expired, whereas there is no such evidence here. The reason for that is because Nationwide refused to produce discovery it was repeatedly ordered to produce (such

as, for example, the post-marked envelope in which the proposal for settlement was mailed). Nationwide is now attempting to use the fruit of its own discovery misconduct as a shield against sanctions being imposed.

Nationwide's jurisdictional brief also asserted that the Kuvin case has been "effectively overruled" by this court's recent opinions in Sarkis v. Allstate Ins. Co., –So2d–, 2003 Fla. Lexis 1710, 28 Fla. L. Weekly S740, (Fla. October 2, 2003) and Willis Shaw Express, Inc. v. Hilyer Sod, Inc., 849 So2d 276 (Fla. 2003). That is not accurate. Neither the Sarkis nor the Willis case had anything to do with the time limits for serving a proposal for settlement, nor did either of those cases even mention the Kuvin case or the Grip case.

This conflict between the Third and Fourth Districts should be resolved because the issue can repeatedly arise, it involves the intent behind an important rule of procedure, and because the inter-district conflict will cause uncertainty until it is resolved.

II. WHETHER THE OPINION OF THE FOURTH DCA EXPRESSLY AND DIRECTLY

CONFLICTS WITH DECISIONS FROM OTHER DISTRICTS HOLDING THE DATE PLACED ON A CERTIFICATE OF SERVICE TO CREATE A REBUTTABLE PRESUMPTION OF MAILING ON THAT DATE, RATHER THAN A CONCLUSIVE PRESUMPTION?

Even if the Fourth DCA had properly interpreted and applied the 90 day waiting period, its decision still creates express and direct conflict with a line of cases concerning the type of presumption created by a certificate of service attached to a pleading . Until now, there was no conflict on that issue.

The Fourth DCA below held that the sanction of striking Nationwide's defenses to an award of attorney's fees cannot be allowed here because, according to the certificate of service, the proposal for settlement was not timely served. The Fourth DCA noted that there was a dispute raised about when the proposal was actually mailed, notwithstanding the date stated on the certificate of service. The certificate of service indicates mailing on November 26, 1997 (R. I/846-49; App. "B") which is 84 days after service of process on September 3, 1997. (See circuit court docket sheet entry #12.) That was also the Wednesday before the long Thanksgiving weekend. Plaintiffs sought to prove through discovery that the proposal was not actually mailed until after the Thanksgiving weekend was over, on the first or second day of December. December 2, 1997 was the 90th day after service of process. Plaintiffs also

sought to discover when Nationwide received the proposal for settlement and how it disposed of the post-marked envelope. It was likely received after the 90 day waiting period had expired. The Plaintiffs were also hoping, through discovery, to prove that Nationwide had actual knowledge the lawsuit was filed at least 12 days before it was formally served. The trial court allowed that discovery to be pursued.

The Fourth DCA held that none of that mattered because the courts should not look beyond the date stated in the certificate of service to determine the timeliness of a proposal for settlement. The Fourth DCA stated:

> To do otherwise, as the Plaintiffs suggest, would create uncertainty in the enforcement of the rule. There would be no end to the myriad of factual scenarios presented by litigants to demonstrate timeliness. As we discussed in Grip...we need precise, strictly enforced time requirements...Toward that end, we must have a uniform means by which to measure the timeliness of acts constituting service of offers or demands.

With all due respect, "timeliness" is always a factual issue no matter how precise the time period involved. According to the Fourth DCA, the Plaintiffs here can not be allowed to impugn the credibility of the date typed into the certificate of service to show that the document really was served on a later date. That conclusion is directly contrary to numerous cases holding that a certificate of service on a pleading creates only a rebuttable presumption that the document was mailed on that date. See Abrams v. Paul, 452 So2d 826 (Fla. 1st DCA 1983) (holding that "the presumption raised by

the certificate of service is clearly not conclusive"); Scutieri v. Miller, 584 So2d 15 (Fla. 3d DCA 1991); Jones v. State, 785 So2d 561 (Fla. 2d DCA 2001). Even the Fourth DCA, until now, followed that rule. See Migliore v. Migliore, 717 So2d 1077 (Fla. 4th DCA 1998); Camerota v. Kaufman, 666 So2d 1042 (Fla. 4th DCA 1996). Fla.R.Civ.P. 1.080(f) provides that a certificate of service "shall be taken as prima facie proof of such service." "Prima facie" does not mean "irrebuttable".

Nationwide argues that the cases cited above do not involve a party trying to rebut its own certificate of service, but rather involved a challenge by the opposing party. That argument suggests the presumption created by a certificate of service should be rebuttable for one party, but irrebuttable for another party. No presumption has, to our knowledge, been construed in such a schizophrenic manner. The rule of civil procedure, 1.080(f), does not say a certificate of service is prima facie proof for one party but conclusive for another.

There will always be some factual variations in how this issue arises because a certificate of service must be attached to all types of pleadings. In one case, the issue may arise from a certificate attached to a complaint and in another case it may arise from a certificate attached to an answer. It does not matter. In all cases it creates a rebuttable presumption that can be overcome with other evidence by whichever party seeks to rebut the certificate. The certificate of service is only prima facie proof

and it does not metamorphasize into something else depending on which party seeks to rebut it. Does Nationwide think clerical errors are never made in a certificate of service? A strict construction of the offer of judgment statute does not mean that parties should not be permitted to rebut clerical errors made in pleadings. Suppose the wrong year is inserted in the certificate of service. Should that be irrebuttable?

Nationwide stated in its jurisdictional brief that there was evidence Nationwide's attorney received the proposal for settlement by fax on the date stated in the certificate of service. There was no such evidence presented before sanctions were entered against Nationwide, and even aside from that, the testimony of Nationwide's attorney is simply evidence to be considered along with other evidence. It does not explain Nationwide's refusal to comply with multiple court orders to provide discovery. That is what caused the sanctions to be entered.

Nationwide also argued in its jurisdictional brief that since the proposal for settlement was mailed to Nationwide's attorney rather that to Nationwide's claims adjustor, Nationwide itself did not have any post-marked envelope showing a later date of mailing. Nationwide cannot refuse to produce unprivileged documents ordered to be produced on grounds it would be in their attorney's file rather than the adjustor's file. Nationwide also argued in its jurisdictional brief that the Plaintiffs' attorney never offered sworn testimony as to when the proposal for settlement was

actually mailed. That is because this case was still in the discovery stage when Nationwide was sanctioned. If Nationwide had simply complied with discovery orders and if the matter had eventually come to an evidentiary hearing, as it should have, then of course the Plaintiffs' attorney would have testified and submitted other evidence to rebut the presumption raised by the certificate of service.

By statute in Florida, all presumptions are deemed rebuttable except those that are expressly made conclusive. See §90.301(2), Fla. Stat. (2001). Presumptions that are meant to facilitate litigation are considered "vanishing" or "bursting bubble" presumptions that should disappear once a party has presented credible evidence to contradict the presumption. See §90.302-304, Fla. Stat. (2001). The prima facie presumption raised by a certificate of service is obviously meant to facilitate litigation and is a "vanishing presumption".

This court, in approving the rules of civil procedure, did not intend the date typed into a certificate of service to be conclusive and irrebuttable. The Fourth DCA's holding to the contrary expressly conflicts with the cases cited above. It is also inconsistent with cases from this court holding irrebuttable presumptions to be unconstitutional. E.g. Straughn v. K&K Land Mgt., Inc., 326 So2d 421 (Fla. 1976).

The Fourth DCA has adopted an inflexible rule that would never allow a party to contradict the date typed into a certificate of service attached to a proposal for

settlement no matter how strong the evidence might be that the document was actually mailed on a different date. In this way, although the Fourth DCA's stated goal was to create a bright line rule that would be easy to apply, it now has created conflict and uncertainty as to what types of certificates of service can be rebutted with evidence and what types cannot. Until now, all of them created only a rebuttable presumption. This court should correct the Fourth DCA's departure from that long-standing rule.

III. WHETHER THE OPINION OF THE FOURTH DCA FINDING THAT A TRIAL JUDGE CANNOT STRIKE A DEFENDANT'S PLEADINGS AS A SANCTION FOR DISCOVERY MISCONDUCT WITHOUT FIRST EXAMINING THE VALIDITY OF THE PLAINTIFF'S CLAIM, EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT IN MERCER v. RAINE?

This issue is possibly the most far-reaching from a case management viewpoint.

Although the Fourth DCA's opinion begins by citing this court's decision in Mercer v. Raine, 443 So2d 944 (Fla. 1983), it then goes on to engraft an exception to Mercer that neither this court nor any other court has ever approved. Although stating that the trial court did not abuse its discretion to find Nationwide's conduct sanctionable, the Fourth DCA held that a trial court cannot strike a defendant's pleadings and defenses for misconduct under Fla.R.Civ.P. 1.380 without first

examining the plaintiff's claim to make sure it is not void. No authority is cited to support that conclusion, and it not only conflicts with Mercer v. Raine, but it emasculates the intent behind Rule 1.380.

According to Mercer v. Raine, supra, the issue on appeal is simply whether reasonable persons could differ with the propriety of the action taken by the trial judge in striking defenses as a sanction for a defendant's discovery misconduct. This court in Mercer explained that the trial judge is granted discretionary power because it is impossible to establish rules for every possible sequence of events and types of violations that may occur in the discovery process. This court went on to state that "deliberate and contumacious disregard" of the court's authority will justify application of the severest sanctions, as will "gross indifference to an order of the court." Id. at 946. This court did not mention or carve out any exceptions to that discretionary power of the trial court.

In the present case, Nationwide's stonewalling tactics were calculated to deprive the Plaintiffs of having any chance to prove timely service of their proposal for settlement. After less drastic sanctions proved ineffectual against Nationwide, the trial court finally entered a sanction that went directly to the issue involved in the Plaintiffs' attempted discovery. Nationwide had refused to appear at depositions or produce documents ordered multiple times by the trial court. (See App. "C", "E" and

"F".) Its conduct was absolutely flagrant. The Fourth DCA's holding means that if a defendant is convinced the plaintiffs' claim is time-barred, it has little to lose by refusing to cooperate with any discovery or to comply with court orders, since its defenses cannot possibly be stricken.

In striking Nationwide's defenses to the claim for attorney's fees, the trial court was exercising the discretion granted under Fla.R.Civ.P. 1.380(b)(2)(B) to refuse "to allow the disobedient party to support or oppose designated claims or defenses." Rule 1.380(2)(A)(B) & (C) not only authorizes a trial court to strike a disobedient party's pleadings and refuse to allow that party to oppose designated claims, but also to consider certain facts in issue to be viewed against the position of the disobedient party and to enter a judgment by default.

The trial court found Nationwide guilty of "deliberate and contumacious disregard" and a unanimous appellate panel stated those findings were well supported by the record. (App. "A"). That should have been the end of the appellate inquiry. Instead, the Fourth DCA went on to consider the timeliness of the Plaintiffs' claim for attorney's fees under the offer of judgment statute and rule of procedure. That was error because all defenses were stricken by the trial court, including any defenses going to the timeliness of the claim.

This court noted in Mercer v. Raine that to justify an appellate court's reversal

of an order striking pleadings as a sanction "it would have to be shown on appeal that the trial court clearly erred in its interpretation of the facts and the use of its judgment." Id. at 946. That is because the inherent powers of the court to perform its judicial functions and to protect its dignity and independence necessarily includes the discretionary authority to impose appropriate sanctions. See also Tramel v. Bass, 672 So2d 78 (Fla. 1st DCA 1996).

In Farish v. Lum's, Inc., 267 So2d 325, 327-28 (Fla. 1972) this court also set forth the standard of review stating:

> The exercise of discretion by a trial judge who sees the parties first-hand and is more fully informed of the situation is essential to the just and proper application of procedural rules. In the absence of facts showing an abuse of that discretion, the trial court's decision excusing or refusing to excuse, noncompliance with rules...must be affirmed...It is the duty of the trial court, and not the appellate courts, to make that determination.

In the present case, the Fourth DCA added a new basis for appellate reversal: when a defendant's challenge to the timeliness of a claim might have had merit if it had not been stricken. This court never authorized such a basis for appellate reversal of a trial court's sanction order. Moreover, it would emasculate the purpose of the sanction rule (1.380) to encumber it with such an exception.

Nationwide's pattern of turning the discovery process into an endurance contest created significant problems of judicial administration. The trial court was required

to devote an enormous amount of time for numerous hearings, and to review deposition transcripts and legal memoranda to sort out the recurring source of the discovery problems. Nationwide not only flouted the authority of the trial court, but also significantly increased the Plaintiffs' costs and their attorney's time long after the jury trial was completed, and it was calculated to keep the Plaintiffs from presenting evidence rebutting the certificate of service. After many months of this, the trial court ran out of time and patience and exercised its discretion to do what the rules of procedure expressly authorize.

This court has noted that Rule 1.380 authorizes a dismissal with prejudice for failure to provide discovery even in the absence of a party violating a direct court order. See Wallraff v. TGI Friday's Inc., 490 So2d 50 (Fla. 1986). In the present case, there were multiple court orders ignored by Nationwide prior to its being sanctioned. (See App. "C".)

The timeliness of a claim is a defense that must be affirmatively raised. If a defendant never files an answer or an affirmative defense and is thereby defaulted, that party is hard pressed to argue later that it cannot be defaulted because the plaintiff's claim is untimely, or because the plaintiff has not exhausted some condition precedent. Likewise for a defendant whose defenses are stricken due to discovery misconduct. Once that happens, the timeliness of the plaintiff's claim is no longer an

issue.

The Fourth DCA below expressed concern that the sanction order deprives Nationwide of the right to argue voidness. That is true, and that is what an order striking all defenses inherently does. The threat of such a sanction is supposed to encourage parties not to do what Nationwide did in this case. The Fourth DCA's opinion will embolden parties in litigation to emulate Nationwide's conduct in this case, since they have little to lose.

The Fourth DCA's opinion, which determines that the Plaintiffs' proposal for settlement was untimely on its face, deprives the Plaintiffs of the opportunity to prove otherwise and it makes a factual finding before the trial court ever had an opportunity to consider the evidence because Nationwide refused to produce it.

The Fourth DCA's engrafting of exceptions that are in no way inferred by Rule 1.380(2)(A)(B) & (C), and limiting the trial court's discretion to deal with repeated discovery misconduct in a way not authorized by this court in Mercer v. Raine, constitutes an express and direct conflict with Mercer on an issue that is likely to recur and should be resolved. The district court's misapplication of supreme court precedent constitutes an express and direct conflict. See Wale v. Barnes, 278 So2d 601 (Fla. 1973).

CONCLUSION

This court should quash the opinion of the Fourth DCA below and remand the case back to that court with instructions to reinstate the trial court's sanction order and attorney's fee judgment. We respectfully request such specific instructions because Nationwide's modus operandi in the past has been to continue perpetuating the same issues even after losing if there is any hint of ambiguity.

Moreover, this court should grant the Petitioners' separately filed motion for appellate attorney's fees pursuant to the offer of judgment statute.

Respectfully submitted,

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true and correct copy of the foregoing document has been furnished by U.S. Mail this 12th day of January 2004 to: **Hinda Klein, Esq.**, Conroy, Simberg & Gannon, 3340 Hollywood Blvd., Hollywood, FL 33021, counsel for Respondent.

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IN THE SUPREME COURT OF FLORIDA

STACEY ROBINSON, and
ROBERT ROBINSON,
Petitioners,

CASE NO. SC03-1670

v.

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,
Respondent.
_________________________________/

APPENDIX TO PETITIONERS' INITIAL BRIEF ON THE MERITS

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