SUPREME COURT OF FLORIDA
500 DUVAL STREET
TALLAHASSEE, FL 32399-1927

DIANE KROCK,

Petitioner(s)

vs.

IRWIN ROZINSKY AND STATE FARM MUTUAL AUTO., ETC

Respondent(s)

CASE NO SC12-549
LT CASE NO. 4D09-4815
502002CA014474XXXXMB

PETITIONER'S JURISDICTIONAL BRIEF

TABLE OF CONTENTS

TABLE OF CITATIONS

SUMMARY ARGUEMENT

This decision of the 4DCA is in conflict with decisions of the Florida Supreme Court and other District Courts of Appeal which reflect the correct rule of law on the same point and therefore this 4DCA opinion of January 11, 2012 should be vacated. The Florida Supreme Court has ruled that cases should be judged on their merits, not trickery, ex-parte hearings, default judgments and corruption. N. Shore Hosp., Inc. v. Barber, 143 So. 2d 849, 852 (Fla. 1962) This addresses issues of GREAT PUBLIC IMPORTANCE REGARDING THE STANDARD OF REVIEW AND DEFINITIONS OF ABUSE OF DISCRETION/ GROSS ABUSE OF DISCRETION, AND STANDARD OF REVIEW FOR VACATING DEFAULT JUDGMENTS TO ELIMINATE INCONSISTENCIES AND UNFAIRNESS AND REDUCE CONFUSION IN THE JUDICIAL SYSTEM.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a District Court of Appeal that expressly and directly conflicts with decisions of the FL Supreme Court or another District Court of Appeal on the same point of law. Art V ss 3 (b) (3), Fla. Const. (1980); Fla.R.App.P. 9.030(a) (2) (A) (iv).

PETITIONER HEREBY RESPECTFULY REQUESTS THE FLORIDA

SUPREME COURT TAKE JURISDICTION OF THIS CASE AND VACATE THE DECISION OF THE 4DCA AND DEFINE AND OR CLARIFY THE STANDARD OF REVIEW FOR ABUSE OF DISCRETION AND OR GROSS ABUSE OF DISCRETION AS A MATTER OF GREAT PUBLIC IMPORTANCE AND TO ELIMINATE INCONSISTENCIES AND UNFAIRNESS AND REDUCE CONFUSION IN THE JUDICIAL SYSTEM.

ARGUMENT / STATEMENT OF CASE AND FACTS

The decision of the Fourth District Court of Appeal in this case expressly and directly conflicts with the following decisions of the Florida Supreme Court and other District Courts of Appeal on the same point of law.

The case of U.S. BANK NATIONAL ASSOCIATION V. LLOYD (981 So. 2d 633, 639 (Fla 2DCA 2008) sets an important standard regarding the Abuse of Discretion in the Court. Cases should be judged on merits instead of trickery, ex-parte hearings and default judgments.

"The longstanding policy in Florida is one of liberality toward vacating defaults, and any reasonable doubt with regard for setting aside a default should be resolved in favor of vacating the default and allowing trial on the merits" Allstate Ins. Co. v. Ladner, 740 So. 2d 42, 43 (Fla 1st DCA 1999).

"where there exists any reasonable doubt in the matter, and where there has been no trial on the merits, the trial court is to exercise it's discretion in the direction of vacating the default" APOLARO V. FALCON 566 So. 2d 815, 816 (Fla 3d DCA 1990); NORTH SHORE HOSPITAL, INC. V. BARBER 143 So. 2d 849, 852-53 (Fla 1962);

"Where inaction results from a clerical or secretarial error, reasonable misunderstanding, a system gone awry or any other of the foibles to which human nature is heir, then upon timely application accompanied by a reasonable and credible explanation, the matter should be permitted to be heard on the merits" Somero v. Hendry, 467 So. 2d 1103 (Fla 4th DCA 1985). Petitioner is a 100% disabled senior woman, innocent victim of a car accident, who was framed with a default judgment while medically incapacitated. The petitioner immediately and in a timely manner moved to have default judgment vacated based upon Inadvertence, Excusable Neglect, Meritorious Defense and Diligence Seeking to Vacate Default Judgment. This is GROSS ABUSE OF DISCRETION. Petitioner had notified the court of her intention to defend herself with a meritorious defense, and notified the court that she was incapacitated. She was told by State Farm and the Judge's secretary that the hearing was postponed. Then State Farm went before the judge in an ex-parte hearing and got a judgment against an incapacitated

disabled person who was undergoing medical treatments at the same time, after she was told the hearing was postponed. My doctor provided a letter stating the serious nature of my medical conditions and inability to travel or represent myself. My lawyer withdrew without telling me and the judge allowed him to withdraw without giving me notice or providing me my paperwork or property. This was FRAUD ON THE COURT. State Farm had an ex-parte hearing with the judge behind my back and State Farm received a default judgment for fees. When the default judgment was discovered I promptly filed an appropriate motion to vacate the judgment. The court further abused it's discretion in failing to vacate the default judgment due to Inadvertence, Excusable Neglect, Meritorious Defense, and Diligence in Seeking to Vacate Default Judgment. There is also a serious conflict of interest in the case. My in-laws, the infamous Adlers, had conflicts of interest with Judges on the cases and were obsessed with stealing my father's money. Adler worked in the same office as the lower court judge who did this to me. Adler worked for infamous Scott Rothstein who appointed the other Judge. They framed me with this judgment and stole my inheritance, telling my father he couldn't leave me any money because of the judgment, and to leave my inheritance to them, which he did. Violation of Rules of Conduct

4.1-8 and 4.1-9, conflicts of interest. This again is GROSS ABUSE OF DISCRETION. This was a violation of Rule 12.405, impropriety. The 4DCA's decision is in conflict with decisions of the FL Supreme Court and other District Courts of Appeal. The default judgment resulting from the ex-parte hearing in this case should also be reversed. These cases support my argument. EMMER V. BRUCATO 813 So. 2d 264, 265 (Fla 5th DCA 2002); HUNT EXTERMINATING CO V. CRUM 598 So. 2d 113,114 (Fla 2d DCA 1992); GIRON V FAIRWAYS OF SUNRISE HOMEOWNERS ASSOC 903 So. 2d 1008, 1009 (Fla 4 DCA 2005); AL HENDRICKSON TOYOTA INC V YAMPOLSKY 695 So. 2d 948 (Fla 4 DCA 1997); GIBSON TRUST, INC V OFFICE OF THE ATTORNEY GENERAL 883 So. 2d 379, 382-83 (Fla 4 DCA 2004); LEVANTE V CORALLO 688So. 2d 427, 428 (Fla 3 DCA 1997); Cole v. Blackwell, Walker, Gray, Powers, Flick & Hoehl 523 So. 2d 725, 725-726 (Fla 3DCA 1988); Am Republic Insurance Co v. Westchester General Hospital 414 So. 2d 1163, 1163-64 (Fla 3d DCA 1982); Rubenstein v. Richard Fidin Corp. 346 So. 2d 89, 90-9(Fla 3d DCA 1977); Weeks Cartage, Inc v. CSX Transport 547 So. 2d 573-574 (Fla 4th DCA 1999). George v. Radcliffe, 753 So. 2d 237, 238 (Fla 4th DCA 1999); Also supported by the following: Rule 12.405; Florida Rules of Civil Procedure 1.500(a),

1.500(b); Rule 1.540(b) of Civil Procedure; Rules of Conduct 4.1-8 and 4.1-9; Cannon 9 Florida Code of Professional Responsibility; Cannon 2(b) of the Judicial Code; Florida Constitution Article 1, sections 2, 3, 3 (b)(4), 9 and 21. When this ex-parte hearing was held, I was recovering from a serious car crash in which I almost lost my leg due to crush injuries. I smashed my head and sustained several other injuries. Shands Trauma One Hospital University of Florida said I also had additional head trauma. I had multiple surgeries and blood transfusions. I was on my deathbed for months. I was confined to a hospital bed for months and had compound open fractures and complications. I was on strong pain medications and suffering from post traumatic stress disorder and severe depression. The trial court abused it's discretion by holding an ex-parte hearing while I was temporarily incapacitated due to medical reasons and undergoing medical treatment 5 hours away from the Palm Beach Courthouse. My doctor, the Chairman of the Orthopedics Department and Chief of Staff at Shands Trauma One Hospital, University of Florida, wrote a very clear letter to the court stating that I was unable to attend the hearing and was not fit to defend myself at that moment due to medical issues. I spoke to Spellacy attorney for State Farm and he told me he would reschedule the hearing and I spoke to the

judge's secretary regarding the hearing. I was specifically told that the hearing would be cancelled. I was lied to and tricked while I was undergoing medical procedures and temporarily incapacitated for medical reasons. Then State Farm had an ex-parte hearing with the judge and railroaded me with a judgment which I did not even know about until later. In the case of MAKES & MODELS MAGAZINE, INC V. WEB OFFSET PRINTING CO, INC. (2 D08-1061) trickery was used to obtain a default judgment. Judges Silberman, LaRose and Villante reversed the default judgment stating that the trial court must show regard for civility and professionalism. National Union Fire Insurance Co of Pittsburg v. McWilliams, 799 So. 2d 378, 380 (Fla 4DCA 2001); Ole, Inc. v. Yariv, 566 So. 2d 812, 814-15 (Fla 3d DCA 1990); BARTOLO CASTILLO V. CATOE AND SON PLUMBING 502004CA009824XXXXMB; BRONSTEIN V. STATE FARM MUTUAL INS CO. case no 1-97-0603; CINKAT TRANSPORT INC V. MD CAS.CO. 596 So. 2d 746, 747 (Fla 3d DCA 1992); GULF MAINTENANCE & SUPPLY V. BARNETT BANK OF TALLAHASEE 543 So. 2d 813, 817 (Fla 1st DCA 1989); NTERNATIONAL ENERGY CORP. V. HACKETT 687 So. 2d 941,943(Fla 3d DCA 1997); 205 JACKSONVILLE LLC V. A-AFFORDABLE AIR, LLC. (case 3D09-374)

CONCLUSION

This court has discretionary jurisdiction to review the decision of the Fourth District Court of Appeal, and should exercise that jurisdiction to consider the merits of the Petitioner's arguments in order that the inconsistency between the District Courts of Appeal and Florida Supreme Court should be clarified and also that petitioner should have some justice. The petitioner asks the court to clarify and define the standard of review for abuse of discretion and gross abuse of discretion as a matter of great public importance to eliminate inconsistencies and unfairness and reduce confusion in the judicial system.

Respectfully Submitted this 9TH day of May 2012.

Diane Krock

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the following was served by U.S. Mail and certified mail on May 9, 2012 to: Nancy Gregoire, Esq. 1301 E Broward Boulevard #230, Ft. Lauderdale, FL 33301 ;Patrick Shawn Spellacy, Kirwan and Spellacy, P.A., 888 S.E. 3rd Avenue, 301, Ft. Lauderdale, FL, 33316.

BY: Diane Krock

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210 (a) of the Florida Rules of Appellate Procedure.

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DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
January Term 2012

DIANE KROCK,
Appellant,

v.

IRWIN ROZINSKY and **STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,**
Appellees.

No. 4D09-4815

[January 11, 2012]

WARNER, J.

Appellant, Diane Krock, appeals a final judgment awarding attorney's fees and costs to State Farm Mutual Automobile Insurance Company in the amount of $163,415.79 pursuant to an offer of settlement. Krock challenges the trial court's denial of her request for a continuance of the fee hearing. Finding no abuse of the court's discretion, we affirm.

This case began in 2002 when Krock filed a negligence action against another driver for personal injuries Krock suffered in an automobile accident in 1999. Krock later filed an amended complaint in which she asserted a claim for underinsured motorist benefits against State Farm. State Farm denied liability and served a proposal for settlement which Krock did not accept. At trial, she recovered less than the proposal. She appealed the resulting judgment, which this court per curiam affirmed on appeal. *See Krock v. Kahan*, 989 So. 2d 649 (Fla. 4th DCA 2008). In connection with the appeal of that final judgment, this court conditionally granted State Farm's motion for appellate fees to be set by the trial court. Shortly after the conclusion of the appeal, Krock's attorney withdrew from her representation. After the underlying final judgment was affirmed on appeal, State Farm filed an Amended Motion to Tax Attorney's Fees and Costs pursuant to section 768.79, Florida Statutes, and also filed a motion for the trial court to award appellate fees and costs. Those motions were filed in 2008 and set for hearing first in December 2008, which hearing was continued at Krock's request, and again in February 2009. Prior to that hearing, Krock requested a six-

month continuance based on various health problems. The trial court granted the motion.

About six months after Krock's previous request for a continuance had been granted, State Farm re-noticed its fee motions for hearing on October 9, 2009. On October 5, 2009, Krock sent a letter to the judge. Attached to Krock's letter was a doctor's note, which stated that she was 100% disabled, that she had multiple medical and psychological problems, that she was in no condition to travel, and that she would never be able to drive again. This same letter and request for continuance was faxed to the judge the day before the hearing.

The trial court denied Krock's request for an extension of time and went forward with the hearing on State Farm's fee motions. In the order denying Krock's motion for an extension of time, the trial court explained in detail its reasoning for denying the request:

> This action came before the Court upon receipt of a letter that appears to be ex parte, in other words there is no certificate of service. Therefore a copy of the letter is attached to this order.
>
> Plaintiff Mrs. Krock requests an extension of time based on a medical note from her doctor that in essence said that she will never be able to drive again and she is in no condition to travel. This is not the first time that this matter has been extended for Mrs. Krock's benefit so that she can attend a hearing. This case was tried before a jury and a verdict [was] rendered on September 15, 2006 and an amended final judgment was entered on September 15, 2006 and an amended final judgment was entered on March 20, 2007. The defense has been waiting for its hearing in order to have its fees and costs taxed. Mrs. Krock's medical condition apparently has never allowed her to appear. There appears to be no likelihood that Mrs. Krock will ever appear. Therefore to have extended the last hearing would have been pointless. The hearing remained scheduled and never extended. The motion to vacate that order and further extend the time is hereby denied.

Subsequently, the trial court entered a final order awarding attorney's fees and costs to State Farm in the amount of $163,415.79. The final order mentioned that Krock "made no attempt to appear telephonically or make other arrangements to participate in the hearing." Krock filed a

motion for rehearing, raising a litany of allegations. However, before any ruling from the trial court on her motion for rehearing, Krock filed a notice of appeal as to the final fee judgment and as to the order denying her an extension of time. Therefore, any matters in her motion for rehearing were abandoned. *See* Fla. R. App. P. 9.020(h)(3).

In her brief, Krock contends that the trial court abused its discretion in denying her motion for extension of time based upon her medical condition. The standard of review of a trial court's denial of a motion for continuance is abuse of discretion. *See A.P.D. Holdings, Inc. v. Reidel*, 865 So. 2d 682, 683 (Fla. 4th DCA 2004). An appellate court will not reverse unless an abuse of discretion is "clearly shown." *Taylor v. Mazda Motor of Am., Inc.*, 934 So. 2d 518, 520 (Fla. 3d DCA 2005).

Factors to be considered in determining whether the trial court abused its discretion in denying the motion for continuance include the following: 1) whether the denial of the continuance creates an injustice for the movant; 2) whether the cause of the request for continuance was unforeseeable by the movant and not the result of dilatory practices; and 3) whether the opposing party would suffer any prejudice or inconvenience as a result of a continuance. *Fleming v. Fleming*, 710 So. 2d 601, 603 (Fla. 4th DCA 1998). However, "when undisputed facts reveal that the physical condition of either counsel or client prevents fair and adequate presentation of a case, failure to grant a continuance is reversible error." *Ziegler v. Klein*, 590 So. 2d 1066, 1067 (Fla. 4th DCA 1991). As noted by the Fifth District in *Myers v. Siegel*, 920 So. 2d 1241 (Fla. 5th DCA 2006), cases involving illness of counsel or a party do not mandate reversal in all circumstances. Instead, additional factors should be considered, including:

> (1) the length of the requested continuance; (2) whether the counsel who becomes unavailable for trial has associates adequately prepared to try the case; (3) whether other continuances have been requested and granted; (4) the inconvenience to all involved in the trial; and (5) any other unique circumstances. Consideration of these factors allows the courts to balance the protection of the client's right to counsel of his or her choice with the general interest in the prompt and efficient administration of justice, which includes an opposing party's right to prompt resolution of the issues involved in the proceedings.

Id. at 1243.

Applying these factors to the present case, we cannot say that the trial court abused its discretion. Krock's medical condition appears not to be disputed and has been ongoing. Her physical issues began with another automobile accident in 2008, and she had additional issues which predated that accident, which she claimed arose from the 1999 automobile accident. The cause of the need for the continuance was clearly foreseeable, yet Krock waited until just a few days prior to each hearing to make a request for continuance. In the case of the final hearing, although the notice of hearing was sent in August, Krock did not send her motion for continuance until four days prior to the hearing.

Based upon the history of requests at the last minute, the trial court could conclude that the request was dilatory and solely to delay the proceedings. This is reinforced by Krock's failure to make other arrangements to attend the hearing either telephonically or through other means. And, the request for a delay of nine months appears unreasonable, given the prior lengthy continuances.

Because the hearing involved the setting of attorney's fees, we cannot conclude that Krock's absence prevented a fair and adequate presentation of the case. In this regard, this is unlike *Ziegler v. Klein,* where the husband, who was pro se, was absent from the final hearing on his divorce because he was hospitalized. His absence meant that he could not present his own testimony on the issue of child custody, child support, or alimony. In this case, on the other hand, the issue was the amount of attorney's fees to be awarded. That would require expert attorney testimony. Krock has not suggested that she had made arrangements to submit such evidence to the court.

The trial court granted substantial continuances to Krock as a result of her medical conditions. Considering the balance of her right to attend the hearing with the efficient administration of justice and the right of the opposing party to have its day in court, we cannot say that the court abused its discretion in denying her request for the additional nine-month continuance.

While Krock makes a litany of other claims, including that State Farm's attorney agreed to a continuance and that the judge's judicial assistant told her the hearing would be continued, there is no record support for such claims. A party may not go outside the record in making appellate arguments. *See, e.g., Doctors Assocs., Inc. v. Thomas,* 898 So. 2d 159, 162 (Fla. 4th DCA 2005) ("An appellate court may not consider matters outside the record."). Therefore, they do not provide a ground for reversal.

For the foregoing reasons, we affirm.

POLEN, J., and EHRLICH, MERRILEE, Associate Judge, concur.

* * *

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Edward Fine, Judge; L.T. Case No. 502002CA014474 XXXXMB.

Diane Krock, Reddick, pro se.

Nancy W. Gregoire of Kirschbaum, Birnbaum, Lippman & Gregoire, PLLC, and Patrick Shawn Spellacy of Kirwan & Spellacy, P.A., Fort Lauderdale, for appellee State Farm Mutual Automobile Insurance Company.

Not final until disposition of timely filed motion for rehearing.