

SUPREME COURT OF FLORIDA

Carolann D. Kozel v. D. Steven Ostendorf, D.P.M.

629 So.2d 817 (Fla. 1993) · No. 80380

SUMMARY

In **Kozel v. Ostendorf**, 629 So.2d 817 (Fla. 1993), the Florida Supreme Court held that dismissal with prejudice is the ultimate sanction and should be reserved for aggravating circumstances where a lesser sanction would fail to achieve a just result. The court adopted a six-factor test (the “Kozel factors”) that trial courts must consider before dismissing a case for attorney misconduct: (1) whether the disobedience was willful, deliberate, or contumacious; (2) whether the attorney has been previously sanctioned; (3) whether the client was personally involved; (4) whether the delay prejudiced the opposing party; (5) whether the attorney offered reasonable justification; and (6) whether the delay created significant problems of judicial administration. If a sanction less severe than dismissal is viable, the trial court must impose it, because dismissal with prejudice punishes the litigant rather than the attorney.

CASE DETAILS

COURT	Supreme Court of Florida
WRITING FOR THE COURT	McDonald; Barkett; Overton; Shaw; Grimes; Kogan; Harding
JURISDICTION	Florida
DOCKET	80380
DISPOSITION	quashed
PROCEDURAL POSTURE	Review of a district court decision affirming dismissal with prejudice as a sanction; conflict with <i>Clay v. City of Margate</i> .
STANDARD OF REVIEW	abuse of discretion
PRECEDENTIAL VALUE	binding
PARTIES	Carolann D. Kozel v. D. Steven Ostendorf, D.P.M.

TOPICS

- civil procedure
- sanctions
- medical malpractice
- appellate procedure

PRACTICE AREAS

- Medical Malpractice
- Civil Procedure
- Sanctions

QUESTIONS PRESENTED

1. Whether the trial court abused its discretion by dismissing the complaint with prejudice as a sanction for the attorney's failure to timely file an amended complaint, when the delay was not attributable to the client.

HOLDINGS

1. Dismissal with prejudice is the ultimate sanction and should be reserved for aggravating circumstances where a lesser sanction would fail to achieve a just result. Before dismissing with prejudice, the trial court must consider: (1) whether the attorney's disobedience was willful, deliberate, or contumacious; (2) whether the attorney has been previously sanctioned; (3) whether the client was personally involved; (4) whether the delay prejudiced the opposing party; (5) whether the attorney offered reasonable justification; and (6) whether the delay created significant problems of judicial administration. If a sanction less severe than dismissal is viable, it should be imposed.

KEY QUOTATIONS

"Dismissal 'with prejudice' in effect disposes of the case, not for any dereliction on the part of the litigant, but on the part of his counsel. We are not unmindful of the rule that counsel is the litigant's agent and that his acts are the acts of the principal, but since the rule is primarily for the governance of counsel, dismissal 'with prejudice' would in effect punish the litigant instead of his counsel." (817-18)

"(1) whether the attorney's disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience; 2) whether the attorney has been previously sanctioned; 3) whether the client was personally involved in the act of disobedience; 4) whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion; 5) whether the attorney offered reasonable justification for noncompliance; and 6) whether the delay created significant problems of judicial administration." (818)

FACTUAL BACKGROUND

Carolann Kozel filed a medical malpractice complaint against Dr. Ostendorf in July 1989. The trial court granted Ostendorf's motion to dismiss with twenty days to amend, later extended by agreement. Kozel's attorney, Kelley Finn, filed the amended complaint on July 23, 1990, over five months late. Ostendorf moved for dismissal, and the trial court dismissed the complaint with prejudice. The district court affirmed.

PROCEDURAL HISTORY

Kozel filed a medical malpractice complaint. The trial court dismissed with leave to amend. Her attorney filed the amended complaint over five months late. The trial court dismissed with prejudice, and the Second District Court of Appeal affirmed. The Florida Supreme Court quashed and remanded.

DISPOSITION

quashed

REMAND INSTRUCTIONS

On remand, the trial court must reconsider the dismissal in light of the factors set forth in this opinion.

CASES CITED

- Kozel v. Ostendorf, 603 So.2d 602 (Fla. 2d DCA 1992)
- Clay v. City of Margate, 546 So.2d 434 (Fla. 4th DCA), review denied, 553 So.2d 1164 (Fla. 1989)
- Beasley v. Girtten, 61 So.2d 179 (Fla. 1952)
- New River Yachting, Inc. v. Bacchiocchi, 407 So.2d 607 (Fla. 4th DCA 1981)
- Neida's Boutique, Inc. v. Gabor and Co., 348 So.2d 1196 (Fla. 3d DCA 1977)
- Reynolds v. Deep South Sports, Inc., 211 So.2d 37 (Fla. 2d DCA 1968)

CITED IN

- Carolann D. Kozel v. D. Steven Ostendorf, D.P.M., Kozel v. Ostendorf, 629 So. 2d 817 (Fla. 1993)
- Carolann D. Kozel v. D. Steven Ostendorf, D.P.M., Kozel v. Ostendorf, 629 So. 2d 817, 818 (Fla. 1993)
- Carolann D. Kozel v. D. Steven Ostendorf, D.P.M., Kozel v. Ostendorf, 629 So. 2d 817 (Fla. 1994)
- Carolann D. Kozel v. D. Steven Ostendorf, D.P.M., Kozel v. Ostendorf, 629 So. 2d 817, 818 (Fla. 1993)