

MOTIONS TO DROP PARTIES
Case Numbers: 05-2013-CP-028863 & 05-2012-CP-048323

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VII. Legal Authority

- 21) Fla. Rule of Civil Procedure 1.070
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- 23) Fla. Rule of Judicial Administration 2.420
- 24) Fla. Probate Rule 5.025
- 25) Fla. Probate Rule 5.040
- 26) Powell v. Madison Cty. Sheriff's Dep't, 100 So. 3d 753 (Fla. 1st DCA 2012).
- ✓ 27) Pixton v. Williams Scotsman, Inc., 924 So. 2d 37 (Fla. 5th DCA 2006).
- ✓ 28) Kozel v. Ostendorf, D.P.M., 629 So. 2d 817 (Fla. 1993).
- 29) In Re Estate of Odza, 432 So. 2d 740 (Fla. 4th DCA 1983).
- 30) Galbut v. Garfinkl, 340 So. 2d 470 (Fla. 1976).
- 31) Florida Department of Revenue v. Cummings, 930 So. 2d 604 (Fla. 2006).
- 32) 18 Fla. Jur 2d Decedents' Property § 723 (2014).
- 33) Smith v. DeParry, 86 So. 3d 1228 (Fla. 2d DCA 2012).
- 34) Estate of Ripley v. Mortgage One Corporation, 16 S.W. 3d 593 (Mo. App. 1999).
- 35) Immer v. City of Miami, 898 So. 2d 258 (Fla. 3d DCA 2005).
- 36) Daniels v. Vann, 396 So. 2d 723 (Fla. 4th DCA 1981).

924 So.2d 37

District Court of Appeal of Florida,
Fifth District.

Robert PIXTON and Nancy Pixton, etc., Appellant,

v.

WILLIAMS SCOTSMAN, INC., etc., et al., Appellee.

No. 5D05-202. | Jan. 27, 2006.

| Rehearing Denied March 27, 2006.

Synopsis

Background: Plaintiffs brought negligence action against defendant. The Circuit Court, Orange County, A. Thomas Mihok, J., granted defendant's motion to dismiss for failure to comply with 120-day service rule. Plaintiffs appealed.

✓ **[Holding:]** The District Court of Appeal, Semento, L.J., Associate Judge, held that trial court was required, in determining whether dismissal was warranted, to conduct evidentiary hearing and to consider factors set forth in Kozel v. Ostendorf, including whether plaintiffs were involved or complicit in attorney's conduct in misrepresenting to trial court the basis for requested extension of time for serving process.

Reversed and remanded.

West Headnotes (6)

[1] Pretrial Procedure

⚡ Hearing and Determination in General

307A Pretrial Procedure

307AIII Dismissal

307AIII(B) Involuntary Dismissal

307AIII(B)6 Proceedings and Effect

307Ak678 Hearing and Determination in General

In determining whether dismissal of negligence action was proper for failure to timely serve process, trial court was required to conduct evidentiary hearing and to consider factors set forth in Kozel v. Ostendorf, including whether plaintiffs were involved or complicit in attorney's conduct, where plaintiffs' attorney was involved

in the conduct to be sanctioned, given that he made misrepresentation to obtain extension of time for serving process and presented an "agreed order" granting extension of time despite no other party having consented. West's F.S.A. RCP Rule 1.070(j).

5 Cases that cite this headnote

[2] Pretrial Procedure

⚡ Process, Defects and Objections as To

Process

⚡ Time for Service

307A Pretrial Procedure

307AIII Dismissal

307AIII(B) Involuntary Dismissal

307AIII(B)2 Grounds in General

307Ak560 Process, Defects and Objections as To

313 Process

313II Service

313II(A) Personal Service in General

313k63 Time for Service

If a plaintiff shows good cause or excusable neglect, the court must extend the time for service of process and has no discretion to do otherwise; however, if neither good cause nor excusable neglect is shown, the trial court is not required to dismiss the action without prejudice, but is left to exercise its discretion. West's F.S.A. RCP Rule 1.070(j).

5 Cases that cite this headnote

[3] Appeal and Error

⚡ Ordering New Trial, and Directing Further Proceedings in Lower Court

30 Appeal and Error

30XVII Determination and Disposition of Cause

30XVII(D) Reversal

30k1178 Ordering New Trial, and Directing

Further Proceedings in Lower Court

30k1178(1) In General

Where an attorney is responsible for a procedural error, a trial court's failure to consider the factors set forth in Kozel v. Ostendorf in determining whether dismissal is appropriate is, by itself, a basis for remand for application of the correct standard.

EX K-2

3 Cases that cite this headnote

[4] **Pretrial Procedure**

⊞ Matters Considered in General

307A Pretrial Procedure

307AIII Dismissal

307AIII(B) Involuntary Dismissal

307AIII(B)6 Proceedings and Effect

307Ak681 Matters Considered in General

Where an attorney is involved in conduct to be sanctioned, an analysis of the factors set forth in *Kozel v. Ostendorf* is required before dismissal is used as a sanction.

3 Cases that cite this headnote

[5] **Pretrial Procedure**

⊞ Disobedience to Order of Court or Other Misconduct

307A Pretrial Procedure

307AIII Dismissal

307AIII(B) Involuntary Dismissal

307AIII(B)2 Grounds in General

307Ak563 Disobedience to Order of Court or Other Misconduct

Lacking involvement or complicity by the client, an attorney's misconduct should not result in a dismissal of an action.

[6] **Attorney and Client**

⊞ Liability for Costs; Sanctions

Pretrial Procedure

⊞ Grounds in General

45 Attorney and Client

45I The Office of Attorney

45I(B) Privileges, Disabilities, and Liabilities

45k24 Liability for Costs; Sanctions

307A Pretrial Procedure

307AIII Dismissal

307AIII(B) Involuntary Dismissal

307AIII(B)2 Grounds in General

307Ak551 In General

It is essential that attorneys adhere to filing deadlines and procedural requirements; sanctions other than dismissal are appropriate in those situations when the attorney, and not the client, is responsible for the error.

Attorneys and Law Firms

*38 Marcia K. Lippincott of Marcia K. Lippincott, P.A., Lake Mary, for Appellant.

Penny W. Schmidt and Neil L. Weinreb of Schutt, Schmidt Burnett, Jacksonville, for Appellee.

Opinion

SEMENTO, L.J., Associate Judge.

Robert and Nancy Pixton, ("Pixtons"), husband and wife, appeal a trial court's order dismissing their negligence action against Williams Scotsman, Inc., et al., ("Scotsman"). The Pixtons assert that the court failed to apply the correct rule of law in dismissing their action for failure to timely serve process, the trial court abused its discretion in dismissing their action because the statute of limitations had expired, and that the sanction of a complete dismissal was too severe.

On December 28, 2003, the Pixtons filed a negligence complaint against Scotsman two days prior to the expiration of the applicable four-year statute of limitations.¹ Then, on April 22, 2004, prior to the expiration of the 120 days within which to serve process,² Pixtons' counsel filed a motion for enlargement of time to perfect *39 service of process on the defendants, stating that "[t]o date, the Plaintiffs have been unsuccessful in obtaining service of process upon the Defendants," and "this motion is filed in good faith and not for purposes of delay." Pixtons' counsel also submitted an "Agreed Order Granting Plaintiffs' Motion for Extension of Time" which the court entered, allowing the Pixtons an additional 90 days to perfect service of process. A summons was issued for Scotsman on July 2, 2004, and service was perfected on July 8, 2004.

Scotsman filed a motion to dismiss for failure to comply with the 120 day service rule, since the summons was issued 188 days after the complaint was filed and not served until 194 days after the filing. Scotsman contends that no excusable neglect or good cause was shown for the delay.

The trial court held a non-evidentiary hearing on the motion to dismiss. At the hearing, Pixtons' counsel advised the court that the use of the phrase "Plaintiffs have been unsuccessful

in obtaining service of process" in the motion for extension of time was in error because no attempt had been made to serve process at that time, and that the proposed "Agreed Order" was also in error because no other party consented to an extension. The Pixtons claimed that both errors were mistakes resulting from the use of forms, and that no deliberate attempt was made to mislead the court. The Pixtons' counsel advised the court that there was a delay in service because "[his] client still works for one of the defendants and was, quite frankly, trying to decide whether or not to pursue a claim against her." Understandably troubled by the false and misleading representations made in the Pixtons' motion and proposed order, the trial court found that the motion for extension was not filed in good faith and that the stated reasons for the delay in service, that the Pixtons had not decided whether to pursue a claim against a defendant, did not constitute good cause or excusable neglect for failure to timely perfect service of process. The court made no finding with regard to whether the misrepresentations were made intentionally or by mistake; opining that the result is the same-the court was misled and the delay was for an inappropriate tactical reason. The trial court noted that had it known the true basis for the requested extension of time, it would not have granted the motion because a conscious and tactical decision not to comply with the rule of procedure requiring defendants to be served within 120 days of filing did not constitute good cause. The trial court ultimately found that under the particular circumstances of this case the dismissal of the Pixtons' complaint was proper. This appeal ensued.

[1] [2] [3] [4] [5] [6] Florida Rule of Civil Procedure 1.070(j) provides a court with three options when a plaintiff has not properly served a defendant within 120 days after filing the complaint: (1) direct that service be effected within a specified time; (2) dismiss the action without prejudice; or (3) drop that defendant as a party. *E.g.*, Chaffin v. Jacobson, 793 So.2d 102 (Fla. 2d DCA 2001). If a plaintiff shows good cause or excusable neglect, the court must extend the time for service and has no discretion to do otherwise. *Id.* at 104. However, if neither good cause nor excusable neglect is shown, the trial court is not required to dismiss the action without prejudice, but is left to exercise its discretion. *Id.* Further, in determining whether a dismissal is warranted, the trial court should consider the factors set forth in Kozel v. Ostendorf, 629 So.2d 817 (Fla.1993). A trial court's failure to consider the Kozel factors in determining whether dismissal is appropriate is, by itself, a basis for remand for *40

application of the correct standard. *See Ham v. Dummire*, 891 So.2d 492 (Fla.2004); Warren v. Shands Teaching Hospital & Clinics, Inc., 700 So.2d 702, 705 (Fla. 1st DCA 1997). If this was a case in which only the Pixtons, and not their counsel, had engaged in wrongdoing or noncompliance with the rules, Kozel would not apply. *E.g.*, Levine v. Del American Properties, 642 So.2d 32 (Fla. 5th DCA 1994). In that event, the trial court, having determined that good cause was not shown, could have used its discretion to determine whether the case should be dismissed, even if the dismissal would have barred the cause of action because of the statute of limitations. *See, e.g.*, Petrucelli v. Boehringer & Ratzinger, 46 F.3d 1298 (3d Cir.1995). However, where the attorney is involved in the conduct to be sanctioned, a Kozel analysis is required before dismissal is used as a sanction. Clearly, the Pixtons' trial counsel was involved in the conduct which was sanctioned; he misrepresented that the Pixtons had been unable to obtain service of process despite there being no actual attempt to serve, and presented an "Agreed Order" granting the extension of time despite no other party having consented. Under these circumstances, an evidentiary hearing is mandated to determine the clients' involvement or complicity in the attorney's conduct. *See, e.g.*, Schlitt v. Currier, 763 So.2d 491 (Fla. 4th DCA 2000). Lacking such involvement or complicity by the client, the attorney's misconduct should not result in a dismissal of the action. *E.g.*, Rose v. Fiedler, 855 So.2d 122 (Fla. 4th DCA 2003). Indeed, this court has held that "[b]ecause dismissal is the ultimate sanction, it should be reserved for those aggravated cases in which a lesser sanction would fail to achieve a just result." American Express Co. v. Hickey, 869 So.2d 694, 695 (Fla. 5th DCA 2004). Further, "it is essential that attorneys adhere to filing deadlines and procedural requirements, sanctions other than dismissal are appropriate in those situations when the attorney, and not the client, is responsible for the error." *Id.* at 695. Accordingly, we reverse and remand to the trial court for purposes of reconsideration under Kozel.

REVERSED AND REMANDED for further proceedings.

PLEUS, C.J., and SHARP, W., J., concur.

Parallel Citations

31 Fla. L. Weekly D318

Footnotes

1 § 95.11(3)(a), Fla. Stat. (2004).

2 Fla. R. Civ. P. 1.070(j).

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Declined to Extend by Levine v. Del American Properties, Inc.,
Fla.App. 5 Dist., August 12, 1994

629 So.2d 817
Supreme Court of Florida.

Carolann D. KOZEL, Petitioner,

v.

D. Steven OSTENDORF, D.P.M., Respondent.

No. 80380. | Oct. 28, 1993.

| As Clarified Jan. 13, 1994.

Medical malpractice action was brought. The Circuit Court, Lee County, James H. Seals, J., dismissed complaint with prejudice. Plaintiff appealed. The District Court of Appeal, McDonald, Associate Judge, 603 So.2d 602, affirmed. Plaintiff appealed. The Supreme Court, McDonald, J., held that, where attorney is responsible for procedural error, court should employ sanction less severe than dismissal with prejudice where it determines, upon consideration of certain enumerated factors, that such alternative is viable.

Decision quashed; remanded with instructions.

West Headnotes (2)

[1] **Pretrial Procedure**

⚡ **Grounds in General**

307A Pretrial Procedure

307AIII Dismissal

307AIII(B) Involuntary Dismissal

307AIII(B)2 Grounds in General

307Ak551 In General

Because dismissal is ultimate sanction of adversarial system, it should be reserved for those aggravating circumstances in which lesser sanction would fail to achieve just result.

50 Cases that cite this headnote

[2] **Pretrial Procedure**

⚡ **Grounds in General**

Pretrial Procedure

⚡ **Dismissal with or Without Prejudice**

307A Pretrial Procedure

307AIII Dismissal

307AIII(B) Involuntary Dismissal

307AIII(B)2 Grounds in General

307Ak551 In General

307A Pretrial Procedure

307AIII Dismissal

307AIII(B) Involuntary Dismissal

307AIII(B)6 Proceedings and Effect

307Ak690 Dismissal with or Without Prejudice

Where attorney is responsible for procedural error, court should employ sanction less severe than dismissal with prejudice, such as imposition on attorney of fine, public reprimand, or contempt order, where court determines, upon consideration of following factors, that such alternative is viable: (1) whether attorney's disobedience was willful, deliberate, or contumacious; (2) whether attorney was previously sanctioned; (3) whether client was personally involved in act of disobedience; (4) whether delay prejudiced opposing party; (5) whether attorney offered reasonable justification for noncompliance; and (6) whether delay created significant problems of judicial administration. West's F.S.A.RCP Rules 1.010, 1.500(b, c).

100 Cases that cite this headnote

Attorneys and Law Firms

***817** Kelley A. Finn of Kelley Finn Law Offices, P.A., Miami, for petitioner.

Gerald W. Pierce of Henderson, Franklin, Starnes & Holt, P.A., Fort Myers, for respondent.

Opinion

McDONALD, Justice.

We review Kozel v. Ostendorf, 603 So.2d 602 (Fla. 2d DCA 1992), which directly conflicts with Clay v. City of Margate, 546 So.2d 434 (Fla. 4th DCA), review denied, 553 So.2d 1164 (Fla. 1989). We have jurisdiction pursuant to article V, section 3(b)(3) of the Florida Constitution. We quash Kozel.

SO K-3

Carolann Kozel filed a medical malpractice complaint against Steven Ostendorf on July 25, 1989 in the circuit court of Lee County. Ostendorf filed a motion to dismiss on the grounds that the complaint failed to state a cause of action and that Kozel failed to comply with section 766.205, Florida Statutes (1989). The court granted Ostendorf's motion to dismiss and granted Kozel twenty days to amend her complaint. By agreement of the parties, the time period to amend the complaint was extended another ten days. Kozel's attorney, Kelley A. Finn, did not file the complaint until July 23, 1990, over five months past the due date. On Ostendorf's motion the circuit court then dismissed the complaint with prejudice and the district court affirmed.

The district court properly recognized that the trial court has the discretionary power to dismiss a complaint if the plaintiff fails to timely file an amendment.¹ Although such broad power is vested in the trial court, it is not necessary or beneficial for that power to be exercised in all situations. We concur *818 with Judge Altenbernd's suggestion that the trial courts need a meaningful set of guidelines to assist them in their task of sanctioning parties and attorneys for acts of malfeasance and disobedience. Kozel, 603 So.2d at 605 (Altenbernd, J., dissenting). Without such a framework, trial courts have no standard by which to judge the severity of the party's action or the type of sanction that should be imposed.

[1] In the instant case, the trial court acted within the boundaries of the law. In our view, though, the court's decision to dismiss the case based solely on the attorney's neglect unduly punishes the litigant and espouses a policy that this Court does not wish to promote. The purpose of the Florida Rules of Civil Procedure is to encourage the orderly movement of litigation. Fla.R.Civ.Pro. 1.010. This purpose usually can be accomplished by the imposition of a sanction that is less harsh than dismissal and that is directed toward the person responsible for the delayed filing of the complaint. *Clay*.

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.

Beasley v. Girtten, 61 So.2d 179, 181 (Fla.1952). Because dismissal is the ultimate sanction in the adversarial system, it should be reserved for those aggravating circumstances in which a lesser sanction would fail to achieve a just result.

[2] This Court is vitally concerned with the swift administration of justice at both the trial and appellate levels. In the interest of an efficient judicial system and in the interest of clients, it is essential that attorneys adhere to filing deadlines and other procedural requirements.² However, a fine, public reprimand, or contempt order may often be the appropriate sanction to impose on an attorney in those situations where the attorney, and not the client, is responsible for the error. To assist the trial court in determining whether dismissal with prejudice is warranted, we have adopted the following set of factors set forth in large part by Judge Altenbernd: 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. Upon consideration of these factors, if a sanction less severe than dismissal with prejudice appears to be a viable alternative, the trial court should employ such an alternative.

For the foregoing reasons, we quash the district court's decision, approve *Clay*, and remand the case with directions that the trial court be ordered to reconsider in light of the new factors established in this opinion.

It is so ordered.

BARKETT, C.J., and OVERTON, SHAW, GRIMES, KOGAN and HARDING, JJ., concur.

Parallel Citations

18 Fla. L. Weekly S557, 19 Fla. L. Weekly S31

Footnotes

- 1 *New River Yachting, Inc. v. Bacchiocchi*, 407 So.2d 607 (Fla. 4th DCA 1981), *review denied*, 415 So.2d 1360 (Fla.1982); *Neida's Boutique, Inc. v. Gabor and Co.*, 348 So.2d 1196 (Fla. 3d DCA 1977), *cert. denied*, 366 So.2d 883 (Fla.1978); *Reynolds v. Deep South Sports, Inc.*, 211 So.2d 37 (Fla. 2d DCA 1968).
- 2 According to rule 1.500(c), Florida Rules of Civil Procedure, "[a] party may plead or otherwise defend at any time before default is entered." If a party against whom affirmative relief is sought has filed any paper in a civil action, the court cannot enter a default for failure to file an answer unless the defendant has been served with notice that a default may be entered. Fla.R.Civ.Pro. 1.500(b). However, when the circumstances involve the dismissal of the *plaintiff's* complaint, there are no similar notice requirements. The rules of civil procedure do not require the defendant to file a motion for default or the court to notify the plaintiff that an application for default is pending. Granted, the plaintiff is aware of the filing deadlines and is responsible for the action that she initiates. Nevertheless, dismissal is an unusually harsh sanction when neither the court nor the defendant is required to notify the plaintiff that dismissal is pending.

432 So.2d 740
District Court of Appeal of Florida,
Fourth District.

In re The ESTATE OF Irma ODZA, Deceased.

No. 82-2234. | June 8, 1983.

Appeal was taken from final order entered by the Circuit Court, Broward County, Robert W. Tyson, Jr., J., removing *appellant as copersonal representative of estate*. The District Court of Appeal, Dell, J., held that trial court erred in granting petition for removal, in that petition, amended petition, and notice of hearing failed to notify representative to file a defense within 20 days and that failure to file such a defense may result in a requested order being entered in due course.

Reversed and remanded.

West Headnotes (4)

[1] **Executors and Administrators**

⇒ **Notice**

162 Executors and Administrators

162II Appointment, Qualification, and Tenure

162k35 Removal

162k35(13) Notice

Trial court erred in granting petition for removal of copersonal representative of estate, in that petition, amended petition, and notice of hearing failed to notify copersonal representative to file a defense within 20 days and that failure to file such a defense may result in a requested order being entered in due course. West's F.S.A. R.P. & G.P. Rules 5.040, 5.440.

[2] **Executors and Administrators**

⇒ **Notice**

162 Executors and Administrators

162II Appointment, Qualification, and Tenure

162k35 Removal

162k35(13) Notice

Party seeking to invoke rule governing proceedings for removal of personal representative of estate must strictly comply

with procedural requirements of rule governing notice. West's F.S.A. § 731.301(1)(b); West's F.S.A. R.P. & G.P. Rules 5.040, 5.040(a)(1, 2), 5.440, 5.440(b); U.S.C.A. Const. Amends. 5, 14.

[3] **Constitutional Law**

⇒ **Proceedings**

Executors and Administrators

⇒ **Notice**

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)3 Property in General

92k4087 Wills, Trusts, Probate, Inheritance, and Dower

92k4089 Proceedings

(Formerly 92k306(1))

162 Executors and Administrators

162II Appointment, Qualification, and Tenure

162k35 Removal

162k35(13) Notice

Due process requires that those persons identified in rule governing removal of personal representative of estate be furnished with reasonable notice that failure to respond by filing written defense to the petition for removal may result in a judgment or order being entered against them. West's F.S.A. § 731.301(1)(b); West's F.S.A. R.P. & G.P. Rules 5.040, 5.040(a)(1, 2), 5.440, 5.440(b); U.S.C.A. Const. Amends. 5, 14.

1 Cases that cite this headnote

[4] **Executors and Administrators**

⇒ **Notice**

162 Executors and Administrators

162II Appointment, Qualification, and Tenure

162k35 Removal

162k35(13) Notice

Simply notifying party of date and time scheduled for hearing of petition for removal of representative of estate does not comply with procedural requirements of rule. West's F.S.A. § 731.301(1)(b); West's F.S.A. R.P. & G.P. Rules 5.040, 5.040(a)(1, 2), 5.440, 5.440(b); U.S.C.A. Const. Amends. 5, 14.

Attorneys and Law Firms

*741 Lawrence M. Aglow, West Chester, Co-Executor/Co-Personal Representative, West Chester, Pa., pro se appellant.

Fredric I. Gottlieb of Baskin & Sears, P.A., Palm Beach, for appellee-Hugo Dunhill, Co-Executor/Co-Personal Representative.

Opinion

DELL, Judge.

Lawrence M. Aglow appeals from a final order of the circuit court removing him as co-personal representative of the Estate of Irma Odza.

On September 9, 1982, Hugo Dunhill, co-personal representative of the Estate of Irma Odza, filed an amended petition pursuant to Rule 5.440, Florida Rules of Probate and Guardianship Procedure, for removal of appellant as co-personal representative of the subject estate. Dunhill also filed a notice which scheduled the hearing on the petition for removal on September 29, 1982. On September 13, 1982, appellant received the petition for removal and notice of hearing but failed to appear at the scheduled hearing. The trial court determined that appellant received sufficient notice of the hearing and entered an order removing him as co-personal representative pursuant to Rule 5.440.

Appellant contends that the trial court erred in granting the petition for removal because neither the petition nor the notice of hearing of the removal proceedings complied with the "Formal Notice" requirements of Rule 5.040.

We agree and reverse. Rule 5.440, proceedings for removal, provides:

(a) Proceedings for removal of a personal representative may be instituted by the court or by verified petition of any surety, joint personal representative or other interested person, alleging facts upon which the petition is based, *with formal notice* to all interested persons. [Emphasis added.]

Rule 5.040, Florida Rules of Probate and Guardianship Procedure provides:

Notice; Method and Time; Proof (a) Formal Notice.

(1) When formal notice is required, the petitioner shall serve a copy of the petition or other pleading on any interested person or his attorney if he has appeared by an attorney or requested that notice be sent to his attorney, together *with a notice requiring the person served to file his written defenses to that petition within 20 days after service of such formal notice*, exclusive of the day of service, and to serve a copy on petitioner's attorney, *and notifying the person served that failure to file and serve written defenses within the time required may result in a judgment or order being entered in due course*. [Emphasis added.]

(2) If no written defense is served and filed within 20 days after service of the petition, the petition shall be considered *ex parte*, unless the court orders otherwise. If a written defense is timely *742 served and filed, a hearing shall be set and reasonable notice given.

[1] The petition, the amended petition and the notice of hearing failed to notify appellant to file a defense within twenty days and that failure to file such a defense may result in a requested order being entered in due course. Neither party cites any Florida case in support of his position.

We find the analysis of the Third District Court of Appeal in Nardi v. Nardi, 390 So.2d 438 (Fla. 3d DCA 1980), analogous to the case sub judice. In Nardi the court construed Section 731.301(1)(b), Florida Statutes (1979), which permits *ex parte* entry of an order in the absence of a timely response to any required formal notice, as having the same practical result as the entry of a default judgment. The Nardi court held that a party seeking to take advantage of *ex parte* probate proceedings must strictly comply with the procedural safeguards contained in the probate statutes and rules. We find the operative language of Rule 5.040(a)(2) substantially the same as Section 731.301(1)(b), Florida Statutes (1981).

[2] [3] [4] Therefore, we hold that a party seeking to invoke the provisions of Rule 5.440 must strictly comply with the procedural requirements of 5.040. Due process requires that those persons identified in Rule 5.440(b) be furnished with reasonable notice that failure to respond by filing written defenses to the petition for removal may result in a judgment or order being entered against them. Simply notifying the

party of the date and time scheduled for the hearing on the petition for removal does not comply with the procedural requirements of Rule 5.040(a)(1).

REVERSED AND REMANDED.

Accordingly, we reverse the order removing appellant as co-personal representative in the subject estate and remand this case for further proceedings consistent with this opinion.

DOWNEY and HERSEY, JJ., concur.

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IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT, IN AND
FOR BREVARD COUNTY, FLORIDA

CASE NO.: 05-2013-CP-028863

ANNEEN NINA GLORIA BAUM,
an individual
Plaintiff,

v.

DAVID A. BAUM, as the Personal
Representative of the Estate
of Seymour Baum, deceased, and
as an individual, et al.

Defendants.

HEARING BEFORE
THE HONORABLE JOHN M. HARRIS

DATE TAKEN: March 18, 2014
TIME: 1:21 p.m.
PLACE: Brevard County Courthouse
Moore Justice Center
2825 Judge Fran Jamieson Way
Viera, Florida 32940
REPORTED BY: Jill E. Hastey, RPR and
Notary Public

1 forth in rule 5.040. You'll see, in the record,
2 there's no proof of service because service was
3 never made.

4 In the will contest case, Your Honor, my
5 client is an indispensable party. He's the
6 personal representative of this estate. Under
7 Florida law he's got a duty to defend the validity
8 of the will. In an estate case, the personal
9 representative is always an indispensable party.

10 And I cited to you a number of cases standing
11 for that proposition, including Smith v. DeParry,
12 behind Tab 33, for the proposition that personal
13 representatives is an indispensable party in a will
14 contest. It makes sense they have a duty to defend
15 the validity of the will. So because she's failed
16 to serve, the dropping of my client as a party
17 causes this case to be dismissed.

18 Now, my opponent is going to argue that you
19 shouldn't dismiss this case, Your Honor, because,
20 if it's dismissed, I might be time barred from
21 re-filing a new will contest. But the law that I
22 provided to you, Your Honor, in the notebook, there
23 are two cases that I focused on in particular. One
24 is Powell v. Madison County, and the other is
25 Pixton v. William Scotsman. And in those cases the



1 parties had failed to serve, and the plaintiff
2 said, "Well, Your Honor, if you dismiss my case for
3 failure to serve, even though it's a without
4 prejudice dismissal, I'm going to be barred from
5 re-filing, and that would be prejudicial to me."

6 And the court in those cases went through the
7 typical analysis and said, "Look, you know, this
8 case has been pending for a long time. You haven't
9 shown me good cause or excusable neglect for the
10 delay, and so the fact that you may not be able to
11 re-file your case is of no consequence at the end
12 of the day if you don't comply with my orders and
13 you don't comply with the rules."

14 And that's ultimately what Powell and Pixton
15 say. Those cases are in your notebook, Your Honor,
16 behind 26 and 27.

17 Finally, Your Honor, my opponent cites, in
18 her response to my motion to drop parties, the case
19 of Aguilar v. Aguilar, and that's a probate case.
20 She cites that case for the proposition that the
21 probate rules don't require that objections to the
22 validity of a will be served within three months,
23 they just have to be filed.

24 So, in that case, what happened in Aguilar
25 was the defending party, the personal