SUPREME COURT OF FLORIDA

IN RE: REPORT AND
RECOMMENDATIONS OF THE
WORKGROUP ON IMPROVED
RESOLUTION OF CIVIL CASES Case No: SC22-122
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COMMENT

The Workgroup on Improved Resolution of Civil Cases (the "Workgroup") was charged with proposing revisions to the Florida rules to improve the management and resolution of civil cases. The Workgroup filed a report proposing several changes to the Florida Rules of Civil Procedure to initiate active case management in the civil courts where judges will become more proactive in moving cases forward (the "Report"). Many of the proposed rules appear effective in principle to move cases forward, including creating rules regarding initial disclosures similar to those required by federal courts, motion practice procedure, and case management orders.

I generally comment that I agree with the proposed changes to create active case management.[1] Some of the most important

[1] Other comments discuss the need for more judges and administrative staff as well as the need to allow continuances based on the more stringent rules in revised Rule 1.460. I generally agree with the comments discussing these points as the Report is a valid

revisions addressed in the Report that are critical to improving the resolution of civil cases are the revisions regarding sanctions addressed in Florida Rules of Civil Procedure 1.275 and 1.380. The Report correctly notes that attorneys have been engaging in gamesmanship and litigation abuses warranting revisions to the Florida rules regarding a trial court's obligation to enter sanctions.

Over the past several years, my firm and I have witnessed a vast array of discovery abuses left unchecked by the judicial system. I personally have witnessed attorneys lie about court orders to avoid producing discovery and judges disregard such misrepresentations because of the dislike for contentious discovery and the associated time and labor involved in addressing such issues. Permitting such activity without consequence has led to widespread abuse of the good-faith discovery process, thereby unnecessarily exacerbating the cost and time involved in litigation. Revisions to the Florida rules *requiring* judges to actively prevent abuses of the discovery process are thus warranted.

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endeavor, but it may be stymied by the lack of support in the Florida judiciary. Additionally, continuances cannot be based upon a black-and-white analysis because each case is unique.

Other changes not included in the Report should also be considered. First, Federal Rule of Civil Procedure 26 requires parties to serve initial disclosures. The proposed changes in the Report to Florida Rule of Civil Procedure 1.280 are based on the initial disclosures in Federal Rule 26, but a key component of the federal initial disclosures is missing. Specifically, disclosures relating to expert discovery. Federal Rule 26(a)(1) governs initial disclosures and Federal Rule 26(a)(2)(A) states: "In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705." Fed. R. Civ. Pro. 26(a)(2)(A).

The Report changes Florida Rule 1.280 by adopting Federal Rule 26(a)(1), but it does not propose any material changes to Florida Rule 1.280(c)(5) governing expert discovery in Florida. Presently, Florida rule 1.280(c)(5) provides that discovery of experts can *only* be obtained via interrogatories and then later depositions. Fla. R. Civ. Pro. 1.280(c)(5). A party is therefore not required to disclose experts until the other party sends specific interrogatories asking for experts. Fla. R. Civ. Pro. 1.280(c)(5)(A)(i). To follow the intent of active case

management and avoid discovery delays, disclosure of experts should be required under the Florida rules as they are required under the Federal rules.

Next, the Report does not address affirmative defenses, which is one of the most often abused tactics to delay or obfuscate summary judgment and trial. The Report makes no changes to Rules 1.110 or 1.140 regarding the proper standard for asserting affirmative defenses and for striking improper defenses. The present form of Rules 1.10 or 1.140 provides no guidance or requirement for a judge to strike improper affirmative defenses. Rather, such standards have been addressed in case law. *State Farm Mut. Auto. Ins. Co. v. Curran*, 135 So. 3d 1071, 1079 (Fla. 2014) (holding that affirmative defenses cannot be mere denials of the complaint); *Leal v. Deutsche Bank Nat. Trust Co.,* 21 So. 3d 907, 909 (Fla. 3d DCA 2009) (noting that "[w]here there are no facts pled to support general allegations of affirmative defenses, the defenses are legally insufficient.").

Despite the foregoing law, trial court judges apply a relaxed standard allowing defendants to raise numerous unsupported defenses. Where a defendant raises numerous legally insufficient defenses, a trial court judge should follow a standard to strike legally

insufficient defenses. Florida has a liberal amendment policy and defenses can be raised later if new information is acquired, but a court should not permit a defendant to raise dozens of defenses that fail to even meet the notice pleading standard. Rule changes regarding a court's obligations to strike legally insufficient defenses are thus warranted.

For these reasons, I agree with the changes proposed by the Workgroup and urge additional changes to aid the intent of the Workgroup regarding the better management of cases in Florida.

Dated: June 1, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing was served via Florida Courts eFiling Portal (My FL Court Access) eService on June 1, 2022 with the Honorable John A. Tomasino, Clerk of the Supreme Court of Florida, with a copy provided by mail to the Hon. Chief Judge Robert Morris, on behalf of the Workgroup as its Chair; Improved Resolution of Civil Cases, Second District Court of Appeals, P.O. Box 327, Lakeland, FL 33802, and by electronic mail to Tina White, OSCA Staff Liaison, Workgroup on Improved Resolution of Civil Cases, 500 South Duval Street, Tallahassee, FL 32399 (whitet@flcourts.org).

By: s/Joshua Saval
JOSHUA SAVAL

CERTIFICATE OF COMPLIANCE

I certify this response was prepared in compliance with the font requirements of Florida Rule of Appellate Procedure 9.045.

By: s/Joshua Saval
JOSHUA SAVAL