

# Third District Court of Appeal

State of Florida, January Term, A.D. 2009

Opinion filed March 4, 2009.

Not final until disposition of timely filed motion for rehearing.

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No. 3D08-319

Lower Tribunal No. 03-16247

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**Yalila Alvarado and Wilfredo Alvarado, Jr., as Natural Guardians  
and Parents of Wilfredo Alvarado, III, a Minor,**  
Appellants,

vs.

**Snow White and the Seven Dwarfs, Inc., a/k/a Snow White and the  
Seven Dwarfs School, Inc.,**  
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Jon I. Gordon,  
Judge.

Billbrough & Marks and Geoffrey B. Marks, for appellants.

Daniel J. Woodring (Tallahassee); John S. Derr (Tallahassee), for appellee.

Before WELLS, CORTIÑAS, and ROTHENBERG, JJ.

CORTIÑAS, J.

We reverse the trial court's dismissal with prejudice of appellants' case for failure to comply with certain discovery orders. "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." Kozel v. Ostendorf, 629 So. 2d 817, 818 (Fla. 1993). To ensure that the sanction of dismissal is prudently applied, trial courts must first make certain preliminary findings of fact. Tianvan v. AVCO Corp., 898 So. 2d 1208, 1209 (Fla. 4th DCA 2005). These findings must address:

- 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.

Kozel, 629 So. 2d at 818.

Here, there is no showing that the trial court made preliminary findings of fact concerning each of the Kozel factors. Accordingly, we reverse the order of dismissal with prejudice and remand to the trial court to consider all six Kozel factors. If, after considering the six factors, the trial court determines that no less severe sanction is appropriate, and again dismisses the case with prejudice, the trial court shall include in its order of dismissal findings of fact and conclusions of law

with respect to each of the Kozel factors. See Smith v. City of Panama, 951 So. 2d 959, 962 (Fla. 1st DCA 1997).

Reversed and remanded.