No. _____

**IN THE**

**SUPREME COURT OF THE UNITED STATES**

**ROBERT KELVIN LINDBLOOM,**
PETITIONER

Appeal No. **2D21-1227**
V. L.T. CASE NO. **15-CA-2932**

**PARRISH CEMETERY ASSOCIATION, ET AL**
RESPONDENTS

**ON PETITION FOR A WRIT OF CERTIORARI TO:**

**FLORIDA SECOND DISTRICT COURT OF APPEALS**

# PETITION FOR WRIT OF CERTIORARI

Robert Kelvin Lindbloom, Pro Se

7005121st Ave E.
Parrish, Florida 34219
941-448-8460

Docatari@ Gmail.com

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT KELVIN LINDBLOOM — PETITIONER

VS.

PARRISH CEMETERY ASSOCIAION, et al — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis.*

Please check the appropriate boxes:

☒ Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

Florida 12th Judicial Circuit, Florida 2nd District Court of Appeals, Florida Supreme Court, United States District Court for the Middle District, Florida, United States Court of Appeals, 11th Circuit, Unitied States Supreme Court

☐ Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

☒ Petitioner's affidavit or declaration in support of this motion is attached hereto.

☐ Petitioner's affidavit or declaration is **not** attached because the court below appointed counsel in the current proceeding, and:

☐ The appointment was made under the following provision of law: _____, or

☐ a copy of the order of appointment is appended.

Robert Kelvin Lindbloom
(Signature)

## AFFIDAVIT OR DECLARATION
## IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Robert Kelvin Lindbloom, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

| **Income source** | **Average monthly amount during the past 12 months** | | **Amount expected next month** | |
|---|---|---|---|---|
| | You | Spouse | You | Spouse |
| Employment | $ 0 | $ N/A | $ 0 | $ N/A |
| Self-employment | $ 0 | $ N/A | $ 0 | $ N/A |
| Income from real property (such as rental income) | $ 0 | $ N/A | $ 0 | $ N/A |
| Interest and dividends | $ 0 | $ N/A | $ 0 | $ N/A |
| Gifts | $ 0 | $ N/A | $ 0 | $ N/A |
| Alimony | $ 0 | $ N/A | $ 0 | $ N/A |
| Child Support | $ 0 | $ N/A | $ 0 | $ N/A |
| Retirement (such as social security, pensions, annuities, insurance) | $ 1036.00 | $ N/A | $ 1036.00 | $ N/A |
| Disability (such as social security, insurance payments) | $ 0 | $ N/A | $ 0 | $ N/A |
| Unemployment payments | $ 0 | $ N/A | $ 0 | $ N/A |
| Public-assistance (such as welfare) | $ 0 | $ N/A | $ 0 | $ N/A |
| Other (specify): Fl. Retire | $ 629 | $ N/A | $ 629.00 | $ N/A |
| **Total monthly income:** | $ 1665.00 | $ N/A | $ 1665.00 | $ N/A |

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

| Employer | Address | Dates of Employment | Gross monthly pay |
|---|---|---|---|
| None | | | $ N/A |
| | | | $ |
| | | | $ |

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

| Employer | Address | Dates of Employment | Gross monthly pay |
|---|---|---|---|
| None | | | $ N/A |
| | | | $ |
| | | | $ |

4. How much cash do you and your spouse have? $ 500.00
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

| Type of account (e.g., checking or savings) | Amount you have | Amount your spouse has |
|---|---|---|
| Checking | $ 500 | $ N/A |
| | $ | $ |
| | $ | $ |

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☒ Home
Value 1/3 of 200,000

☐ Other real estate
Value N /A

☒ Motor Vehicle #1
Year, make & model 2000 S430 Mercedes
Value 3000.00

☐ Motor Vehicle #2
Year, make & model N/A
Value

☐ Other assets
Description None
Value 0

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

| Person owing you or your spouse money | Amount owed to you | Amount owed to your spouse |
|---|---|---|
| N/A | $ 0 | $ 0 |
| | $ | $ |
| | $ | $ |

7. State the persons who rely on you or your spouse for support. For minor children, list initials instead of names (e.g. "J.S." instead of "John Smith").

| Name | Relationship | Age |
|---|---|---|
| None | | |
| | | |
| | | |

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

| | You | Your spouse |
|---|---|---|
| Rent or home-mortgage payment (include lot rented for mobile home)<br>Are real estate taxes included? ☐ Yes ☒ No<br>Is property insurance included? ☐ Yes ☒ No | $ 0 | $ N/A |
| Utilities (electricity, heating fuel, water, sewer, and telephone) | $ 175.00 | $ N/A |
| Home maintenance (repairs and upkeep) | $ 500.00 | $ N/A |
| Food | $ 350.00 | $ N/A |
| Clothing | $ 100 | $ N/A |
| Laundry and dry-cleaning | $ 0 | $ N/A |
| Medical and dental expenses | $ 100.00 | $ N/A |

| | You | Your spouse |
|---|---|---|
| Transportation (not including motor vehicle payments) | $ 100.00 | $ N/A |
| Recreation, entertainment, newspapers, magazines, etc. | $ 0 | $ N/A |
| Insurance (not deducted from wages or included in mortgage payments) | | |
| Homeowner's or renter's | $ 0 | $ N/A |
| Life | $ 0 | $ N/A |
| Health | $ 0 | $ N/A |
| Motor Vehicle | $ 70.00 | $ N/A |
| Other: _____ | $ 0 | $ N/A |
| Taxes (not deducted from wages or included in mortgage payments) | | |
| (specify): Property Tax | $ 43.33 | $ N/A |
| Installment payments | | |
| Motor Vehicle | $ 0 | $ N/A |
| Credit card(s) | $ 120. | $ N/A |
| Department store(s) | $ 0 | $ N/A |
| Other: _____ | $ 0 | $ N/A |
| Alimony, maintenance, and support paid to others | $ 0 | $ N/A |
| Regular expenses for operation of business, profession, or farm (attach detailed statement) | $ 0 | $ N/A |
| Other (specify): _____ | $ 0 | $ N/A |
| **Total monthly expenses:** | $ 1515.00 | $ N/A |

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☒ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I have an old house that is need of a roof and AC.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: September 6 _____, 2022

(Signature)

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

ROBERT KELVIN LINDBLOOM — PETITIONER

PARRISH CEMETERY ASSOCIATION, et al — RESPONDENT(S)

**PROOF OF SERVICE**

I, ROBERT KELVIN LINDBLOOM, do swear or declare that on this date, September 6, 2022, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

LUKS, SANTANIELLO, PERTRILLO, & JONES, Attorneys for Defendants, 100 North Tampa Street Suite 2120, Tampa Florida 33602

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 6, 2022

(Signature)

No. _____

**IN THE**

**SUPREME COURT OF THE UNITED STATES**

**ROBERT KELVIN LINDBLOOM,**
**PETITIONER**

Appeal No. **2D21-1227**
v. L.T. CASE NO. **15-CA-2932**

**PARRISH CEMETERY ASSOCIATION, ET AL**

**RESPONDENTS**

**ON PETITION FOR A WRIT OF CERTIORARI TO:**

**FLORIDA SECOND DISTRICT COURT OF APPEALS**

# PETITION FOR WRIT OF CERTIORARI

Robert Kelvin Lindbloom, Pro Se

7005121st Ave E.
Parrish, Florida 34219
941-448-8460

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## QUESTIONS PRESENTED

**I.** Was the decision of the Second District Court of Appeals in **direct conflict with previous decisions of;** another state court of last resort, [1] Florida Supreme Court ,[2] or the United States Court of Appeals. [3]

> [1] *Austin v. Papol No. 84-847 District Court of Appeal of Florida,* ***Second District*** *464 So. 2d 1338 (Fla. Dist. Ct. App. 1985) Decided Mar 15, 1985;*
>
> [2] *No. 75370* **Supreme Court of Florida**; *Commonwealth Fed. Sav. Loan v. Tubero, 569 So. 2d 1271 (Fla. 1990) Decided Dec 31, 1990*
>
> [3] *Betty K Agencies, Ltd. v. M/V Monada No. 04-14208 United States Court of Appeals,* ***Eleventh Circuit*** *4 33 (11th Cir.2005) Decided Dec 16, 2000.)*

Without exception, these courts found that "willfulness" was a necessary element when dismissing a complaint with prejudice, for: " *failure of an adverse party to comply with these rules or any order of court." (Rules of Civil Procedure* 1.420.(b))

**II.** Did the decision of the Second District Court of Appeals denying Lindbloom's appeal, deprive him of basic **due process and of equal protection of the law** when it failed to follow previous decisions of the Second District of Appeal, the Florida Supreme Court, as well as the

11th US District Court of Appeals, that found that "willfulness" was a necessary element for "*dismissal with prejudice for failure* to *comply with these rules or any order of court.*"

## LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

ROBERT KELVIN LINDBLOOM, PETITIONER

PARRISH CEMETERY ASSOCIATION, LACY PRITCHARD, as an individual and as President, Parrish Cemetery Association, IRIS MCCLAIN, as an individual and as Secretary, Parrish Cemetery Association, EDWARD CHITTY, as an individual and as President, Parrish Cemetery Association, LINDA BRITT, as an individual and as an officer of the Parrish Cemetery Association, JOEL WHIDDEN, as an individual and as an officer of the Parrish Cemetery Association, BONNY WHIDDEN, as an individual and as an officer of the Parrish Cemetery Association, MEAD BRITT, as an individual and as an officer of the Parrish Cemetery Association, HORACE DOZIER, as an individual and as an officer of the Parrish Cemetery Association,

CORKY WHIDDEN, as an individual and as an officer of the Parrish Cemetery Association, JOHN MCADAMS, as an individual and as an officer of the Parrish Cemetery Association, LEO MILLS, as an individual and as an officer of the Parrish Cemetery Association, DORTHY MILLS, as an individual and as an officer of the Parrish Cemetery Association. RESPONDENTS

**RELATED CASES:**

**NONE**

## INDEX OF APPENDICES

## TABLE OF AUTHORITIES CITED

As we have observed, dismissal with prejudice is a drastic sanction that may be imposed only upon finding a clear pattern of delay or willful contempt and that lesser sanctions would not suffice. World Thrust Films, Inc. v. Int'l Family Entm't, Inc., 41 F.3d 1454, 1456 (11th Cir. 1995); Mingo v. Sugar Cane Growers Co-op. of Fla., 864 F.2d 101, 102-03 (11th Cir. 1989).

## TABLE OF AUTHORITIES

No. 84-847
District Court of Appeal of Florida, Second District

**Austin v. Papol**

464 So. 2d 1338 (Fla. Dist. Ct. App. 1985)
Decided Mar 15, 1985 No. 84-847.
March 15, 1985.

PER CURIAM.

Appeal from the Circuit Court, Lee County,
William J. Nelson, J.
Kevin F. Jursinski and Michael C. Tice, Fort Myers, for appellant.
Louis F. Sisson, III, of Blackwell, Walker, Gray, Powers, Flick Hoehl, Fort Myers, for appellee.

PER CURIAM

We reverse the final judgment dismissing Austin's complaint with prejudice and entering a default judgment against him on Papol's counterclaim. The trial court erred in imposing such extreme sanctions without first affording Austin the opportunity to be heard on the question of whether his failure to appear at the scheduled depositions was willful or in bad faith. Lazare v. Weiss, 437 So.2d 211 (Fla. 3d DCA 1983); Kuechenberg v. Creative Interiors, Inc., 424 So.2d 145 (Fla. 4th DCA 1982); Sunstream Jet Center, Inc. v. Lisa Leasing Corp., 423 So.2d 1005 (Fla. 4th DCA 1982); Owens-Illinois 260 So.2d 221 (Fla. 1st DCA 1972).

Accordingly, we reverse and remand the case for an evidentiary hearing after notice to Austin.

GRIMES, A.C.J., DANAHY, J., and BOARDMAN, EDWARD F., (Ret.) J., concur.

No. 75370
Supreme Court of Florida

**Commonwealth Fed. Sav. Loan v. Tubero**

569 So. 2d 1271 ( Fla. 1990)
Decided Dec 31, 1990 No. 75370. November 15, 1990. Rehearing Denied December 31, 1990.

Robert S. Hackleman and Connis 0 . Brown, III of Gunster, Yoakley Stewart, P.A., Fort Lauderdale, for petitioner.

Thomas James O'Grady, Boca Raton, for respondent.

GRIMES, Justice.

We review *Tubero v. Chapnich,* 552 So.2d 932, 936 (Fla. 4th DCA 1989), in which the district court of appeal certified the following as a question of great public interest:

> Is an express written finding of willful or deliberate refusal to obey a court order to comply with discovery under Florida Rule of Civil Procedure 1.380 necessary to sustain the severe sanctions of dismissal or default against a noncomplying plaintiff or defendant?

We have jurisdiction under article V, section 3(b)(4) of the Florida Constitution.

Moshe Tubero filed suit against Commonwealth Savings and Loan Association and others on November 16, 1987. On January 21, 1988, Commonwealth filed a request for production of documents and interrogatories, all of which were to be answered by February 20, 1988. On February 17, 1988, Tubero's lawyer filed a motion to withdraw premised upon lack of cooperation and irreconcilable differences between him and his client. He set the motion for hearing on March 24, 1988.

The motion and notice of hearing reflect service upon the opposing attorneys but not on Tubero. The record contains no indication that this hearing ever took place.

On March 8, 1988, Commonwealth filed a motion to compel discovery and for entry of an ex parte order. The motion alleged that Tubero had not responded to its requested discovery and had neither objected to the discovery nor requested an 1272extension *1272 of time. Pursuant to local administrative rules, this motion was submitted to the court without a hearing and resulted in an order entered on the same date which required compliance with the discovery requests within ten days. When the discovery was not forthcoming, Commonwealth filed a Motion to Compel Discovery and for Sanctions on March 22, 1988, and set the motion for hearing on April 5, 1988. On that date, the court entered an order stating that Commonwealth's motion was "granted for Plaintiffs failure to comply with this court's Order of March 8, 1988, and Plaintiff's complaint is hereby dismissed."

The district court of appeal observed that the record contained no showing that Tubero had attempted to comply with the order or communicate any excuse for noncompliance to the court by the time of the hearing at which the complaint was dismissed. Thus, the court concluded that "these facts might support a finding of willful disregard of the orders of the court." However, the court was concerned with the absence of an express finding that Tubero had willfully disregarded the rulings of the trial judge. Relying upon several of its previous decisions, the district court of appeal held "that an order granting a dismissal or default under rule 1.380 for failure to provide discovery must make an express written finding that appellant's conduct was a willful or deliberate violation of the discovery orders." 552 So.2d at 935. Therefore, the court reversed the order of dismissal and remanded for further proceedings to reconsider the sanctions in order to determine whether there was a deliberate or willful disregard of the discovery order.

In *Mercer v. Raine,* 443 So.2d 944 (Fla. 1983), this Court considered the circumstances under which a trial judge was authorized to strike pleadings or enter a default for noncompliance with an order compelling discovery. While noting that because of the severity of such a sanction it should only be employed m extreme circumstances, we said:

> A deliberate and contumacious disregard of the court's authority will justify application of this severest of sanctions, *Swindle v. Reid,* 242 So.2d 751 (Fla. 4th DCA 1970), as will bad faith, willful disregard or gross indifference to an order of the court, or conduct which evinces deliberate callousness, *Herold v. Computer Components International, Inc.,* 252 So.2d 576 (Fla. 4th DCA 1971).

*Mercer,* 443 So.2d at 946.

In *Mercer,* we did not specifically hold that the trial court's order must contain an express finding of willful or deliberate refusal to obey a court order to comply with discovery. However, in affirming the order striking the answer, we noted that the trial court had found that the defendant's actions amounted to willful disregard. In this manner, we distinguished *Santuoso v. McGrath Associates, Inc.,* 385 So.2d 112 (Fla. 3d DCA 1980), *disapproved, Mercer v. Raine,* 443 So.2d 944 (Fla. 1983), the case upon which conflict was based, by pointing out that the order entering default had not recited that Santuoso's failure to submit to discovery was willful.

> In a series of cases, the Fourth District Court of Appeal has construed *Mercer* to require that an order imposing sanctions under Florida Rule of Civil Procedure 1.380 must recite a party's willful failure to submit to discovery. *In re Foifeiture of Twenty Thousand Nine Hundred Dollars ($20,900) US. Currency,* 539 So.2d 14 (Fla. 4th DCA 1989); *Bernaad v. Hintz,* 530 So.2d 1055 (Fla. 4th DCA 1988);

*Arviv v. Perlow,* 528 So.2d 139 (Fla. 4th DCA 1988); *Donner v. Smith,* 517 So.2d 709 (Fla. 4th DCA 1987); *Championship Wrestling from Florida, Inc. v. DeBlasio,* 508 So.2d 1274 (Fla. 4th DCA), *review denied,* 518 So.2d 1274 (Fla. 1987); *McNamara v. Bradley Realty, Inc.,* 504 So.2d 814 (Fla. 4th DCA 1987); *Stoner v. Verkaden,* 493 So.2d 1126 (Fla. 4th DCA 1986). In a concurring opinion in *Championship Wrestling,* Judge Anstead suggested that the question of whether or not a written finding of willful refusal was required in cases such as this was in doubt and that clarification was necessary to put trial courts on notice of such a requirement. *Championship Wrestling,* 508 So.2d at 1274

1273(Anstead, J., *1273 concurring). By certifying the instant question, the court has now sought that clarification.

At the outset, we wish to reaffirm the position set forth in *Mercer* concerning the trial judge's discretion to order dismissal or default for failure to comply with discovery requirements. The standard by which such orders shall be reviewed is whether there was an abuse of discretion. If reasonable persons could differ as to the propriety of the action taken, there can be no finding of an abuse of discretion. *Canakaris v. Canakaris,* 382 So.2d 1197 (Fla. 1980). Yet, it is for the very reason that the trial judge is granted so much discretion to impose this severe sanction that we have determined that the subject order should contain an explicit finding of willful noncompliance.

Except where mandated by statute or rule, we are loath to require trial judges to make specific findings of fact in support of their rulings. We have done so, however, in the case of orders which find spouses in contempt for willful nonpayment of alimony, *Bowen v. Bowen,* 471 So.2d 1274 (Fla. 1985), and the sanction of dismissal or default could

be viewed as substantially comparable.

By insisting upon a finding of willfulness, there will be the added assurance that the trial judge has made a conscious determination that the noncompliance was more than mere neglect or inadvertence. Further, there are some cases in which the record, standing alone, is susceptible to more than one interpretation and a judge's finding of willfulness can serve to assist the appellate court in reaching its conclusion. *See Wal/raff v. TG.I Friday's, Inc.*, 490 So.2d 50 (Fla. 1986) (record did not resolve the dispute of whether deposition which plaintiff failed to attend had been cancelled). We hasten to add that no "magic words" are required but rather only a finding that the conduct upon which the order is based was equivalent to willfulness or deliberate disregard.

We answer the certified question in the affirmative and approve the opinion of the district court of appeal.

It is so ordered.

SHAW, C.J., and OVERTON, McDONALD, EHRLICH, BARKETT and KOGAN, JJ., concur.

No. 04-14208
United States Court of Appeals, Eleventh Circuit

**Betty K Agencies, Ltd. v. M/V Monada**

432 F.3d 1333 (11th Cir. 2005)
Decided Dec 16, 2005

No. 04-14208.

1334December 16, 2005. *1334

Stephen C. Irick, Jr., Hayden Milliken, P.A., Miami, FL, for Appellant.

Arthur Joel Levine, Law Office of Arthur Joel Levine, Miami, FL, for Appellees.

Appeal from the United States District Court for the Southern District of Florida.

Before HULL, MARCUS and HILL, Circuit Judges.

MARCUS, Circuit Judge:

Appellant, Betty K Agencies, LTD. ("Betty K"), challenges the district court's *sua sponte* order dismissing *with prejudice* its maritime claims against Appellees Tidal Wave Limited ("Tidal Wave") and M/V MONADA ("MONADA").
Because the district court dismissed the case *with prejudice* as a sanction for failure to answer a counterclaim and perfect service of process, without finding that Betty K acted with willful or contumacious disregard for court rules, and without finding that lesser sanctions were somehow inadequate, we vacate the district court's Dismissal Order and remand for further proceedings consistent with this opinion.

I. Betty K is in the business of transporting marine cargo between Miami and Nassau, Bahamas. In 2003, Betty K entered into an agreement with Tidal Wave to charter the defendant M/V MONADA, a cargo vessel. Soon thereafter, and with twenty-seven days remaining in the charter period, the vessel's engine failed, rendering the vessel inoperable for the remainder of the charter period. Betty K requested from Tidal Wave $52,650 in unearned charter hire and $6,051 in advances made to the vessel while in service. Tidal Wave refused to return the requested funds, whereupon Betty K commenced suit in the United States District Court for the Southern District of Florida.

Betty K sued the M/V MONADA, *in rem,* and Tidal Wave, *in personam,* on April 7, 2004, and moved for an order directing issuance of a warrant of arrest. The next day, the district court issued a Warrant of Arrest for the vessel, but before the marshal could arrest the vessel, Tidal Wave filed an Emergency Motion stating that "this vessel is voluntarily submitting to the Court's jurisdiction, and the disruption caused by an arrest is not necessary." At an emergency hearing before the district court, Tidal Wave agreed on behalf of the vessel to post an adequate security bond in lieu of arrest in the amount of $65,956.58. On April 29, 2004, the marshal, not surprisingly, returned the arrest warrant unexecuted, explaining: "Defendant posted bond. Court advised not to arrest. Return
1336unexecuted." *1336

On April 14, 2004, Tidal Wave filed and served on Betty K its Answer, Affirmative Defenses, and Counterclaims. It is undisputed that Betty K did not file its Answer to the counterclaim with the clerk of court; the parties dispute whether Betty K served its Answer on Tidal Wave. Betty K claims to have served counsel by hand with an answer to the counterclaim in court at the emergency hearing; counsel for Tidal Wave denies this. No hearing was conducted nor were findings made by the district court as to whether an answer was served on Tidal Wave.

The parties continued to litigate their claims before the district court even after the date on which Betty K's Answer was due, and no motion to compel an answer or dismiss was ever filed by any party. Indeed, nothing in the record suggests that, during that time, the court or the litigants were aware of Betty K's failure to respond to Tidal Wave's counterclaim. Nevertheless, on July 30, 2004, the district court, *sua sponte,* entered its terse Dismissal Order stating:

> Plaintiff failed to respond as required by S.D. Fla. L.R. 7.1.C and Fed.R.Civ.P. 12(a) (2). In addition, the Court notes that service was never perfected as to Defendant M/V MOVADA [sic]. After reviewing the record and being otherwise advised of the premises, it is hereby ORDERED AND ADJUDGED that this action is DISMISSED WITH PREJUDICE.

No further explanation was offered.

Soon thereafter, on August 5, 2004, Betty K, pursuant to Rule 60(b), timely filed a Motion to Vacate arguing that: (1) the district court mistakenly concluded, based on the docket entry reflecting incomplete service on the MONADA, that the vessel was not properly before the court, even though posting the bond established the district court's *in rem* jurisdiction; and, (2) Betty K committed excusable neglect by failing to file its Answer with the court. Betty K said that, in any event, the draconian remedy of dismissing with prejudice the entire complaint was the wrong remedy. The District Court denied Betty K's Motion to Vacate, citing as its sole reason Betty K's failure to answer Tidal Wave's counterclaim. In its entirety, the order read as follows:

> THIS CAUSE came before the Court upon Plaintiff Betty K Agencies, Ltd.'s Motion to Vacate or, Alternatively, to Alter and Amend "Final Order of Dismissal and Denying All Pending Motions as Moot," (D.E.30), filed August 5, 2004. The Court having carefully considered the case file and being duly advised, Plaintiff's Motion is DENIED.

Plaintiff avers in its Emergency Motion that the response to the Defendants' counterclaim was hand delivered at an emergency hearing held on April 16, 2004. Plaintiff's Motion at ¶ 4. Pursuant to Fed.R.Civ.P. 12(a)(2), a party must serve a reply to a counterclaim within twenty (20) days after service of the answer. All papers after the complaint required to be answered "shall be filed with the clerk where the assigned Judge is chambered either before service or within three business days, thereafter." S.D. Fla. L.R.
5.1.B. Plaintiff failed to provide any demonstrable evidence that it has complied with the Fed.R.Civ.P. or the S.D. Fla. L.R. Moreover, the docket does not provide any evidence that the Plaintiff filed and served its response to Defendants' counterclaim, as required.

It is therefore: ORDERED AND ADJUDGED that Plaintiff's Request for *1337 Emergency Motion to Stay enforcement of Order is hereby DENIED.

Betty K has timely appealed both the Dismissal Order and the Order Denying Plaintiff's Motion to Vacate.

II. (11th Cir. 1995) (reversing sua sponte dismissal Cir. 1985).

We review for abuse of discretion a district court's dismissal for failure to comply with the rules of court. Goforth v. Owens, 766 F.2d 1533, 1535 (11th) Discretion means the district court has a "range of choice, and that its decision will not be disturbed as long as it stays within that range and is not influenced by any mistake of law." Guideone Elite Ins. Co. v. Old Cutler Presbyterian Church, Inc., 420 F.3d 1317, 1324 (11th Cir. 2005) (internal quotation marks omitted).

Although the district court nowhere specified the authority upon which it relied to *sua sponte* dismiss Betty K's case, in these circumstances a court may dismiss a case with prejudice based on two possible sources of authority: Rule 41(b), or the court's inherent power to manage its docket. Rule 41(b) provides: "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him." Fed.R.Civ.P. 41(b). The Supreme Court also has held that "[t]he authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an `inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs. . . ." *Link v. Wabash R.R. Co.,* 370 U.S. 626, 630, 82 S.Ct. 1386, 1389, 8 L.Ed.2d 734 (1962).

Although the plain language of Rule 41(b) suggests that a court may act pursuant to that Rule only when dismissing upon the motion of the defendant, and acts only on its inherent authority when dismissing *sua sponte,* many of our decisions elide this neat distinction. For example, in *Hildebrand v. Honeywell, Inc.,* 622 F.2d 179, 181 (5th Cir. 1980),[1] the former Fifth Circuit reviewed a dismissal upon motion, but stated that "a court may *sua sponte* dismiss a case with prejudice under Rule 41(b) of the Federal Rules of Civil Procedure." *Accord World Thrust Films, Inc.v. Int'l Family Entm't, Inc.,* 41 F.3d 1454, 1456 for failure to comply with court rules, and citing Rule 41(b) as the source of the district court's authority); Lopez v. Aransas County Indep. Sch. Dist., 570 F.2d 541, 544 (5th Cir. 1978) (affirming sua sponte dismissal and stating that "[u]nder Rule 41(b) of the Federal Rules of Civil Procedure a case may be dismissed with prejudice. . . . [And]

> although the rule is phrased in terms of dismissal on the motion of the defendant, it is clear that the power is inherent in the court and may be exercised *sua sponte* . . . . ."). At least one decision, however, has drawn

a clear distinction between the two sources of authority: "[Rule] 41(b) allows a defendant to seek the dismissal of an action. . . . In addition to the authority granted by Rule 41(b), a federal district court possesses the inherent authority to dismiss an action for want of prosecution. . . ." *Gonzalez v. Firestone Tire Rubber Co.,* 610 F.2d 241, 247 (5th Cir. 1980).

[1] The Eleventh Circuit has adopted as precedent the decisions of the former Fifth Circuit rendered before October 1, 1981. *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981).

Moreover, the harsh sanction of dismissal that may be properly imposed only when: "(1) a party engages in a clear pattern of delay or willful contempt (contumacious conduct); and (2) the district court specifically finds that lesser sanctions would not suffice." World Thrust Films, 41 F.3d at 1456; accord Gratton v. Great Am. Commc'ns., 178 F.3d 1373, 1374 (11th Cir. 1999); Mingo v. Sugar Cane Growers Co-op. of Fla., 864 F.2d 101, 102 (11th Cir. 1989); Cohen v. Carnival Cruise Lines, Inc., 782 F.2d 923, 924-25 (11th Cir. 1986); Goforth, 766 F.2d at 1535; Jones v. Graham, 709 F.2d 1457, 1458 (11th Cir. 1983); Gonzalez, 610 F.2d at 247; Hildebrand, 622 F.2d at 181; Boazman v. Econ. Lab., Inc., 537 F.2d 210, 212-13 (5th Cir. 1976). This much, however, is clear: a dismissal with prejudice, whether on motion or sua sponte, is an extreme sanction with prejudice is thought to be more appropriate in a case where a party, as distinct from counsel, is culpable. *Gratton,* 178 F.3d at 1375.

Thus, for example, in *Gratton v. Great American Communications,* a panel of this Court found no abuse of discretion where the district court found the plaintiff personally culpable and dismissed the case with prejudice. *Id.* There, the plaintiff repeatedly flouted discovery rules, destroyed evidence, misidentified a witness, and ignored the court's orders. Indeed, the district court tried lesser sanctions on two occasions before concluding that no sanction but dismissal would cure the harm. *Id.* By contrast, in *Boazman,*

537 F.2d at 212-13, a panel of the former Fifth Circuit found that the district court abused its discretion by dismissing a case with prejudice

absent some evidence of both contumacious violation of the court's order and a finding that lesser sanctions were not available.

In this case, the district court identified two reasons for the dismissal: (1) Betty K's failure to answer Tidal Wave's counterclaim as required by S.D. Fla. L.R. 7.1.C and Fed.R.Civ.P. 12(a)(2); and (2) Betty K's failure to perfect service on the MONADA. Neither justifies dismissal with prejudice.

A.

The first reason offered by the district court for dismissal was Betty K's failure to respond to Tidal Wave's counterclaim in violation of Federal Rules of Civil Procedure 5(d), 12(a)(2), and Southern District of Florida Local Rule 5.1.B.[2]

[2] The district court's Dismissal Order cited a violation of S.D. Fla. Local Rule 7.1.C, not Local Rule 5.1.B, as grounds for dismissal. As Betty K noted in its brief, Local Rule 7.1.C regulates service of a memorandum of law in opposition to a motion, and therefore does not control service or filing of a pleading. The court implicitly acknowledged its mistake by referring instead to Local Rule 5.1.B in its Order Denying Plaintiff's Motion to Vacate.

Rule 12(a)(2) provides that "[t]he plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer." Fed.R.Civ.P. 12(a)(2). Rule 5(d) provides that " [a]ll papers after the complaint required to be served upon a party, together with a certificate of service, must be filed with the court within a reasonable time after service." Fed.R.Civ.P. 5(d). Local Rule 5.1.B, in turn, provides that "[a]ll

papers after the complaint required to be served upon a party shall be filed with the clerk where the assigned Judge is chambered either before service or within three business days thereafter. . . .
Failure to comply with this rule is not grounds for denial of the motion or dismissal of the paper filed." S.D. Fla. L.R. 5.1.B.

Betty K concedes that it failed to file with the clerk of court an answer to the counterclaim and, as noted, the parties dispute whether Betty K served its Answer on Tidal Wave. But even if we assume that Betty K wholly failed to respond to Tidal Wave's counterclaim, this failure, under the circumstances of this case, did not justify the draconian remedy of a dismissal with prejudice.

In the first place, the district court failed entirely to find that Betty K's failure to answer the counterclaim (which was filed on April 14, 2004) was somehow willful or contumacious, or, for that matter, that lesser sanctions were inadequate to remedy that failure. In fact, the Dismissal Order contains no findings of any sort; it merely identifies the rules Betty K purportedly violated.

Our case law has articulated with crystalline clarity the outer boundary of the district court's discretion in these matters: dismissal with prejudice is plainly improper unless and until the district court finds a clear record of delay or willful conduct and that lesser sanctions are inadequate to correct such conduct. *See Gratton,*
178 F.3d at 1375 (dismissal with prejudice is appropriate "where there is a clear record of `willful' contempt and an implicit or explicit finding that lesser sanctions would not suffice"); *Goforth,* 766 F.2d at 1535 ("The legal standard to be applied under Rule 41(b) is whether there is a clear record of delay or willful contempt and a finding that lesser sanctions would not suffice.") (internal quotation marks omitted); *Boazman,* 537 F.2d at 212 ("[D]ismissal with prejudice is such a

severe sanction that it is to be used *only* in extreme circumstances, where there is a clear record of delay or contumacious conduct, and where lesser



sanctions would not serve the best interests of justice. . . .") (emphasis added) (internal citations and quotation marks omitted). As we held in *Mingo v. Sugar Cane Growers Co-op. of Florida,* findings satisfying both prongs of our standard are *essential* before dismissal with prejudice is appropriate. 864 F.2d 101, 102-03 (11th Cir. 1989). And, although "we occasionally have found implicit in an order the [findings necessary to support dismissal], we have never suggested that the district court need not make that finding." *World Thrust Films, Inc.,* 41 F.3d at 1456 (internal quotation marks and citation omitted).

We rigidly require the district courts to make these findings precisely "[b]ecause the sanction of dismissal with prejudice is so unsparing," *Mingo,* 864 F.2d at 103, and we strive to afford a litigant his or her day in court, if possible. *Flaksa v. Little River Marine Constr. Co.,* 389 F.2d 885, 888 (5th Cir. 1968) (recognizing the "importance, except in the most flagrant circumstances, of resorting to sanctions that do not deprive a litigant of his day in court"). Thus, in *Mingo,* where the district court found that "it would be unfair to defendant to allow this unhappy litigation to drag on longer than it already has [and] the circumstances of this case cry out for such a just, speedy, and inexpensive determination," we nevertheless found an abuse of discretion because this language did not establish that "the trial court reflected upon the wide range of sanctions at its disposal and concluded that none save dismissal would spur this litigation to its just completion." 864 F.2d at 103. Here, the district court ignored the unambiguous standard that has governed dismissals with prejudice. The Dismissal Order merely recites the rules Betty K purportedly violated, and makes no finding that Betty K's seemingly inadvertent and isolated mistake was willful or contumacious. Moreover, the district court failed to find,

explicitly or implicitly, that lesser sanctions were inadequate to correct Betty K's untimely filing. The district court's failure to make either finding was a clear abuse of discretion.

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> In fact, Local Rule 5.1.B, which requires filing papers within three days of service, expressly provides that "[f]ailure to comply with this rule is not grounds for denial of the motion or dismissal of the paper filed." S.D. Fla. L.R. 5.1.B.

Even if we look beyond the Dismissal Order in search of a reason to affirm, we are compelled to reach the same conclusion. The record, like the Dismissal Order, is devoid of any evidence even remotely suggesting that Betty K acted willfully or contumaciously. Indeed, it appears from a close review of the record before us that this was Betty K's first and only violation of a court rule. Tidal Wave itself flatly concedes the absence of any operative facts other than those stated in the Dismissal Order. Nor does the record indicate that Betty K, rather than its attorney, was in any way responsible for this failure to answer the counterclaim. Likewise, nothing in the record suggests that lesser sanctions were insufficient to cure Betty K's failure to respond to Tidal Wave's counterclaim. To the contrary, a violation of Rule 5(d) for failure to file a pleading "generally is corrected by an order to compel filing." 4B Charles Alan Wright Arthur R. Miller, *Federal Practice and Procedure,* § 1152 (3d ed. 2002); *see also Palmquist v. Conseco Medical Ins. Co.,* 128 F.Supp.2d 618, 623 (D.S.D. 2000) (noting that a "violation of the rule is generally corrected by an order compelling the filing of the missing pleading"); *Biocore Medical Technologies, Inc. v. Khosrowshahi* 181 F.R.D. 660, 668 (D.Kan. 1998) (same); *Wilson v. United States,* 112 F.R.D. 42, 43 (N.D.Ill. 1986) (same).

B.

The second reason offered by the district court for dismissing Betty K's case is as unconvincing as the first. The court "note[d] that service was never perfected as to Defendant M/V MOVADA [sic]," but did not explain



how Betty K's failure to serve the MONADA warranted a dismissal with prejudice.

As we have observed, dismissal with prejudice is a drastic sanction that may be imposed only upon finding a clear pattern of delay or willful contempt and that lesser sanctions would not suffice. *World Thrust Films, Inc. v. Int'l Family Entm't, Inc.*, 41 F.3d 1454, 1456 (11th Cir. 1995); *Mingo v. Sugar Cane Growers Co-op. of Fla.*, 864 F.2d 101, 102- 03 (11th Cir. 1989). Here, the district court merely recited the bare fact that Betty K had not yet perfected service on the vessel, and made no finding that Betty K's failure to serve the MONADA showed willful contempt for court rules.[4] Nor is there any evidence in the record that would support such a finding. To the contrary, the very evidence on which the district court relied in finding that service was not completed — the U.S. Marshal's unexecuted process — gave the following innocuous explanation: "Defendant posted bond. Court advised not to arrest. Return unexecuted."

[4] Notably, in denying Betty K's Rule 60(b) Motion to Vacate, the district court did not reassert improper service as a basis supporting dismissal.

The district court also failed to find that lesser 1341sanctions would be inadequate to *1341 correct any defect in service. Indeed, Federal Rule of Civil Procedure 4(m) explicitly prescribes a lesser sanction for failure to complete service: "If service of the summons and complaint is not made

upon a defendant within 120 days . . . [the court] shall dismiss the action *without prejudice* as to that defendant or direct that service be effected. . . ." Fed.R.Civ.P. 4(m) (emphasis added). The district court did not find, nor



could it have found on this record, that lesser sanctions were insufficient to remedy unexecuted service as to the MONADA. But even if we look deeper into the matter and attempt to divine the district court's unstated rationale, we remain unable to discern how failure to serve the MONADA under the peculiar circumstances of this case could warrant a dismissal with prejudice. As for the suggestion that Betty K's failure to perfect service on the MONADA deprived the court of jurisdiction, we note at the outset that if the district court actually lacked jurisdiction over the vessel, the court would have lacked the power to dismiss Betty K's claims against the vessel *with prejudice. See Hertz Corp. v. Alamo Rent-A-Car, Inc.,* 16 F.3d 1126, 1133 (11th Cir. 1994) (holding that a district court's order of dismissal with prejudice was a nullity because the court lacked jurisdiction); *Boudloche v. Conoco Oil Corp.,* 615 F.2d 687, 688-89 (5th Cir. 1980) ("Since the court lacked jurisdiction over the action, it had no power to render a judgment on the merits").

But putting this aside, the more fundamental point is that the district court was not deprived of *in rem* jurisdiction by Betty K's failure to serve process on the vessel after Tidal Wave posted a release bond. In general, "a valid seizure of the res is a prerequisite to the *initiation* of an *in rem*" action. *Republic Nat'l Bank of Miami v. United States,* 506 U.S. 80, 84, 113 S.Ct. 554, 557, 121 L.Ed.2d
474 (1992). Typically, in admiralty cases, seizure of the res is accomplished by arresting the vessel in dispute. *See* Supp. Adm. Mar. R. C(3). But posting a release bond also brings the res within the court's jurisdiction:

> [T]he bond . . . in a suit *in rem* . . . bec[omes] the substitute for the property; and the remedy of the libellants, in case they prevail in the

suit *in rem* for condemnation, [is] transferred from the property to the bond or stipulation accepted by the court as the substitute for the property seized. *United States v. Ames,* 99 U.S. 35, 42, 25 L.Ed. 295 (1878); *see also Continental Grain Co. v. Federal Barge Lines, Inc.*



, 268 F.2d 240, 244 n. 6 (5th Cir. 1959) ("[S]tipulation for value is a complete substitute for the res, and the *stipulation for value alone is sufficient to give jurisdiction to a court* because its legal effect is the same as the presence of the res in the court's custody") (emphasis added) (internal quotation marks and citation omitted) *aff'd,* 364 U.S. 19, 80 S.Ct. 1470,

4 L.Ed.2d 1540 (1960). As we explained in *Industria Nacional Del Papel, CA. v. M/V ALBERT F,* 730 F.2d 622 (11th Cir. 1984): "The effect of [posting] the release was to transfer the lien from the ship to the fund the security represented. `The lien against the ship [was] discharged for all purposes and the ship cannot again be liable *in rem* for the same claim.'" *Id.* at 625-26 (alteration in original) (quoting G. Gilmore

C. Black, *The Law of Admiralty,* § 989 at 651 (1st ed. 1957)); *accord United States v. Ohio Valley Co., Inc.,* 510 F.2d 1184, 1190 (7th Cir. 1975)

(stipulation for value "was a complete substitute 1342for the res, and thereby *1342 represented the property against which the government had the right to seek to fulfill its judgment") (citing *J.K. Welding Co. v. Gotham Marine Corp.,* 47 F.2d 332 (S.D.N.Y. 1931)).

Here, since Tidal Wave posted a release bond after an emergency hearing before the district court, the relevant res to be adjudicated, the bond, was properly before the district court when it issued its Dismissal Order. Service of process on the vessel in these circumstances could serve no additional purpose.

Service of process *in rem* serves two functions: it brings the res within the court's control and it provides fair notice to interested parties. *See* Supp.

Adm. Mar. R. C(3), C(4); *Republic Nat'l Bank,* 506 U.S. at 87-88, 113 S.Ct. at 559 (noting that the two concerns of *in rem* jurisdiction are "enforceability of judgments and fairness of notice to the parties"). Posting a release bond obviated concerns of enforceability. See Ames, 99



U.S. at 42, 25 L.Ed. 295; Industria Nacional, 730 F.2d at 625-26; Continental Grain, 268 F.2d at 244 n. 6. Also, Tidal Wave — the only party with an interest in the bond — received actual notice of Betty K's claims against the vessel in time not only to defend its interests, but to avoid the vessel's arrest altogether. Additional formal notice was therefore not required. See Supp. Adm. Mar. R. E(5)(a) ("[W]henever . . . process *in rem* is issued the execution of such process shall be stayed, or the property released, on the giving of security. . . ."); *Wong Shing v. M/V MARDINA TRADER,* 564 F.2d 1183, 1187 (5th Cir. 1977) ("The *in rem* process . . . is based upon the presumption that the fact of seizure of a vessel alone will result in prompt, actual notice to all interested parties, without the necessity of formal personal notice.") (quoting *The Mary,* 9 Cranch (13 U.S.) 126, 3 L.Ed. 678 (1815)).

Thus, to the extent the district court based its dismissal on the erroneous conclusion that its *in rem* jurisdiction depended on service of process on the vessel, the district court abused its discretion. *See Ameritas Variable Life Ins. Co. v. Roach,* 411 F.3d 1328, 1330 (11th Cir. 2005) (the district court's discretionary "decision will not be disturbed as long as it . . . is not influenced by any mistake of law") (internal quotation marks omitted).[5]

[5] Finally, even if service of process were somehow required on the M/V MONADA, dismissal with prejudice would still have been an abuse of the district court's discretion. First, the failure to perfect service on the MONADA would not justify dismissal of Betty K's claims against Tidal Wave because Rule 4(m) authorizes a district court to dismiss only "as to that defendant" on whom

the plaintiff failed to serve process. Fed.R.Civ.P. 4(m). Moreover, Rule 4(m) authorizes a district court to dismiss only without prejudice for failure to serve process: "If service of the summons and complaint is not made . . . the court . . . shall

dismiss the action without prejudice." Fed.R.Civ.P. 4(m). Finally, the district court dismissed the Betty K's complaint only 114 days after its complaint was filed, even though Rule 4(m) prohibits dismissal for failure to serve process if fewer than 120 days have elapsed since the plaintiff filed its complaint. Fed.R.Civ.P. 4(m); Henderson v. United States, 517 U.S. 654, 661-62, 116 S.Ct. 1638, 1644, 134 L.Ed.2d 880 (1996) ("[C]omplaints are not to be dismissed if served within 120 days. . . .").

We, therefore, vacate the district court's Dismissal and remand for further *1343 proceedings consistent with this opinion.

Betty K also appeals from the district court's denial of its Motion to Vacate brought pursuant to Federal Rule of Civil Procedure 60(b). Since we have vacated the district court's initial Dismissal Order, Betty K's appeal from the denial of its Rule 60(b) motion is moot. See Urfirer v. Cornfeld, 408 F.3d 710, 727 (11th Cir. 2005).

On August 23, 2004, the district court, on Tidal Wave's motion, directed the clerk to relinquish the vessel's security bond. On remand, the district court should permit Betty K to seek a new arrest warrant for the MONADA or allow the vessel to avoid arrest by re-posting an appropriate bond.

VACATED AND REMANDED.

## TABLE OF CONTENTS

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

## OPINIONS BELOW

[X ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is:

[X ] is unpublished

The opinion of the lower circuit court appears at Appendix B1, B2 to the petition and:

[X ] has been designated for publication but is not yet reported.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

## JURISDICTION

The date on which the highest state court decided my case was March 2, 2022. A copy of that decision appears at Appendix **A .**

[X ] A timely petition for rehearing was thereafter denied on the following date**: June 6, 2022**, and a copy of the order denying rehearing appears at Appendix C

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

**CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED** :

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**Fifth Amendment to the United States Constitution**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, **without due process of law;** nor shall private property be taken for public use, without just compensation.

**Page 6**

**Fourteenth Amendment to the United States Constitution**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, **without due process of law;** nor deny to any person within its jurisdiction the **equal protection of the laws.**

**Page 6**

F.S.S 617.0607 **Termination, expulsion, and suspension.—**

(1) A member of a corporation may not be expelled or suspended, and a membership in the corporation may not be terminated or suspended, except pursuant to a procedure that is fair and reasonable and is carried out in good faith.

Rules of Civil Procedure **RULE 1.380.** **page 6**

**FAILURE TO MAKE DISCOVERY; SANCTIONS**

**(b) Failure to Comply with Order.**

(1) If a deponent fails to be sworn or to answer a question after being directed to do so by the court, the failure may be considered a contempt of the court.

Rules of Civil Procedure **RULE 1.420.** **page 5, 6**

**DISMISSAL OF ACTIONS**

**(b) Involuntary Dismissal.** Any party may move for dismissal of an action or of any claim against that party for failure of an adverse party to comply with these rules or any order of court. . .

**OTHERS**

## STATEMENT OF THE CASE

The instant case is about a missing critical element (willfulness) that is required by all courts to be present in a valid decision dismissing a complaint with prejudice for refusing to comply with a court order. This element is simply not present in Judge Nicholas' decision. This action began in November of 2014 when Lindbloom visited the Parrish Cemetery to pay respect and to place flowers on his family graves. Lindbloom discovered a "real estate sign" proclaiming that a person, unknown to Lindbloom, had been buried in the gravesite between Lindbloom's brother and grandparents. Previous to that, the gravesite had been reserved for Lindbloom for over 60 years. It appeared that Lindbloom's burial site had been confiscated by the Parrish Cemetery Association. It was later revealed that **Respondent Edward Chitty**, then president of the PCA had "purchased" the gravesite. Chitty subsequently told the two Sheriff Deputies that had responded to a complaint; "that he had recently purchased the gravesite and could do anything he wanted to with it."

Parrish Cemetery is a private cemetery and a **501 (3)(c)** not-for-profit corporation under Florida statutes Chapter 617.

Lindbloom was repeatedly denied basic discovery for records of membership, specifically the "book of reservations" and the "reservation map"; showing who and where reservations had been made. PCA blocked the requests by alleging that the records requested were only available to members and Lindbloom was not a member and in fact he had never been a member of the PCA. Judge Gilbert Smith found;

- that the requested membership records were only available to members and
- Lindbloom would have to prove membership in the PCA without the benefit of using the membership records.

From 1997 until November of 2014, Lindbloom had been an officer of the PCA, and under state law [1]617.0607 [1] as well as the then current bylaws, all officers were members and required to be notified of any meetings. Respondent denied Lindbloom's due process and equal protection when it ignored state statutes requiring notification prior to termination

[1]*FS 617.0607 (1) A member of a corporation may not be expelled or suspended, and a membership in the corporation may not be terminated or suspended, except pursuant to a procedure that is fair and reasonable and is carried out in good faith.*

that required any terminations of membership in a not-for-profit corporation be noticed, and conducted in a fair manner. **NO** notice was received. **NO** "termination" hearing was ever held. Requiring Lindbloom to prove that he was a member of the PCA, without access to the membership rosters or other documents pertaining to the membership of the PCA was a "catch 22."

**DEFENDANT'S MOTION FOR CONTEMPT AND DISMISSAL WITH PREJUDICE OR, IN THE ALTERNATIVE, FOR DISMISSAL WITHOUT PREJUDICE**, (hereafter Defendants Motion for Dismissal) is the motion that was granted in part and denied in part, by Judge Nicholas and is the subject of this appeal. Defendants Motion for Dismissal was based on two Florida Rules of Civil Procedure: Rule 1.380(b)(l) [1] and Rule 1.420.(b) [2].

Rule 1.380 (b)(1) is not relevant since Petitioner Lindbloom

**NEVER**:

1. Failed to be sworn,
2. Answer a question,
3. Produce documents. (in his possession

With regard to Rule 1.420 (b)[2] Lindbloom did NOT willfully refuse to comply with the Judge's Order to pay half of the cost to transcribe testimony from a hearing; either half of 4649.00 or

[1] *Rule 1.380 (b)(1) If, after being ordered to do so by the court, a deponent fails to be sworn or to answer a question or produce documents. the failure may be considered a contempt of court."*
[2] *Rule 1.420 (b ) Any party may move for dismissal of an action or of any claim against that party for failure of an adverse party to comply with these rules or any order of court. Notice of hearing on the motion shall be served as required under rule 1.090(d).*

half of 3937.25, depending on the source document. Lindbloom simply did not have the money. From the beginning, Lindbloom offered numerous alternatives to a transcription, including a partial transcription of any pertinent parts of the testimony. All offers were ignored by Respondent PCA as well as Judge Nicholas. Judge Arend, the Judge whom first ordered Lindbloom to pay for half of the cost of a transcription failed to consider Lindbloom's ability to pay for the transcript. (Appendix D) Likewise, Judge Nicholas never considered Lindbloom's ability to pay for the transcription when he dismissed the case with prejudice for failing to comply with his order to pay for half of the cost of a transcription. Willfulness on the part of Lindbloom was never considered with respect to the Order to pay half of the cost of a transcription. Judge Gilbert Smith, the judge who had presided over the case thus far, did not order a transcription of the hearing.

**Reasons for Granting the Petition**

This Honorable Court should grant certiorari in this case, for a number of reasons. The decision reached by the courts in the instant case directly conflicts with existing case law. There is agreement between previous decisions from the Florida Second District Court of Appeal,[1] of the Florida Supreme Court[2], and Federal Courts[3] with respect to the requirement to find willfulness in any action that would result in the dismissal with prejudice of a complaint.

> [1] *"We reverse the final judgment dismissing Austin's complaint with prejudice and entering a default judgment against him on Papol's counterclaim. The trial court erred in imposing such extreme sanctions without first affording Austin the opportunity to be heard on the question of whether* ***his failure to appear at the scheduled depositions*** *was willful or in bad faith. Lazare v. Weiss, 437 So.2d 211 (Fla. 3d DCA 1983); Kuechenberg v. Creative Interiors, Inc., 424 So.2d 145 (Fla. 4th DCA 1982); Sunstream Jet Center, Inc. v. Lisa Leasing Corp., 423 So.2d 1005 (Fla. 4th DCA 1982); Owens-Illinois v. Lewis, 260 So.2d 221 (Fla. 1st DCA 1972)."*
>
> *No. 84-847 District Court of Appeal of Florida,* ***Second*** *District Austin v. Papol 464 So. 2d 1338 (Fla. Dist. Ct. App. 1985) Decided Mar 15, 1985*

> [2] ***"By insisting upon a finding of willfulness, there will be the added assurance that the trial judge has made a conscious determination that the***

***noncompliance was more than mere neglect or inadvertence.. . . "***

*". . . We hasten to add that no "magic words" are required but rather only a finding that the conduct upon which the order is based was equivalent to willfulness or deliberate disregard.*
*We answer the certified question in the affirmative and approve the opinion of the district court of appeal.*
*It is so ordered."*

*SHAW, C.J., and OVERTON, McDONALD, EHRLICH, BARKETT and KOGAN, JJ., concur.*
*No. 75370 Supreme Court of Florida Commonwealth Fed. Sav. Loan v. Tubero 569 So. 2d 1271 (Fla. 1990) Decided Dec 31, 1990*

[3]*Because the district court dismissed the case with prejudice as a sanction for failure to answer a counterclaim and perfect service of process,* ***without finding that Betty K acted with willful or contumacious disregard for court rules,*** *and without finding that lesser sanctions were somehow inadequate, we vacate the district court's Dismissal Order and remand for further proceedings consistent with this opinion.*

*No. 04-14208 United States Court of Appeals, Eleventh Circuit Betty K Agencies, Ltd. v. M/V Monada 432 F.3d 1333 (11th Cir. 2005) Decided Dec 16, 2005*

Death is a universal concern. And where a person will be buried is something that everyone thinks about; probably more so, with older people. For more than 60 years, Lindbloom had known that there was a gravesite reserved for him that was located between his grandparents and his brothers. Around November

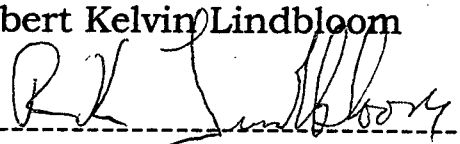
of 2014, during a regular holiday visit to the Parrish Cemetery, he discovered a real-estate sign that had been converted to a placard announcing the burial of a person who was unknown to Lindbloom. It was placed on the gravesite in the middle of Lindbloom's family, that had been reserved for him. It was later discovered that **Respondent Ed Chitty**, who had been appointed vice-president of the PCA by the respondents, had "purchased" the gravesite. He later told law enforcement that "he had bought the gravesite and could do anything he wanted to with it." After seven years of respondents answering verified admissions and interrogatories that included "not knowing what the duties of a vice-president were" to "claiming to have never read the by-laws of the PCA", to "not knowing who had actually called the meeting at which time the existing officers were removed and a new set of officers (respondents) were appointed by themselves. Lindbloom was not able to present any of this evidence because Judge Arend ruled that the question of membership had to be determined (Appendix D) prior to allowing discovery of the membership records.

If boiled down to its' basic elements, this is a bout a group of persons who got together to take-over a family cemetery. Their obvious intent was to deprive Lindbloom of a gravesite next to his parents, brothers, grandparents and assorted aunts, uncles, and cousins. Even after 7 years, Lindbloom is still dumbfounded that people would spend so much time and money to basically steal a gravesite in order to prevent Lindbloom from being buried with his relatives in a gravesite that had been reserved for him for over 60 years.

The petition for a writ of certiorari should be granted.

Respectively submitted,

Robert Kelvin Lindbloom



Date: September 8, 2022

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

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ROBERT LINDBLOOM,

Appellant,

v.

PARRISH CEMETERY ASSOCIATION, INC.; LACY PRITCHARD; IRIS MCCLAIN; EDWARD CHITTY; LINDA BRITT; JOEL WHIDDEN; BONNY WHIDDEN; MEAD BRITT; HORACE DOZIER; CORKY WHIDDEN; JOHN MCADAMS; LEO MILLS; and DOROTHY MILLS.

Appellees.

No. 2D21-1227

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March 2, 2022

Appeal from the Circuit Court for Manatee County; Edward Nicholas, Judge.

Robert Lindbloom, pro se.

Edgardo Ferryra, Daniel S. Weinger, Anthony Petrillo, and Lauren Wages of Luks, Santaniello, Petrillo Cohen & Peterfriend, Tampa, for Appellees.

PER CURIAM.

Affirmed.

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT, IN AND FOR MANATEE COUNTY, FLORIDA
CIVIL DIVISION

MANATEE CO. FLORIDA
**CASE NO.: 2015-CA-2932**
ROBERT LINDBLOOM,
Plaintiff,
**V.**
PARRISH CEMETERY ASSOCIATION, INC.,
*et al,*
Defendants.
----------*I*

**ORDER GRANTING IN PART AND DENYING** IN **PART DEFENDANT'S MOTION FOR CONTEMPT AND DISMISSAL WITH PREJUDICE OR, IN THE ALTERNATE, FOR DISMISSAL WITHOUT PREJUDICE**

THIS CAUSE, having come before the Court at a hearing held on March 29, 2021 on Defendant's Motion for Contempt and Dismissal with Prejudice or, in the Alternate, for Dismissal without Prejudice, and the Court having been fully advised of the premises and having heard the arguments of counsel, it hereby finds as follows:

1. This cause was originally filed on June 24, 2015.
2. The Court has issued three orders ("orders"), the initial order dating back to May 29, 2018, requiring the transcripts be filed from the evidentiary hearings on August 3, 2017 and January 10, 2018 so that the Court could address the issue of standing. The transcripts have never been filed.
3. Plaintiff has clearly shown his intent to disregard those orders and it is clear that Plaintiff is not inclined to do that which is necessary to continue to move this case forward.
4. The Court recognizes that dismissals with prejudice are the exception rather than the rule, and that the system prefers a resolution on the merits, but Defendants have a right to finality and this is one of those rare instances wherein a dismissal with prejudice is necessary and appropriate.
5. Plaintiff appears to have attempted to circumvent this Court's orders and start the litigation all over again by filing a new lawsuit bearing case No. 2021-CA-509.

That cause appears to contain many of the same defendants and allegations as the instant matter.

6. Plaintiffs deliberate disregard of the Court's orders for nearly three

years is a result of his own failure to comply and involuntary dismissal against the Plaintiff and in favor of the Defendants is reasonable and well taken.

7. The Court does not have sufficient basis to determine that Plaintiff should be held
in contempt.

It is therefore, **ORDERED and ADJUDGED** as follows:

1. Defendants' Motion for Contempt is **DENIED.**
2. Defendants' Motion for Dismissal with Prejudice is **GRANTED.**
3. The Court reserves jurisdiction for the purposes of determining Defendants' entitlement to prevailing party costs and/or attorney's fees and as to amounts of prevailing party costs and/or attorney's fees.

~

**DONE and ORDERED** in chambers in Manatee County, Florida on this 12TH OF April, 2021.

.

EDWARD NICHOLAS
Circuit Court Judge
Conformed Copies to:
Lauren E. Wages, Esq.-Lwages@insurancedefense.net; lukstpa-pleadings@ls-law.com
Robert Lindbloom, pro se –
DOCATARI2@GMAIL.COM

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT IN AND FOR MANATEE COUNTY, FLORIDA
CIVIL DIVISION

**ROBERT LINDBLOOM**
**Plaintiff,**

**vs. CASE NO.: 2015-CA-2932**

**PARRISH CEMETERY ASSOCIATION, INC., et. al,**
**Defendants.**

**ORDER OF DISMISSAL**

THIS CAUSE having come to be heard pursuant to the Court's receipt of the May 13, 2021 Order of the Second District Court of Appeal, regarding the pending appeal of the above-referenced case, and the Court having reviewed and considered said Order, having reviewed, as well, this Court's Order of April 12, 2021 entitled Order Granting in Part and Denying in Part Defendant's Motion for Contempt and Dismissal with Prejudice or, in the Alternative, For Dismissal without Prejudice, as well as Plaintiffs Motion to Memorialize a Decision, said motion having been filed on April 19, 2021, and being otherwise fully advised in the premises, finds as follows:
Based upon this Court's Order entitled Order Granting in Part and Denying in Part Defendant's Motion For Contempt and Dismissal with Prejudice or, in the Alternative, for Dismissal without Prejudice, this cause is hereby DISMISSED, with prejudice.
The Court continues to reserve jurisdiction for all purposes according to law.

**APPENDIX B4**

DONE AND ORDERED in Chambers in Manatee County, Bradenton, Florida THIS 17TH DAY OF MAY 2021.

EDWARD NICHOLAS, CIRCUIT COURT JUDGE

Copies to:

Lauren E. Wages,sq.
Anthony Petrillo, Esq.
Daniel S. Weinger, Esq.
Robert Lindbloom, prose
EDWARD NICHOLAS, CIRCUIT COURT JUDGE
Mary Elizabeth Kuenzel, Clerk, Second District Court of Appeal

**IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA**
**SECOND DISTRICT, POST OFFICE BOX 327, LAKELAND, FL 33802-0327**

June 07, 2022

**CASE NO.: 2D21-1227**
L.T. No.: 15-CA-2932

| | | |
|---|---|---|
| ROBERT LINDBLOOM | v. | PARRISH CEMETERY ASSOCIATION, INC. |
| Appellant / Petitioner(s), | | Appellee / Respondent(s). |

**BY ORDER OF THE COURT:**

Appellant's motion for rehearing, clarification, certification, and issuance of a written opinion is denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

ANTHONY PETRILLO, ESQ.
EDGARDO FERREYRA, JR., ESQ.
ROBERT LINDBLOOM
DANIEL S. WEINGER, ESQ.
LAUREN E. WAGES, ESQ.
ANGELINA M. COLONNESO, CLERK

mep

Mary Elizabeth Kuenzel
Mary Elizabeth Kuenzel
Clerk

APPENDIX C

Dkt. 359

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR MANATEE COUNTY

ROBERT LINDBLOOM

CASE NO.: 2015 CA 2932

vs

PARRISH CEMETERY ASSOC., ET AL

**ORDER ON MOTION**

Upon consideration in open Court having heard the Defendant's/Plaintiff's Motion to

Compel Discovery,

the Court makes these findings:

1. THE COURT MUST DETERMINE THE ISSUE OF MEMBERSHIP PRIOR TO RULING ON THE MOTION.

2. PRIOR JUDGE HELD AN EVIDENTIARY HEARING ON THE ISSUE OF MEMBERSHIP, BUT WAS RECUSED PRIOR TO ISSUING AN ORDER.

3. PARTIES SHALL PROVIDE THIS COURT WITH A TRANSCRIPT OF THE EVIDENTIARY HEARING, ANY RELATED MEMORANDA, AND PROPOSED ORDERS WITHIN 30 DAYS OF THIS ORDER.

4. PARTIES SHALL SPLIT THE COST OF TRANSCRIPTS

**DONE AND ORDERED**, in Bradenton, Manatee County, Florida this 29 day of MAY, 2018.

**CIRCUIT JUDGE**

Copies furnished to:
Plaintiff _____
Defendant _____
Other _____

FILED IN
OPEN COURT
MAY 29 2018
MANATEE COUNTY
CLERK OF CIRCUIT COURT
BY: _____
DEPUTY CLERK



**APPENDIX D**

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

ROBERT KELVIN LINDBLOOM — PETITIONER

PARRISH CEMETERY ASSOCIATION, et al — RESPONDENT(S)

**PROOF OF SERVICE**

I, ROBERT KELVIN LINDBLOOM, do swear or declare that on this date, September 6, 2022, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

LUKS, SANTANIELLO, PERTRILLO, & JONES, Attorneys for Defendants, 100 North Tampa Street Suite 2120, Tampa Florida 33602

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 6, 2022

(Signature)