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COMMENTARY

Turning Best Practices on Its Head

By Michael Brooke Fisher

As a former Civil Part judge, I read, with dismay, the unpublished opinion of *Werthmann v. New Jersey Manufacturers Ins. Co.*, A-1444-11. There, the Appellate Division affirmed a dismissal of a case after the plaintiff's sole request for an adjournment following five adjournments granted to the defense. The panel found that the lower court properly exercised its discretion.

Lawyers can take away several cautionary lessons from this case, which was decided on Oct. 5.

First, the plaintiff lawyer was a bit cavalier in assuming that the trial would be postponed, but having said that, I had and still have a certain sympathy for lawyers, plaintiff and defense, having to contend with multiple trial listings as each case slowly works its way up the list.

Through the years, I knew that attorneys worked weekends preparing cases that ultimately were postponed by the court because another case went first, and often incurred additional expenses because of nonrefundable fees charged by their experts. Admittedly, the pressures were greater on plaintiff attorneys by virtue of the fact that they go first and the defense has a little more time, and thus wiggle room, to line up experts, but I came to see that defense experts weren't much more cooperative with their attorneys in making themselves available for trial.

So all lawyers were left with a juggling act. Do they truly get trial-ready no matter how far down the trial list their case is and incur continual expert costs each time, or do they engage in a little prognostication in deciding whether their case is going to trial? And what is the penalty for guessing wrong — a sanction imposed on the attorney or a dismissal in the case of a plaintiff or suppression of a defense in the case of a defendant. I submit, as a general principle, that a sanction imposed on the attorney is preferable to foisting an ultimate penalty on a litigant.

Another lesson for lawyers is to remember that judges are people first and that how an argument is framed can affect the result. I suspect that the plaintiff attorney might have fared better had he modified and modulated his arguments to the trial and appellate courts. While I do not know what was said at oral argument, I suspect that the trial judge was not pleased, as he stated that the attorney "tried to stonewall the court." Stonewalling certainly seems to have a negative connotation.

The Appellate Division also noted the "plaintiff's claim that the dismissal with prejudice was improper due to the trial court's failure to explore the availability of lesser sanctions, and as a result, the judge's actions showed favoritism towards the defendant, and were unduly harsh and unwarranted. We find these arguments to be unpersuasive." Clearly the plaintiff attorney's unwarranted accusation of bias in favor of the defense caused the Appellate Division to fail to consider the very warranted argument that lesser sanctions clearly would have sufficed.

As the case now stands, the original plaintiff no longer has a personal injury case, being left only with recourse to file a legal malpractice claim, with a determination years away. The best-case scenario is that the plaintiff will get a much-delayed recovery or, conversely, will receive nothing at all.

Ironically, the Appellate Division approvingly cites *Kosmowski v. Atlantic City Med. Ctr.*, 175 N.J. 568, (2003): "[T]he court must focus on the tension between, on the one hand, the salutary principle that the sins of the advocate should not be visited on the blameless litigant, and ... the court's strong interest that management of litigation, if it is to be effective, must lie ultimately with the trial court and not counsel trying the case."

The *Kosmowski* court elected not to punish the litigant, yet here the Appellate Division punished a clearly "blameless" litigant. Using a surgical analogy, the appeals court operated using a cleaver instead of a scalpel. The operation was successful but the patient, the plaintiff's case, died.

It appears in this case the defendant did not even demand a dismissal; rather, the court did it on its own. Certain questions come to mind: Did the court have another case to try? If so, why not just grant the request for a postponement? If the court was inconvenienced, would

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not a monetary sanction have sufficed? Yet the appellate court ruled that "any lesser sanction ... would circumvent the purposes of Best Practices." To the contrary, I assert that its very purpose cries out for an appropriate "lesser" sanction. I believe "best practices" could survive and justice prevail if the case were reinstated. Shouldn't best practices at least be fair? ■