

**IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA, SIXTH DISTRICT**

JOHN DOE,)
)
Appellant,)
)
v.)
)
THOMAS S. MONAGHAN and)
AVE MARIA SCHOOL OF LAW,)
INC.,)
)
Appellees.)
_____)

CASE NO: 6D23-2449
L.T. CASE NO. 21-CA-2765

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**APPELLEES’ RESPONSE IN OPPOSITION TO APPELLANT’S
MOTION FOR ISSUANCE OF A WRITTEN OPINION, REHEARING,
AND FOR REHEARING *EN BANC***

Appellants, AVE MARIA SCHOOL OF LAW, INC. (“AMSL”) and THOMAS S. MONAGHAN (“Mr. Monaghan”), by and through their undersigned counsel and pursuant to Rules 9.330 and 9.331, Florida Rules of Appellate Procedure, file this Response in Opposition to Appellant’s Motion for Issuance of a Written Opinion, Rehearing, and Rehearing *En Banc* (“Motion”), and in support thereof state as follows:

INTRODUCTION

The Motion should be denied in its entirety for multiple reasons. Appellant argues for the first time in the Motion that a pending motion for sanctions for spoliation precludes entry of summary judgment. The cases cited by Appellant, *Evans v. McCabe* 415, 168 So. 3d 238 (Fla. 5th DCA 2015), *Kimball v. Publix Super Mkts.*, 901 So. 2d 293 (Fla. 2d DCA 2005), and *Fini v. Glascoe*, 936 So. 2d 52 (Fla. 4th DCA 2006), were not cited in his Initial Brief or Reply Brief. In addition, Appellant did not raise this issue during the final summary judgment hearing. Aside from the above-referenced legal argument, Appellant raises more issues in the Motion not previously briefed in his Initial Brief or Reply Brief. In addition, Appellant asks this Court to re-review and re-consider the same arguments made in his Initial Brief and Reply Brief. Appellant's grounds for the Motion are plainly prohibited by Rule 9.330, Florida Rules of Appellate Procedure.

Appellant's dependence upon his spoliation claim is telling. By focusing again on this issue, Appellant continues to seek to be relieved of his obligation to support his allegations against Appellees with evidence. Appellant seeks to be relieved of this obligation

because, as the trial court found below, there is no admissible evidence supporting his allegations. Accordingly, this Court must deny Appellant's Motion in its entirety.

ARGUMENT

I. Appellant's Motion for Written Opinion Should be Denied Because Appellant Raised an Issue for the First Time in the Motion.

Appellant requests that this Court issue a written opinion pursuant to Rule 9.330(a)(2)(D)(ii) and 9.330(a)(2)(D)(iii)(b), Florida Rules of Appellate Procedure. Namely, Appellant—for the first time ever—argues that this Court's opinion conflicts with sister appellate courts' holdings that summary judgment is premature before there is a process to address the absence of court ordered discovery and/or a pending motion for sanctions for spoliation. *Motion*, at 1–2. Appellant did not raise this issue during the final summary judgment hearing. Appellant did not raise this issue in his Initial Brief or his Reply Brief. Appellant's argument that summary judgment was premature has long been waived and was not properly preserved on appeal. *See Lowe Inv. Corp. v. Clemente*, 685 So. 2d 84, 85 (Fla. 2d DCA 1996) (“[T]his court is frequently presented with claims of error which were not properly preserved at trial. Such a claim of error does

not warrant a written opinion because the law in this area is clear.”). Because this legal issue was not before this Court when it decided this case, there is no deviation from the precedent cited by Appellant.

Appellant also requests that this Court draft a written opinion to explain the requirement for preserving an issue relating to spoliation for appeal. Appellant ignores that there is exhaustive Florida case law explaining the requirement for preserving an issue on appeal. *See, e.g., MacDonald v. Department of Children and Families*, 855 So. 2d 1270, 1271 (Fla. 4th DCA 2003) (“It is well-settled that, absent a fundamental error, *a party must object and obtain a ruling* from the trial court in order to preserve an issue for appellate review.”) (emphasis added); *Carratelli v. State*, 832 So. 2d 850, 856 (Fla. 4th DCA 2002) (“A plethora of Florida cases support the notion that a party must obtain a ruling from the trial court in order to preserve an issue for appellate review.”); *Lacey v. State*, 831 So. 2d 1267, 1268 (Fla. 4th DCA 2002); *Tillman v. State*, 471 So. 2d 32,35 (Fla. 1985). An issue relating to spoliation is no different than any other issue with respect to preservation for appeal and there is no need for the requirements to be clarified. Accordingly, Appellant’s Motion for Written Opinion must be denied.

II. Appellant’s Motion for Rehearing Must Be Denied.

- i. Appellant Raised New Issues Not Previously Briefed in His Initial Brief or Reply Brief.

Appellant’s Motion for Rehearing must be denied because Appellant raises multiple issues for the first time in his Motion. Pursuant to Rule 9.330(a)(2)(A), Florida Rules of Appellate Procedure, “[a] motion for rehearing shall state with particularity the points of law or fact that, in the opinion of the movant, the court has overlooked or misapprehended in its order or decision. The motion shall not present issues not previously raised in the proceeding.” (emphasis added).

First, Appellant requests relief not previously requested in his Initial Brief. In his Initial Brief, Appellant requested that the Court reverse and remand the trial court’s order with instructions to remand to (1) enter a default judgment with a finding of contempt of court, (2) proceed to trial with a presumption instruction, or (3) proceed to trial with an adverse inference instruction. *Initial Brief*, at 31–32. In his Motion, Appellant requests that this Court rehear his argument on the spoliation issue and remand the issue back to the trial court to conduct an evidentiary hearing so he can “test the

Appellees' purported justifications for the loss of crucial evidence” *Motion*, at 6. Prior to filing this Motion, Appellant never requested an evidentiary hearing on the alleged spoliation issue from the trial court or from this Court.

Second, Appellant raises for the first time that a motion for rehearing with the trial court on the spoliation issue would have been “futile” because his main argument in the final summary judgment hearing was that the spoliation issue is dispositive against Appellees’ Motion for Final Summary Judgment. *Id.* at 5–6. Appellant did not argue in his Initial Brief or his Reply Brief that a motion for rehearing with the trial court would be futile. Furthermore, Appellant cites to no Florida case law that states a party is relieved of their obligation to preserve an issue for appeal where it would be “futile.”

Finally, Appellant clarifies for the first time in his Motion that he is not challenging the sufficiency of the trial court’s factual findings on the spoliation issue but is instead claiming the process was insufficient. Appellant inadvertently makes a tipsy coachman argument in favor of affirming this Court’s opinion and denying his requested relief. *See Robertson v. State*, 829 So. 2d 901, 906 (Fla. 2002) (stating that the tipsy coachman doctrine allows an appellate

court to affirm a trial court that “reaches the right result, but for the wrong reasons” so long as “there is any basis which would support the judgment in the record”). Nonetheless, Appellant’s clarification is contrary to his position in his Initial Brief and Reply Brief where he focused entirely on the substantive merits of the spoliation issue. In summary, this Court should not consider the newly raised issues argued by Appellant in the Motion.

ii. Appellant’s Motion is a Re-Argument of His Initial Brief and Reply Brief.

Furthermore, Appellant simply asks this Court to re-review and re-consider the arguments he made in his Initial Brief and Reply Brief. Therefore, Appellant’s request for rehearing is plainly improper.

Certainly it is not the function of a petition for rehearing to furnish a medium through which counsel may advise the court that they disagree with its conclusion, to reargue matters already discussed in briefs and oral argument and necessarily considered by the court, or to request the court to change its mind as to a matter which has already received the careful attention of the judges, or to further delay the termination of litigation.

See State v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958), *cert. discharged*, 112 So. 2d 571 (Fla. 1959). Appellant’s Motion does not contain a point of law or fact that this Court overlooked or

misapprehended. In his own words, Appellant states that his request is based on “the same issues and arguments raised in the briefs.” *Motion*, at 5. Appellant is blatantly attempting to further delay the termination of this litigation against Appellees by requesting all available appellate relief without any basis in law or fact. Accordingly, Appellant’s Motion for Rehearing must be denied.

III. Appellant’s Motion for Rehearing *En Banc* Must Be Denied.

i. Appellant’s Proffered Grounds Are Not of Exceptional Importance.

Appellant’s grounds for “exceptional importance” fall short. It is not enough that Appellant thinks this case is of exceptional importance—the decision must be of exceptional importance to Florida law. *In re Petition of Doe*, 973 So. 2d 548, 555 (Fla. 2d DCA 2008) (Casanueva, J., concurring). Florida’s *en banc* rule provides that “en banc consideration—if it is to be granted at all—certainly must be the exception and not the rule.” *See Acad. for Positive Learning, Inc. v. Sch. Bd. of Palm Beach Cnty.*, 315 So. 3d 675, 687 (Fla. 4th DCA 2021) (Forst, J., concurring). Moreover, Florida appellate courts have taken up cases *en banc* under the “exceptional importance” rule when the case has involved a significant

constitutional question or has broad application to many cases. *See id.* at 693 (Gross, J., dissenting) (internal citations omitted).

Appellant argues that his request for rehearing *en banc* is warranted because the alleged spoliator is a Florida ABA-accredited law school. In addition, Appellant baselessly argues that a rehearing *en banc* would curtail any appearance of “impropriety.” Appellant’s proffered grounds do not involve a significant constitutional question or have broad application to many cases. Appellant’s proffered grounds do not bear on the public’s perception of the judiciary’s ability to render justice. *See Fleischer v. Hi-Rise Homes, Inc.*, 536 So. 2d 1101, 1102 (Fla. 4th DCA 1988). Appellant points to no Florida case law finding the above-referenced grounds of exceptional importance. Accordingly, Appellant is not entitled to a rehearing *en banc* on the basis of exceptional importance.

ii. A Rehearing *En Banc* is Not Needed to Maintain Uniformity

Appellant’s grounds for maintaining uniformity of the court’s decisions also fails. As previously discussed, Appellant’s argument that this Court’s opinion conflicts with sister appellate court’s holdings that summary judgment is premature before there is a

process to address the absence of court ordered discovery and/or a pending motion for sanctions for spoliation was not briefed in his Initial Brief or his Reply Brief. *See supra*, at 3. Appellant did not raise this issue with the trial court during the final summary judgment hearing or seek relief from the trial court on these grounds. Therefore, this Court did not base its decision on a legal issue that was not properly preserved or briefed and there is no present conflict threatening uniformity. Accordingly, Appellant is not entitled to a rehearing *en banc* on the basis of maintaining uniformity.

CONCLUSION

Based on the foregoing, Appellees' respectfully request that this Court deny Appellant's Motion for Issuance of a Written Opinion, Rehearing, and for Rehearing *En Banc*.

Dated this 12th day of February 2024.

Respectfully submitted,

DENTONS COHEN & GRIGSBY P.C.

/s/ Courtney L. DaSilva

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was electronically transmitted to the Clerk of Court via Florida Courts E-Filing Portal (FCEP) for filing and transmittal of electronic mail, on this 12th day of February 2024, upon the following FCEP registrant(s):

John Doe
Jd0002765@gmail.com

/s/ Courtney L. DaSilva
COURTNEY L. DASILVA, ESQ.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that that foregoing Response satisfies all of the font and word count requirements prescribed by Rule 9.045 of the Florida Rules of Appellate Procedure.

/s/ Courtney L. DaSilva
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