IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,259

MARK STEVEN WALLRAFF,

Petitioner,

vs.

T. G. I. FRIDAY'S, INC., etc.,

Respondent

_____/

RESPONDENT, T. G. I, FRIDAY'S, INC.'S
ANSWER BRIEF

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INTRODUCTION

Petitioner/Plaintiff, Mark Steven Wallraff shall be referred to WALLRAFF. Respondent/Defendant, T. G. I. Friday's, Inc., shall be referred to as FRIDAY'S. Citations to the trial court record shall be designated (TCR_____). Citations to the record of The Fifth District Court of Appeal shall be designated (DCA_____).

STATEMENT OF THE CASE AND FACTS

This case is a petition invoking the discretionary jurisdiction of this court to review decisions of the District Courts of Appeal which are certified to be in direct conflict with decisions of other District Courts of Appeal. Rule 9.030 (a)(2)(vi), Florida Rules of Appellate Procedure. The decision of the Fifth District Court of Appeals below in Wallraff v. T.G.I.Friday's, 5th DCA Case No. 84-406, Opinion filed May 9, 1985, was certified to be in conflict with the decisions in Rashard v. Cappiali, 171 So.2d 581 (Fla. 3d DCA 1965) and Reliance Builders of Coral Springs, Inc. v. City of Coral Springs, 373 So.2d 410 (Fla. 4th DCA 1979). The basis of the conflict is the holding of the Fifth District Court of Appeal in Wallraff that the discretion afforded a trial judge to impose discovery sanctions under Rule 1.380(d), Fla.R.Civ.P., includes the right to dismiss an action with prejudice for failure to comply with discovery even absent a violation of a court order. Both the decisions in Rashard and Reliance Builders, supra, indicate that a violation of a discovery order is a prerequisite for the sanction of dismissal with prejudice.

In order to fully comprehend and appreciate the imposition of discovery sanctions which occurred in the case under consideration it is important to note that WALLRAFF instituted two separate circuit court proceedings. As noted by the Fifth District Court of Appeal in its WALLRAFF opinion, the imposition of discovery sanctions under review was based in large part upon WALLRAFF'S violation of discovery procedures and violation of a court order in the earlier action between the parties.

Both circuit court proceedings arose out of nearly identical complaints alleging that WALLRAFF sustained personal injuries in an altercation with an employee of Friday's. (TCR 1-3.) The parties and cause of action were identical in both cases. (TCR 1-3, 13-15.) The action which was initially filed in the Seminole County Circuit Court was designated Case No. 1621. Pertinent pleadings in Case No. 82-1621 were attached to the Motion to Dismiss subsequently filed by FRIDAY'S in the second action, Case No. 83-3153. (TCR 11-26.)

In Case No. 82-1621, WALLRAFF failed to respond to a set of Interrogatories and a Request to Produce propounded by FRIDAY'S on August 26, 1982. (TCR 19.). As a consequence, FRIDAY'S filed a Motion to Compel Discovery on December 9, 1982 which subsequently resulted in a discovery order dated January 18, 1982 requiring WALLRAFF to respond to FRIDAY'S Interrogatories and the Request to Produce within 10 and 20 days respectively. (TCR 19.). WALLRAFF violated the provisions of the January 18, 1982 discovery order in Case No. 82-1621 by failing to file discovery responses within the prescribed time. (TCR 19.) FRIDAY'S filed a Motion to Dismiss in Case No. 82-1621 on February 17, 1983 and, as a result, the case was dismissed, with prejudice, by Circuit Court Judge Dominick J. Salfi by Order dated March 15, 1983. (TCR 23.) As an apparent courtesy to WALLRAFF'S counsel, Judge Salfi subsequently entered an Order on May 3, 1983, vacating the Final Judgment of Dismissal and allowing WALLRAFF five days in which to serve a Memorandum Brief in opposiiton to FRIDAY'S Motion to Dismiss. (TCR 25.). However, instead of filing the Memorandum Brief in opposition to FRIDAY'S

Motion to Dismiss within five days as required by the May 3, 1983 Order, WALLRAFF filed a Notice of Voluntary Dismissal, without Prejudice, on May 20, 1983.

WALLRAFF'S Complaint against Friday's was refiled in Case No. 83-3153 on December 6, 1983. (TCR 13.). In this second action, WALLRAFF similarly failed to respond to FRIDAY'S Request to Produce and initial Interrogatories propounded on January 16, 1984. (TCR 12.). In addition, WALLRAFF failed to appear at his deposition scheduled for March 2, 1984. (TCR 12-27.) FRIDAY'S filed a Motion to Dismiss bringing to the Court's attention WALLRAFF'S disregard of discovery procedures in the pending lawsuit but also brought to the Court's attention WALLRAFF'S disregard of discovery procedures and violation of a discovery order in Case No. 82-1621. On May 1, 1984, the trial court in Case No. 83-3153 dismissed that action with prejudice. (TCR 28.).

SUMMARY OF ARGUMENT

FRIDAY'S contends that the decision of the Fifth District Court of Appeal below provides the correct interpretation of Rule 1.380, Florida Rules of Civil Procedure. Rule 1.380 vests the trial court with broad discretion with regard to the imposition of sanctions for failure to make discovery. The plain language of subsections (b) and (d) of Rule 1.380 authorized the trial court to impose a number of different sanctions when a party fails to attend his own deposition, serve answers to interrogatories or respond to a request to produce. The sanctions include the dismissal of the action or proceeding or any part of it without regard to whether the party is in dereliction or violation of a court order. To require that a party be in violation of a court order before a trial court can impose the sanction of dismissing the action or proceeding is to impose a limitation neither expressly or implicitedly required by the Rule.

The unique facts in this case also establish that Wallraff was, in fact, in violation of a court discovery order. Two separarate circuit court proceedings were instituted by Wallraff. In the first proceeding, Wallraff was in violation of a court order and sought to avoid the imposition of sanctions by taking a voluntary dismissal of that action. In his subsequent proceeding, Wallraff again persisted in his disregard of the discovery rules. The Motion to Dismiss filed by Wallraff in the subsequent proceeding brought to the trial court's attention Wallraff's dereliction in the initial action. It was appropriate and well within the discretion of the trial court to take into

considerations, Wallraff's earlier violation of a court discovery order in dismissing the pending action. To hold otherwise would permit gross forms of "judge shopping".

Even if it should be determined that the trial court abused its discretion in dismissing the second action with prejudice the error was harmless because even if the action had been dismissed without prejudice, the applicable statute of limitations had expired and would have barred the action.

ISSUES ON APPEAL

I

DOES RULE 1.380, FLORIDA RULES OF CIVIL PROCEDURE, AUTHORIZE A TRIAL COURT TO DISMISS AN ACTION WITH PREJUDICE FOR FAILURE TO COMPLY WITH DISCOVERY ABSENT A VIOLATION OF A COURT ORDER?

II

DID THE TRIAL COURT ABUSE ITS DISCRETION IN DISMISSING WALLRAFF'S COMPLAINT WITH PREJUDICE FOR FAILURE TO COMPLY WITH DISCOVERY REQUESTS WHERE WALLRAFF HAD VOLUNTARILY DISMISSED AN EARLIER ACTION TO AVOID DISMISSAL WITH PREJUDICE FOR FAILURE TO COMPLY WITH A COURT ORDER?

ARGUMENT

I

THE EXPRESS LANGUAGE OF RULE 1.380, FLORIDA RULES OF CIVIL PROCEDURE, AUTHORIZES A TRIAL COURT TO DISMISS AN ACTION WITH PREJUDICE FOR FAILURE TO COMPLY WITH DISCOVERY REQUESTS UNDER APPROPRIATE CIRCUMSTANCES EVEN ABSENT A VIOLATION OF A COURT ORDER.

II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING WALLRAFF'S COMPLAINT WITH PREJUDICE FOR FAILURE TO COMPLY WITH DISCOVERY REQUESTS WHERE WALLRAFF HAD VOLUNTARILY DISMISSED AN EARLIER ACTION BETWEEN THE PARTIES TO AVOID DISMISSAL WITH PREJUDICE FOR FAILURE TO COMPLY WITH A COURT ORDER.

I

THE EXPRESS LANGUAGE OF RULE 1,380, FLORIDA RULES OF CIVIL PROCEDURE, AUTHORIZES A TRIAL COURT TO DISMISS AN ACTION WITH PREJUDICE FOR FAILURE TO COMPLY WITH DISCOVERY REQUESTS UNDER APPROPRIATE CIRCUMSTANCES EVEN ABSENT A VIOLATION OF A COURT ORDER.

The decision of the Fifth Distict Court of Appeal below in Wallraff held that a violation of a court order is not a necessary prerequisite to the imposition of sanctions for failure to comply with discovery under Rule 1.380. As observed by the Fifth District, there is nothing in the express language of the Rule that would require a prior violation of a court order before sanctions for failure of a party to attend his own deposition, serve answers to interrogatories, or respond to a request to produce can be imposed. Subsection (d) of Rule 1.380 provides in pertinent parts:

> if a party or an officer, director, or managing agent of a party . . . fails (1) to appear before the officer who is to take his deposition after being served with a proper notice, or (2) to serve answers or objections to interrogatories . . . or (3) to serve a written response to a request for inspection . . . the court in which the action is pending may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule.

Subsection (b)(C) includes the following sanctions:

> (C) An order striking out pleadings or parts of them or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part of it, or rendering a judgment by default against the disobedient party.

Under the express language of the Rule, there is no requirement that a party litigant be in violation of a prior order of the court before sanctions, including the sanction of dismissal, can be imposed by the trial court. A decision imposing sanctions, whether based upon a violation of a court order or not, is always subject to review for abuse of discretion. See Mercer v. Raine, 443 So.2d 944 (Fla. 1983). Appellate review, therefore, of a Rule 1.380 order imposing sanctions is whether under the facts of a particular case, the imposition of the sanctions imposed constitutes an abuse of discretion and should not involve artificial constraints neither imposed nor required by the Rule.

The only Florida appellate decision expressly holding that a prior violation of a court discovery order is a necessary prerequisite to the imposition of the sanction of dismissal is the decision of the Third District Court of Appeal in Rashard v. Cappiali, 171 So.2d 581 (Fla. 3d DCA, 1965). Even in Rashard, however, the Court apparently left open the possibility that circumstances may arise in which the sanction of denial of access to the courts may be appropriate even absent violation of the court order. Thus, the court in Rashard at 171 So.2d 583:

> The law abhors the denial of access to the courts for any reason other than a willful abuse of the processes of the court. Such a willful disregard of the rules of court will not ordinarily be shown by a record which does not show the violation of a specific order of the court. (emphasis added).

The decision of the Fourth District Court of Appeal in American Air Transport, Inc. v. Seafirst Commercial Corporation, 452 So.2d 1037 (Fla. 4th DCA, 1984) is in agreement with the

Wallraff decision that violation of a court order is not a necessary prerequisite to sanctions. American Air had under consideration, an order precluding a defendant from presenting at trial, any evidence of testimony concerning his affirmative defenses as a sanction against the defendant for raising the Fifth Amendment privilege in response to plaintiff's discovery requests. It was contended on appeal, that the trial court improperly imposed sanctions under Rule 1.380(b) because there had not been a prior order of the court to provide or permit discovery. The Fourth District rejected this contention stating that an order to compel discovery is not an "indispensable precursor" to sanctions. 452 So.2d at 1038.

The Wallraff decision represents a more logical and well-reasoned interpretation of Rule 1.380. Rule 1.380 neither expressly or implicitedly requires the violation of a court order as a prerequisite for the imposition of sanctions. Obviously, in many cases, sanctions will be imposed for violation of court discovery orders. Circumstances can arise, however, where the record will reveal such a willful and contumacious disregard of discovery procedures as to warrant the sanction of dismissal with prejudice absent violation of a prior order of the court.

II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING WALLRAFF'S COMPLAINT WITH PREJUDICE FOR FAILURE TO COMPLY WITH DISCOVERY REQUESTS WHERE WALLRAFF HAD VOLUNTARILY DISMISSED AN EARLIER ACTION BETWEEN THE PARTIES TO AVOID DISMISSAL WITH PREJUDICE FOR FAILURE TO COMPLY WITH A COURT ORDER.

This case does not squarely present the issue of whether or not a trial court is authorized under Rule 1.380 to impose the ultimate sanction of dismissal for discovery violations absent the violation of a court order. The record reflects that WALLRAFF was in willful violation of a court order in his initial action and sought to avoid dismissal of that action with prejudice by filing a premature Notice of Voluntary Dismissal. The issue is whether it was an abuse of discretion for the trial judge in the subsequent action to take into consideration WALLRAFF'S prior derelictions.

Research has failed to reveal any reported case in which the decision to impose Rule 1.380 sanctions was based in part upon a litigants prior violation of a court order in earlier litigation between the parties. It is recognized, however, that courts have the inherent power to impose the sanction of dismissal for its coercive effect. Surrency v. Winn & Lovett Grocery Co., 34 So.2d 564 (Fla. 1948). This inherent power is given expression not only in Rule 1.380 but also in Rule 1.420(b) which provides for the involuntary dismissal of any action for failure to comply with the civil procedure rules or any order of the court. Where, as here, a second judicial proceeding is a mere continuation of an initial proceeding between the identical parties on the same cause of action, it is entirely reasonable and appropriate for the trial

court to consider present as well as past derelictions of a party litigant in imposing discovery sanctions under Rule 1.380.

When FRIDAY'S presented its Motion to Dismiss in the second action, Case No. 83-3153, it laid before the court WALLRAFF'S failure to respond to a request to produce and failure to attend deposition in the pending action as well as a gross attempt of "judge shopping" in the earlier litigation between the parties to avoid dismissal with prejudice. (TCR. 11-26). In the earlier litigation, WALLRAFF was in violation of a discovery order requiring him to respond to a set of interrogatories and a request to produce within certain time frames. (TCR. 19). As a result, an order dismissing WALLRAFF'S Complaint with prejudice had been entered in Case No. 82-1621. (TCR. 23). Subsequent to this order of dismissal, WALLRAFF filed a Motion for Rehearing and as a result, the court in Case No. 82-1621 entered an order vacating the previously entered Order of Dismissal "solely on the grounds that counsel for plaintiff may not have sufficient opportunity to be heard on defendant's Motion to Dismiss" and further ordered that WALLRAFF serve a Memorandum Brief in reply to the Motion to Dismiss within five days of the date of the Order. (TCR. 25). WALLRAFF violated this Order by failing to serve his Memorandum Brief within the five alloted days and took no further action to comply with the court order but, instead, filed a Notice of Dismissal on May 20, 1983. Thus, WALLRAFF violated not only the discovery order in the initial litigation, but also was in direct violation of the order requiring the service of the Memorandum Brief. The filing of the Notice of Voluntary Dismissal was a calculated act in bad faith designed

solely to avoid a dismissal with prejudice of the initial action so as to permit WALLRAFF to refile the case in the hope that it would be assigned to another judge.

It is submitted that WALLRAFF'S violation of two separate court orders in Case No. 82-1621 and his calculated and bad-faith attempt to avoid dismissal with prejudice would have been sufficient to warrant the dismissal of any newly filed action under the provisions of Rule 1.420(b). However, WALLRAFF continued in his willful and flagrant disregard of discovery rules in his newly-filed action. He failed to respond to a request to produce as well as to appear at his scheduled deposition. The suggestion made by WALLRAFF that he had contacted the secretary of defense counsel and advised that he would not be available for deposition due to his incarceration in a federal penitentiary completely dehors the record. There is no affidavit or other proof in support of these contentions. What the record does reflect is that WALLRAFF'S Motion for Protective Order concerning his deposition was not served until March 27, 1984, some twenty-five days after his scheduled deposition on March 2, 1984. The first mention of WALLRAFF'S incarceration in the record is this March 27, 1984 Motion for Protective Order.

Under these circumstances it can hardly be said that the trial court abused its discretion dismissing Case No. 83-3153 with prejudice. As this court recently observed in Mercer v. Raine, 443 So.2d 944 (Fla. 1983), Rule 1.380 invests the trial court with broad discretion in imposing discovery sanctions and even if reasonable men could differ as to the propriety of the action

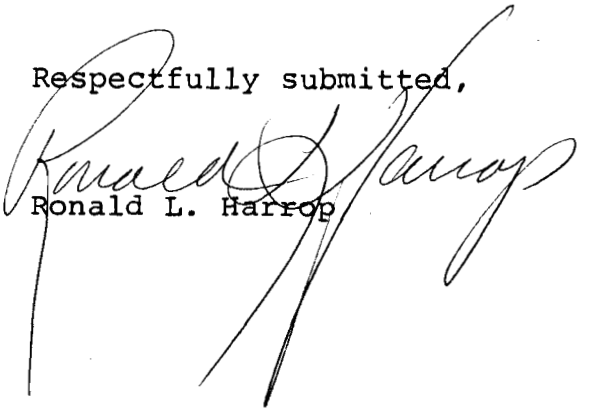
taken by the court, the action is not unreasonable and there could be no finding of an abuse of discretion.

It should finally be observed that even if it were held that the trial court in the instant case abused its discretion in dismissing WALLRAFF'S Complaint with prejudice, the trial court was clearly vested with authority to dismiss the action without prejudice. For example, in Rashard, supra, although the court reversed the Order of Dismissal with Prejudice, it remanded the case with instructions that the dismissal be without prejudice. In the instant case, because the statute of limitations on Wallraff's claim had already expired at the time of the May 1, 1984 Order of Dismissal, the dismissal with prejudice was at best, harmless error.

CONCLUSION

For the foregoing reasons, the Appellee, T.G.I.Friday's, Inc., respectfully requests this Court to enter an Order affirming the trial court's Final Judgment of Dismissal dated May 1, 1984.

Respectfully submitted,



Ronald L. Harrop

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to RICHARD S. TAYLOR, ESQUIRE, Post Office Box 1117, Longwood, Florida 32750, this the 12th day of August, 1985.

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