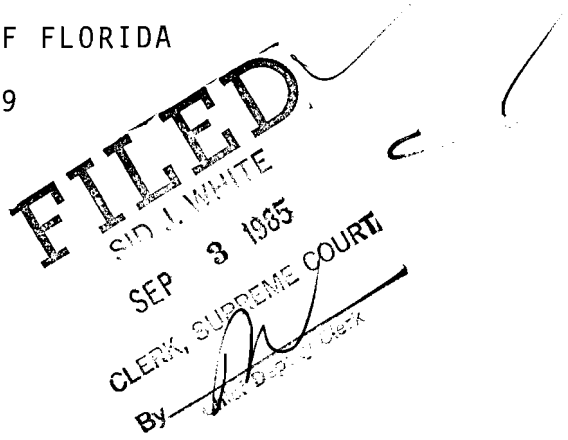
IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,259




MARK STEVEN WALLRAFF,

Petitioner,

vs.

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

Respondent.
_____/

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PETITIONER, MARK STEVEN WALLRAFF'S
REPLY BRIEF

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## INTRODUCTION

Petitioner, MARK STEVEN WALLRAFF, shall be referred to as WALLRAFF, Appellant or Plaintiff; Respondent, T.G.I. FRIDAY'S, INC., shall be referred to as FRIDAY'S, Appellee or Defendant.

## STATEMENT OF THE CASE AND FACTS

There are several points of clarification required to the Respondent's Statement of the Case and Facts.

The Respondent states that the imposition of discovery sanctions under review was based in a large part upon WALLRAFF'S violation of discovery procedures and violation of a court order in the earlier action between the parties. The fact is that neither the trial court or Fifth District Court of Appeal orders or opinions state that their decisions are based in a large part upon ... the earlier action. The Final Judgment of Dismissal did not state any reasons for granting the Defendant's Motion to Dismiss.

It is also important that the judge in the trial court in this case was not the same judge as in the first action. The record and circumstances surrounding that record were not available to the trial court judge in this action.

Further, WALLRAFF did comply with FRIDAY'S Request to Produce and initial Interrogatories on March 27, 1984, four (4) days after the Defendant sent the Motion to Dismiss out and one (1) day after receiving the Motion to Dismiss. The Request to Produce and Interrogatories were not addressed by the trial court at the hearing on the Motion to Dismiss. The entire issue was WALLRAFF'S failure to appear at his deposition.

Finally, it is noted that the deposition of WALLRAFF was set in a county other than where the action was pending. The

Notice of Taking Deposition was filed without leave of court although WALLRAFF was incarcerated in a federal prison is Minnesota. Because of these facts it was the Plaintiff's counsel's understanding as a result of telephone calls with FRIDAY'S counsel's secretary, that the deposition had in fact been cancelled.

## ISSUES ON APPEAL

I

WHETHER THE CASE LAW INTERPRETING AND CONSTRUING RULE 1.380, FLORIDA RULES OF CIVIL PROCEDURE, REQUIRES THAT A COURT ORDER DIRECTING DISCOVERY BE VIOLATED BEFORE A COURT DISMISSES A CASE WITH PREJUDICE?

II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING THE PLAINTIFF'S COMPLAINT?

## ARGUMENT

### I

THE CASE LAW INTERPRETING AND CONSTRUING RULE 1.380, FLORIDA RULES OF CIVIL PROCEDURE, REQUIRES THAT A COURT ORDER DIRECTING DISCOVERY BE VIOLATED BEFORE A COURT DISMISSES A CASE WITH PREJUDICE.

### II

THE TRIAL COURT DID ABUSE ITS DISCRETION IN DISMISSING WALLRAFF'S COMPLAINT.

## ARGUMENT

### I

THE CASE LAW INTERPRETING AND CONSTRUING RULE 1.380, FLORIDA RULES OF CIVIL PROCEDURE, REQUIRES THAT A COURT ORDER DIRECTING DISCOVERY BE VIOLATED BEFORE A COURT DISMISSES A CASE WITH PREJUDICE.

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The Appellee, as well as the Fifth District Court of Appeal, fails to cite any cases on point supporting their position. They both rely upon "express language" of the rule and totally ignore or disagree with established case law interpreting said rule. The Appellee as well as the Fifth Dsitrict Court of Appeal seemed to have overlooked the fact that courts interpret the meaning and application of rules and statutes all the time. This is commonly known as case law as opposed to statutory law.

The case law construing Rule 1.380, Florida Rules of Civil Procedure and Federal case law construing the similar federal rule clearly state that a case can not be dismissed with prejudice for failure to make discovery absent a court order directing said discovery. There was no such order in this case. The fact is that the Plaintiff's deposition had not been previously set. The Plaintiff had in fact answered the interrogatories and complied with the Request to Produce prior to the hearing. These matters were not at issue at the hearing on the Motion to Dismiss.

It is also important that the lower court's order dismissing the Plaintiff's complaint made no finding of any willful or contumacious disregard of the rules of court. The facts of this case indicate quite the contrary. The Plaintiff was incarcerated in a federal prison in Minnesota. He obviously had no way of attending a deposition if Florida. The Defendant was well aware of this. The Plaintiff did not file a Motion for Protective Order until after the Defendant filed their Motion to Dismiss because the Plaintiff was under the belief and understanding that the deposition had in fact been cancelled by the Defendant. This is a disputed fact. The Defendant also set the deposition in a county other than where the case was pending and failed to obtain leave of court to take the Plaintiff's deposition as required by Rule 1.310(a), Florida Rules of Civil Procedure, in that the Plaintiff was confined in prison. The setting of the Plaintiff's deposition should therefore be considered a nullity.

The Appellee cites the case of American Air Transport, Inc. v. Seafirst Commercial Corporation, 452 So.2d 1037 (Fla. 4th DCA 1984), in support of its position. A cursory reading of said case reveals that the court's decision does not even remotely support their position. The case involved a Defendant invoking his Fifth Amendment privilege against self-incrimination in response to a set of interrogatories. The Plaintiff filed a motion to compel discovery with respect to the interrogatories and deposition questions. The trial court denied the Plaintiff's

motion to compel, but also prohibited the Defendant from presenting at trial any evidence or testimony concerning his affirmative defenses.

The issue is said case was whether the trial court failed to comply with the essential requirements of law when it imposed sanctions on the Defendant while denying Plaintiff's motion to compel discovery. The Fourth District Court of Appeal concluded that it did. The Defendant's position on appeal was that sanctions such as those applied by the trial court may be applied only if a party fails to obey an order to provide or permit discovery. The Court noted that the rules of civil procedure describes court procedures and powers relating to discoverable matters. Therefore the Court concluded it does not follow that an order to compel discovery is an indispensable precursor when a privilege is claimed. Thus the case is totally distinguishable from the case at bar.

The Appellee also cites in support of its position this Court's decision in Mercer v. Raine, 443 So.2d 944 (Fla. 1983). An examination of the facts and this Court's decision in that case shows that this case supports the Appellant's position in the case at bar. In the Mercer case the trial court ordered the Defendant to respond to all pending discovery within twenty (20) days. The Defendant failed to comply with the requirements of the trial court's order. In its decision this Court noted that the trial court expressly found at the hearing on the motion

for sanctions that the Defendant "knew what was going on" and had "total disregard for the consequences" of the pending action. There was no such finding in the case at bar. This Court went on to state: "Florida Rule of Civil Procedure 1.380 clearly authorizes the sanctions imposed by the trial court for the defendants failure to comply with the court's order." Id at 946. The Court went on to note that there was no showing that the defendant ever communicated any explanation or excuse to the Court by the time the Plaintiffs' motion was heard. The Plaintiff in the instant action filed a Motion For Protective Order on the grounds that the Plaintiff was incarderated in a U.S. Federal Prison and that the U.S. Marshall's office would not transport the Plaintiff to Orlando for his deposition but would for trial. The Plaintiff also responded to the Defendant's Motion to Dismiss by explaining that the Plaintiff was under the impression that the deposition has been cancalled. Counsel for the Plaintiff in this case readily admits that he should have confirmed the cancellation of the deposition in writing. As this Court pointed out in some cases the sanction is in effect punishing the litigant too severly for an act or failure on the part of his counsel. Citing Beasley v. Girten, 61 So.2d 179 (Fla. 1952); Goldman vs. Tabor, 239 So.2d 529 (Fla. 2d DCA 1970). This Court went on to state:

> "We agree that the striking of pleadings or entering a default for noncompliance with an order compelling discovery is the most severe of all sanctions which should be employed only in extreme circumstances." Citing Hart v. Weaver, 364 So.2d 524 (Fla. 2nd DCA 1978).

> "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).

In the case at bar there was not a noncompliance with a court order compelling discovery, was not a deliberate and contumacious disregard of the Court's authority or bad faith, willful disregard or gross indifference to an order of the Court. The Plaintiff simply could not have attended the deposition. There was no court order requiring him to attend his deposition. To dismiss his Complaint under such circumstances is unreasonable, contrary to existing case law and an abuse of the court's discretion.

## AGRUMENT

## II

THE TRIAL COURT DID ABUSE ITS DISCRETION IN DISMISSING WALLRAFF'S COMPLAINT.

It is the Appellants position that the issue in this case is not whether the lower court abused its discretion in dismissing the Plaintiff's complaint. However, the Appellant does believe that the trial courts action could also be construed as an abuse of discretion in addition to its error in dismissing the complaint in the absence of a court order compelling discovery.

The Appellee asserts that the record reflects that WALLRAFF was in willful violation of a court order in his initial action. This statement constitutes pure conjecture on the part of the Appellee. The fact is that the record does not specifically make any findings of any willful violation of court orders or discovery rules in either case. The fact is that due to the Plaintiff's incarceration in prison it was difficult to communicate with the Plaintiff and a decision was made to voluntarily dismiss the suit and refile when the Plaintiff was released from prison or would be at least be released in time for a trial. The fact is that the trial judge realized that the court was premature in dismissing the Plaintiff's complaint and therefore set aside its order.

The Appellee cites in support of its agrument the case of Surrency v. Winn & Lovett Grocery Co., 34 So.2d 564 (Fla. 1943). In said case the Plaintiff refused to submit himself for questioning by the Defendant. This factual situation clearly does not exist in the instant case.

The second action by WALLRAFF should be considered on its own merits. The prior proceeding should not be considered by the court, especially when the case had a new judge who was not familiar with the proceedings in the prior action. The Appellees contention that the Plaintiff was "judge shopping" is ridiculous. The Defendant could have filed a motion to have the second action reassigned to the judge in the first case. They failed to however. They also failed to file a motion to stay the second action until the costs of the first action were paid. Further, if the Defendant felt that the Plaintiff improperly filed a voluntary dismissal in the first action they should have so noted their objection with the trial court in that action. They have at this late date waived any objection to the voluntary dismissal.

Finally, the Appellee keeps referring to the Interrogatories and Request to Produce that the Plaintiff had in fact responded to. The fact is that the Plaintiff's failure to attend his deposition was the only matter heard before the trial court on the Motion to Dismiss. The Plaintiff's deposition had never been scheduled in the first action and was not the subject of any motions to compel in the first action. It is improper to connect

the problem in the first action with interrogatories and request to Produce with the improper scheduling of a deposition in the second action.

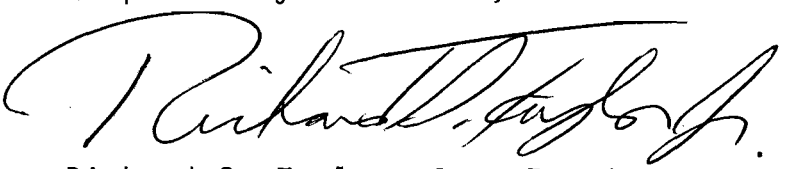
The Plaintiff did in fact immediately file a Motion for Protective Order once it became evident that the Defendant was not going to honor its prior oral agreement to cancel the deposition.

It is clear under the facts that the trial court did in fact abuse its discretion in dismissing the Plaintiff's complaint.

## CONCLUSION

For the foregoing reasons, the Appellant, MARK STEVEN WALLRAFF, respectfully requests this Court to enter an Order reversing the trial court's Final Judgment of Dismissal dated May 1, 1984, and reversing the Fifth District Courts affirmation of the dismissal.

Respectfully submitted,



Richard S. Taylor, Jr., Esquire

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to RONALD L. HARROP, Esquire of Gurney & Handley, P.A., Post Office Box 1273, Orlando, Florida 32802-1273, this 29th day of August, 1985.

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