IN THE SUPREME COURT OF THE STATE OF FLORIDA

SUPREME COURT CASE #75,370

FOURTH DISTRICT COURT OF APPEAL
CASE #88-1187

DAVID I. CHAPNICK, d/b/a
FLORIDA FINANCIAL SERVICE
GROUP, BARRY CHAPNICK and
COMMONWEALTH SAVINGS AND LOAN,

Petitioner/Appellee,

VS.

MOSHE TUBERO,

Respondent/Appellant.

PETITIONERS' BRIEF ON THE MERITS

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add → ROBERT S. HACKLEMAN, ESQUIRE
CONNIS O. BROWN, III, ESQUIRE
GUNSTER, YOAKLEY & STEWART! P.A.
Attorneys for Commonwealth
Federal Savings and Loan
Post Office Box **14636**
Fort Lauderdale, FL **33302**
Telephone: **(305) 462-2000**

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PREFACE

This appeal involves an action brought by Respondent/Plaintiff, MOSHE TUBERO ("Tubero") against Defendants, DAVID I. CHAPNICK d/b/a Florida Financial Service Group ("David Chapnick"), BARRY CHAPNICK ("Barry Chapnick") and Petitioner, COMMONWEALTH FEDERAL SAVINGS AND LOAN ASSOCIATION ("Commonwealth").

This brief is submitted on behalf of Commonwealth.

In this brief, the parties will be referred to by name or as Plaintiff and Defendants. Reference to the record on appeal will be by R. 1-40.

STATEMENT OF CASE AND FACTS

On November 19, 1987, Tubero filed an action for breach of contract and fraud seeking compensatory and punitive damages totaling $30,000,000.00, together with court costs and attorney's fees (R. 1-3). Commonwealth answered and raised affirmative defenses (R. 6-8).

On January 21, 1988, Commonwealth served, by hand delivery, Interrogatories and a First Request for Production upon Tubero (R. 23-28). Tubero failed to timely object or otherwise respond to either the interrogatories or the request to produce.

On March 8, 1988, pursuant to local administrative rules, Commonwealth served its Motion to Compel Discovery and for Entry of Ex Parte Order upon Tubero (R. 33-34). The trial court granted Commonwealth's motion on March 8 and set a ten day deadline for Tubero to serve his answers to interrogatories and to produce the documents requested (R. 35). Tubero violated the order. No interrogatories were answered. No documents were produced. No objections were filed. No motion to extend the time to respond was made.

On March 22, 1988, Commonwealth served a Motion to Compel Discovery and for Sanctions upon Tubero (R. 36-37). The Motion was initially set for hearing on March 31, 1988 (R. 36), then set over until April 5, 1988 (R. 38).

The motion to compel and for sanctions was heard on April 5, 1988. The trial court entered an order granting the motion and for sanctions "for Plaintiff's failure to comply with this court's

order of March 8, 1988, and the Plaintiff's complaint is hereby dismissed." (R. 38).

On appeal, the Fourth District Court of Appeals reversed the order of the trial court due to the absence of an express written finding of willful disregard and remanded for further proceedings without prejudice to the trial court to reconsider the sanction imposed in the order to determine whether there was a deliberate or willful disregard of the discovery order. Tubero v. Chapnick, 552 So.2d 932 (Fla. 4th DCA 1989).

The Fourth District certified as a matter of great public importance the following question to the Florida Supreme Court:

> 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?

SUMMARY OF ARGUMENT

In Tubero v. Chapnick, 552 So.2d 932 (Fla. 4th DCA 1989), the Fourth District certified as a matter of great public importance the question of whether an express written finding of deliberate refusal to comply with a discovery order is necessary under Fla.R.Civ.P. 1.380 to sustain the sanction of dismissal or default against a disobedient party.

The question, as posed, must be answered in the negative. It incorrectly assumes that Fla.R.Civ.P. 1.380 only authorizes the sanction of dismissal for failure to comply with **a** discovery order and, premised upon this misassumption, poses the question of whether an express written finding of willful violation of the discovery order is necessary. In actuality, Fla.R.Civ.P. 1.380(d) authorizes dismissal or default as a sanction for the mere violation of certain of the discovery rules. The Florida Supreme Court determined in Wallraff v. TGI Friday's, Inc., 490 So.2d 50, 51 (Fla. 1986), that violation of an order compelling discovery is unnecessary to sustain the sanction of dismissal or default under Rule 1.380(d).

Additionally, the landmark case of Mercer v. Raine, 443 So.2d 944 (Fla. 1983), was intended to put an end to needless appellate restrictions upon the trial court's discretionary authority to impose discovery sanctions, including the restriction that the dismissal order contain an express recitation of willful non-compliance. Under Mercer, the discretionary decision to impose discovery sanctions and the severity thereof are vested in the

trial court, not the appellate court. The scope of appellate review is narrowly limited under the "reasonableness test," which requires the appellate court to affirm the imposition of the sanction if the record contains a logical factual basis for the exercise of the trial court's discretion. Id. at 946. It glorifies form over substance to require an express written finding of willful disobedience of a court order. If the record establishes that the party willfully violated a discovery order, why should the trial court be reversed because of the failure to make an express finding in the dismissal order?

ARGUMENT

POINT I

ORDER IMPOSING DISCOVERY SANCTION OF DISMISSAL UNDER FLA.R.CIV.P. 1.380 NEED NOT CONTAIN AN EXPRESS WRITTEN FINDING OF WILLFUL OR DELIBERATE REFUSAL TO OBEY A COURT ORDER

A. Introduction.

In Tubero v. Chapnick, 552 So.2d 932 (Fla. 4th DCA 1989), the Fourth District Court of Appeals reversed the trial court's order dismissing Tubero's action for failure to comply with an order compelling discovery. The Fourth District reversed solely because the dismissal order failed to contain an affirmative written finding that the disobedient party willfully or deliberately refused to obey the order compelling discovery. The Fourth District concluded that an express finding of willful disobedience of a court order was required based upon its interpretation of the landmark case of Mercer v. Raine, 443 So.2d 944 (Fla. 1983), and its progency, Wallraff v. TGI Fridays, Inc., 490 So.2d 50 (Fla. 1986). However, the Fourth District admitted uncertainty as to the correctness of its interpretation and certified the following question as a matter of great public importance:

> 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?

For the reasons set forth in the following discussion, Commonwealth respectfully disagrees that Mercer or Wallraff require am affirmative recitation in the dismissal order of willful or

deliberate refusal to obey an order compelling discovery. To the contrary, Wallraff expressly holds that Fla.R.Civ.P. 1.380(d) authorizes dismissal as a sanction for mere violations of the rules of discovery and that no violation of a discovery order is required. Moreover, the imposition of such a restriction upon the discretionary authority of the trial court violates the fundamental policies expressed in Mercer. It represents one in a continuing series of appellate decisions in the past four years eroding the scope of the trial court's discretionary authority to impose discovery sanctions.

B. Mercer v. Raine.

Fla.R.Civ.P. 1.380 expressly empowers a trial court to enter a judgment of dismissal or default against a party for discovery non-compliance. Rule 1.380(b)(2)(C) authorizes entry of a default or dismissal against a party for failure to obey an order to provide discovery. Rule 1.380(d) authorizes entry of a dismissal or default judgment against a party who violates the discovery rules by failing to appear for deposition, to serve answers to interrogatories or to serve a response to a request to produce. A dismissal under Rule 1.380(d) need not involve disobedience of a discovery order, the mere violation of one of the pertinent discovery rules is sufficient. Wallraff V. TGI Friday's, Inc., 490 So.2d at 51.

In the 1983 landmark decision in Mercer V. Raine, 443 So.2d at 944, the Florida Supreme Court upheld the Fourth District's affirmance of a trial court order striking a defendant's pleadings for a single violation of an order compelling discovery.

The Court determined dismissal to be an appropriate sanction for contumacious disregard of the court's authority, bad faith, willful disregard or gross indifference to a court order, or conduct which evinces deliberate callousness. Id. at 946.

Mercer held that the decision to impose sanctions for discovery violations and the severity of the sanctions applied are matters within the sound discretion of the trial court, which may only be disturbed when the decision fails to satisfy the reasonableness test established in Canakaris V. Canakaris, 382 So.2d 1197 (Fla. 1980). Under the Canakaris test adopted by Mercer: "(i)f reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion." 443 So.2d at 946.

The expressed purpose of Mercer was to preclude the District Courts of Appeal from substituting their judgment for that of the trial court. The Florida Supreme Court made this point time-after-time in the opinion. It cited with approval Farish v. Lum's Inc., 267 So.2d 325, 327-328 (Fla. 1972), and quoted an excerpt from Farish explicitly by stating that it is "the duty of the trial court, not the appellate courts" to make the discretionary determination excusing or refusing to excuse discovery non-compliance. 443 So.2d at 945. The Florida Supreme Court cited with approval the "same rule of law" as stated by the United States Supreme Court in National Hockey League V. Metropolitan Hockey Club, Inc., 472 U.S. 639, 49 L.Ed.2d 747, 751 (1976) (affirming a dismissal as a discovery sanction and

cautioning the appellate courts against interfering with trial court's discretionary determination). Indeed, the Florida Supreme Court went to far as to declare:

> Thus, to justify reversal, it would have to be shown on appeal that the trial court clearly erred in its interpretation of the facts and the use of its judgment and not merely that the court, or another fact-finder, might have made a different factual determination. Id. at 946.

In order to understand why the Florida Supreme Court deemed it necessary in Mercer to limit the scope of appellate review, it is helpful to review the status of the case law as it existed in 1983, when Mercer was decided.

In that era, the District Courts of Appeal routinely second-guessed and reversed trial court decisions imposing the sanction of dismissal for failure to comply with a discovery order. The case law established severe restraints upon the authority of the trial court to enter an order of dismissal for failure to obey a discovery order. The retraints included, among others, the following: (1) the requirement that the order of dismissal contain an express finding that the disobedient party willfully refused to obey the order compelling, e.g., Swindle v. Reid, 242 So.2d 751 (Fla. 4th DCA 1971), Santuoso v. McGrath & Associates, Inc., 385 So.2d 112 (Fla. 3d DCA 1980); (2) the requirement that the victim of the discovery abuse affirmatively demonstrate that it was substantially prejudiced by the disobedient party's failure to obey the order compelling discovery, e.g., Beaver Crane Service, Inc. v. National Surety Corporation, 373 So.2d 88 (Fla. 3d DCA 1979); (3) the requirement that, prior to dismissing the action, the

court give the disobedient party another opportunity to comply, e.g., Goldstein v. Goldstein, 284 So.2d 225 (Fla. 3d DCA 1973); (4) the requirement that the record affirmatively demonstrate that the disobedient party was not in "substantial compliance" with the discovery order at the time of the dismissal. E.g., Flanzbaum v. Stan's Lounge, 377 So.2d 750 (Fla. 4th DCA 1979).

These restraints and the interpretations placed upon them by the District Courts of Appeal made it virtually impossible for a trial court judge to impose the sanction of dismissal upon a party for disobedience of a court order. It also had the side-effect of eliminating the sanction of dismissal as a deterrent against discovery misconduct. The consequences were both predictable and unfortunate. Unscrupulous litigants flouted the discovery orders of the trial courts.

In response to this state of affairs, the Florida Supreme Court exercised jurisdiction to consider the Fourth District's affirmance of a trial court order imposing the discovery sanction of dismissal in Mercer v. Raine, 410 So.2d 931 (Fla. 4th DCA 1981). The case came before the Court on the basis of conflict with Santuoso v. McGrath & Associates, Inc., 385 So.2d 112, 114 (Fla. 3d DCA 1980), a decision reversing the sanction of default because the trial court order did not recite that the failure to submit to discovery was willful.

The Florida Supreme Court upheld the Fourth District's decision in Mercer. This affirmance provides strong evidence that the Florida Supreme Court resolved the conflict against the argument espoused by the Third District in Santuoso that the

default order must expressly recite willful disobedience. This conclusion draws express support from the discussion in Mercer on page 945.

The Mercer opinion recites on page 945 that the defendant contended that the "the court abused its discretion in entering the particular sanctions it did without affording the defendant an opportunity to cure the violation by compliance and in the absence of a finding by the court that the noncompliance was willful or that plaintiffs suffered any undue prejudice due to the defendant's noncompliance." Id. at 945. (Emphasis supplied). The Florida Supreme Court repudiated these contentions and declared: "We cannot agree with Defendant's contentions." 443 So.2d at 945 (Emphasis supplied).

The language on page 945 appears to reject the requirement of an express finding of willfulness together with the other restraints on the exercise of the trial court's discretion embodied in the case law as of 1983. However, a contrary interpretation draws support from the final paragraph of the opinion appearing on the bottom of page 946 and the top of 947.

In that paragraph, the Florida Supreme Court arguably harmonizes Mercer and Santuoso by noting that the trial court in Mercer "found that the defendant's actions amounted to willful disregard." Id. at 947. (Emphasis supplied).

C. Wallraff v. TGI Friday's.

Mercer was followed by Wallraff v. TGI Fridays, Inc., 490 So.2d 50 (Fla. 1986). In that case, in the absence of an order compelling discovery, the trial court imposed the sanction of

dismissal with prejudice against a plaintiff for failing to attend a deposition. The Florida Supreme Court acknowledged that the sanction of dismissal with prejudice under Fla.R.Civ.P. 1.380(d) could be imposed under "appropriate circumstances" simply for failing to obey one of the pertinent discovery rules. Id. at 951. The Court, therefore, disapproved the prior inconsistent decisions requiring a violation of a court order as a prerequisite to the imposition of the sanction of dismissal. Nonetheless, the Supreme Court reversed the trial court's dismissal with prejudice for failure to attend the deposition.

Applying the "reasonable test" established in **Mercer**, the Court found that "the trial court's dismissal with prejudice was unreasonable in this case." **Id.** at 51. The Court noted a number of reasons for its decision, such as the trial court's mistaken consideration of misconduct occurring in a prior case and the existence of a dispute between the parties as to whether the deposition was cancelled. The Court also noted that, "the trial court order did not recite that the failure to attend the deposition was willful or done in bad faith." Id. at 52.

D. No Requirement of Express Finding of Willful Violation of Order Compelling

1. No Requirement of Violation of Order Compelling Under Wallraff

A reading of the Tubero opinion under consideration demonstrates that the Fourth District overlooked the import of the holding in Wallraff that a direct violation of a discovery order is not a prerequisite to sustaining the sanction of dismissal under

Rule 1.380. That holding is dispositive of the certified question of whether a written finding of a willful violation of an order compelling discovery under Rule 1.380 is a prerequisite to sustain the sanction of dismissal or default. The question, as posed, must be answered in the negative. Walraff declares that, under "appropriate circumstances," the mere violation of a discovery rule will sustain the sanction of dismissal. Id. at 51. Therefore, a disobedience of an order compelling discovery is not required under Rule 1.380 to sustain the sanction of dismissal, irrespective of the presence or absence of a finding of willfulness.

2. No Requirement of Express Finding of Willful Violation

In addition to the holding in Wallraff, a number of other reasons exist for rejecting the requirement of an express written finding of willful disobedience of a discovery order.

First, Mercer did not narrowly restrict the sanction of dismissal solely to instances involving willful or deliberate refusal to obey a court order under Fla.R.Civ.P. 1.380. The Supreme Court determined dismissal to be an appropriate sanction for a broad range of acts of misconduct, including: (1) contumacious disregard of the court's authority; (2) bad faith; (3) gross indifference to a court order; and (4) conduct which evinces deliberate callousness. Id. at 946. In respect to such misconduct, the trial court's power to sanction by dismisal or otherwise derives not only from the rules of civil procedure, but also from its inherent contempt powers to safeguard the orderly administration of justice. See, Roadway Express, Inc. v. Piper,

447 U.S. 752, 65 L. Ed. 2d 488, 500 (1980). It is, therefore, unwarranted to limit the trial court's power to impose the sanction of dismissal solely to instances involving willful refusal to obey an order compelling discovery.

Second, the Mercer court adopted a "reasonableness test" requiring a factual inquiry on a case-by-case basis to determine whether "the record contains a logical basis" for the exercise of the trial court's discretion. 443 So.2d at 946. Why would the Supreme Court require an inquiry into the record, if the trial court's order was reversible solely on the basis of the absence of an express recitation of willful noncompliance?

Third, the requirement of an express finding in the order of "willful noncompliance" conflicts with the policy rationale announced in Mercer. The court adopted the "reasonableness test" because "it is impossible to establish rules for every possible sequence of events and types of violations that may ensue in the discovery process." Id. at 946. A mechanical rule requiring reversal for orders lacking recitations of willful noncompliance frustrates the purpose behind the reasonableness test. It glorifies form over substance.

By way of illustration, a plaintiff disobeys an order compelling discovery and tells the trial court on the record: "I don't care what you order, I will never produce those documents." The trial court sanctions the plaintiff by dismissing the action, but neglects to include an express recitation of "willful noncompliance" in the order. Why should the trial court be reversed for a clerical oversight when the record clearly supports

a finding of willfulness?

Finally, the plain language of **Mercer** evidences the fact that the Supreme Court considered and rejected the requirement of an express finding of willful non-compliance. **443** So.2d at **945.** The petitioner raised "the absence of a finding by the court that the non-compliance was willful," among other contentions, as a ground for reversal. The Court rejected this and the other legal grounds raised by petitioner unequivocably stating: "We cannot agree with defendants contentions." Id.

POINT II

THE TRIAL COURT'S DISCRETIONARY AUTHORITY TO SANCTION SHOULD NOT BE UNDULY RESTRICTED

The lower courts construed the Florida Supreme Court's decision in Wallraff, reversing the trial court's discretionary decision imposing the dismissal sanction, as signaling a retreat from Mercer.

Since the **1986** decision in **Wallraff,** the District Courts of Appeal have reversed the majority of the discretionary decisions of the trial courts imposing the sanction of dismissal and the frequency of reversals is increasing. **A** West Law survey of the thirty most recent cases involving the dismissal sanction, reveals that the District Courts of Appeal have reversed the discretionary decisions of the trial courts more than eighty percent of the time.

Mercer unequivocally holds that the decision to impose sanctions and the severity thereof are matters within the discretion of the trial court, not the appellate court. **443** So.2d at **945-946.** Mercer forbids an appellate court from reversing

merely because the appellate court or another fact-finder might have made a different determination. This instruction has been ignored. Dismissal-after-dismissal has been reversed because the appellate court deems the sanction imposed by the trial court to be "too severe" or "too harsh." E.g., Dunn v. White, Case No. 89-344 (Fla. 5th DCA Jan. 25, 1990); Steele v. Chapnick, 552 So.2d 209 (Fla. 4th DCA 1985).

The District Courts of Appeal have reestablished the same restrictions that existed on the discretionary authority of the trial court prior to Mercer. These restrictions once again include: (1) the requirement that the order of dismissal contain an express finding that the disobedient party willfully refused to obey an order compelling discovery, e.g., Tubero v. Chapnick, 552 So.2d at 934-935; (2) the requirement that the victim of the discovery misconduct establish prejudice, e.g., In re Forfeiture of Twenty Thousand Nine Hundred Dollars ($20,900) U.S. Currency, 539 So.2d 14 (Fla. 4th DCA 1989); (3) the requirement that the disobedient party not be in substantial compliance, e.g., Steele v. Chapnick, 552 So.2d at 209; and (4) the requirement that the disobedient party be given a second chance to comply prior to dismissal. Klienschmidt v. Gator Office Supply and Furniture, Inc. 551 So.2d 515 (Fla. 3d DCA 1989).

Mercer has been eroded to the point of extinction. As a result, the discovery misconduct that Mercer was intended to remedy has grown and worsened. Anyone knowledgeable of the discovery practices in Dade and Broward Counties can describe the deplorable conditions that prevail there. This is confirmed by the

number of appellate decisions arising in the Third and Fourth Districts involving discovery misconduct.

A major cause of the problem derives from the failure to recognize the import of the Florida Supreme Court's citation with approval in Mercer, 443 So.2d 945-946, to that portion of United States Supreme Court's decision in National Hockey Leauue appearing at 427 U.S. 643. The cited page of National Hockey League, discussing the federal counterpart to Rule 1.380, emphasizes that the purpose of the dismissal sanction is not merely to punish the wrongdoer "but to deter those who might be tempted to such conduct in the absence of such a deterrent." Id. For this reason, the United States Supreme Court reversed the Court of Appeals and affirmed the discretionary decision of the trial court to impose the discovery sanction of dismissal. The Court instructively stated:

> If the decision of the Court of Appeals remained undisturbed in this case, it might well be that these respondents would faithfully comply with all future discovery orders entered by the District Court in this case. But other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other District Courts.

The failure to recognize the importance of the deterrence function has led to an unfortunate result. Parties in lawsuits in Florida all too frequently flout the rules of procedure and discovery orders.

Commonwealth, therefore, respectfully requests this Court not only to reverse the Fourth District's decision in Tubero v. Chapnick, but also to render an opinion clarifying and reconfirming

the holding in **Mercer**.

CONCLUSION

For the foregoing reasons, the decision *of* the Fourth District Court of appeals in Tubero v. Chapnick, 552 So.2d at 932, should be reversed and the question certified as a matter of great public importance should be answered in the negative.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail this 26th day of February, 1990, to THOMAS J. O'GRADY, ESQ., 1388 N.W. 2nd Avenue, P.O. Box 1979, Boca Raton, Florida 33432.

GUNSTER, YOAKLEY & STEWART, P.A.
One East Broward Blvd.
P.O. Box 14636
Fort Lauderdale, FL 33302
(305) 462-2000

By: Robert S. Hackleman
ROBERT S. HACKLEMAN