

IN THE SUPREME COURT OF FLORIDA

**FILED**

SID J. WHITE

JUL 22 1985

CLERK, SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk

MARK STEVEN WALLRAFF,  
Petitioner,

v.

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

CASE NO: 67,259  
5th District Court of Appeal  
CASE NO: 84-806

PETITIONER'S INITIAL BRIEF

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## PREFATORY STATEMENT

With the permission of this Honorable Court, Petitioner will be referred to as "Appellant" or "Plaintiff", and the Respondent will be referred to as "Appellee" or "Defendant".

In this brief, the designations to the Record on Appeal will be designated by "R".

ISSUE ON APPEAL

WHETHER THE FIFTH DISTRICT COURT OF APPEALS OPINION CORRECTLY RECITES THE LAW CONCERNING DISMISSAL OF ACTIONS PURSUANT TO RULE 1.380(d), FLORIDA RULES OF CIVIL PROCEDURE OR WHETHER THE CASE OF RASHARD v. CAPPIALI, 171 So.2d 221 (Fla. 3d DCA 1965) AND RELIANCE BUILDERS OF CORAL SPRINGS, INC. v. CITY OF CORAL SPRINGS, 373 So.2d 410 (Fla. 4th DCA 1979) ARE CORRECTLY STATES THE LAW.

## JURISDICTION

This Court has jurisdiction of this appeal pursuant to Rule 9.030(a)(2)(A)(vi), Florida Rules of Civil Procedure. The opinion of the Fifth District Court of Appeal in this action is in conflict with the Third District Court of Appeal in the case of Rashard v. Cappiali, 171 So.2d (Fla. 3d DCA 1965), the Fourth District Court of Appeal in the case of Reliance Builders of Coral Springs, Inc. v. City of Coral Springs, 373 So.2d 410 (Fla. 4th DCA 1979), as well as cases not cited in the lower court's opinion in the First and Second District Courts of Appeal. See Owens-Illinois, Inc. vs. Lewis, 260 So.2d 221 (Fla. 1st DCA 1972), and Hurley v. Werly, 203 So.2d 530 (Fla. 2d DCA 1967).

STATEMENT OF THE FACTS AND OF THE CASE

This appeal arises out of the dismissal of a personal injury action filed by the Appellant, MARK STEVEN WALLRAFF, against the Appellee, T.G.I. FRIDAY'S, INC., a Florida corporation. As alleged in paragraph 3b of the Complaint (R 1-3), the Appellant received several deep lacerations to his forehead when struck on the forehead by a drinking glass by one of the employees of T.G.I. FRIDAY'S, INC.

The Complaint (R 1-3) was filed on December 6, 1983, and the Appellee answered (R 4) the Complaint on January 17, 1984. Also on January 17, 1984, the Appellee filed a Request to Produce, Notice of Propounding Interrogatories, and Notice of Taking Deposition of the Appellant in the offices of the attorney for the Appellee in Orlando, Orange County, Florida. The action, however, was filed in Seminole County, Florida. At the time the Notice of Taking Deposition of the Appellant was filed, the Appellant was incarcerated in federal prison in the State of Minnesota. The Notice of Taking Deposition was filed without the required leave of Court to do so.

The Appellant complied with the Request to Produce and Answered the Interrogatories on February 16, 1984. However, the attorney for the Appellant, through his secretary, informed the Appellee, through its attorneys secretary, that the Appellant was still incarcerated in federal prison in the State of Minnesota. The Appellee was aware of the Appellant's incarceration from the previous filing of the action which was voluntarily dismissed by the Plaintiff due to his inability to pursue the action while in prison. The Appellee was

advised that we were in the process of having our client check to see if the United States would transport him to Seminole County, Florida for the deposition. In the meantime, it was requested that the deposition be cancelled until we found out if and when the Appellant could be transported to Seminole County, Florida for his deposition. The secretary indicated that it was "no problem" and the deposition was marked off the calendar of the attorney for the Appellant.

On March 2, 1984, the date the deposition was set, the attorney for the Appellant received a telephone call from the office of the attorney for the Appellee asking where the Appellant was. The attorney for the Appellant got on the telephone with the secretary and reminded her that my client was in federal prison in the State of Minnesota and that the deposition has been cancelled to which she responded, "oh, that's right, never mind" and the conversation ended. Within a few minutes thereafter, the attorney for the Appellant called the attorney for the Appellee, however, the attorney for the Appellant was never able to talk to the attorney for the Appellee and although messages were left for him to return my calls, the calls were never returned.

On March 27, 1984, the Appellee filed a Motion to Dismiss and Memorandum in Support of the Motion (R 11-26). On May 2, 1984, the Court dismissed the subject action with prejudice based upon the Appellant's nonappearance at the deposition (R 27). The Court's Order dismissing the case (R 28) was based on the fact that the

Appellant did not appear at the deposition and not on other matters (Interrogatories and Request to Produce) alleged in the Motion to Dismiss as they had been complied with prior to the hearing.

The Plaintiff appealed the trial courts order of dismissal to the Fifth District Court of Appeal. On May 9, 1985, the Fifth District Court of Appeal affirmed the trial court's order dismissing the Plaintiff's complaint. On June 12, 1985, the Fifth District Court of Appeal denied the Appellant's Motion for Rehearing. This Appeal is taken from the Fifth District Court of Appeal's opinion affirming the trial court's order dismissing the complaint.

## ARGUMENT

The lower court acknowledges the fact that the case law which has existed for over two decades supports the Appellant's position. The lower court simply disagrees with the established case law of the Third and Fourth District Courts of Appeal 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).

In Rashard v. Cappiali, supra, the lower court dismissed the plaintiff's complaint with prejudice because of her failure to answer written interrogatories. In reversing the trial court's dismissal the Court interpreted Rule 1.31(d), 30 F.S.A. the predecessor of Rule 1.380(d), which does provide for the sanction of dismissing a plaintiff's action upon failure to appear at a deposition after being served with the proper notice. The fact that the plaintiff was not served with proper notice was discussed under a separate point. The Rashard decision and the decisions in numerous other cases interprets the proper application of the rule. The lower appellate court has taken it upon itself to change the long standing application of the Rule by Florida courts and Federal courts applying the Federal counterpart to the Florida rule. The Court in Rashard stated:

"We hold that a reasonable interpretation of the two rules concerned (Florida Rules of Civil Procedure 1.31(d), and 1.35(b)) is that where dismissal is to be with prejudice and thus act as an adjudication on the merits is must be for the violation of an order of the Court and not for a mere failure to abide by a notice of procedural step. We think that is is important that in case an order of Court is violated or disregarded, the party moved against knows at the time of the order that there has been judicial determination of the requirement he must observe." Id at 583

The Rashard Court also stated:

"The law abhors the denial of access to the courts for any reason other than a wilful abuse of the processes of the court. Such a wilful 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." Id at 583

The opinion of the lower appellate court quotes that portion of the Rashard case which states that the "portion of this rule permitting entry of judgment by default can only be applied against the defendant". The Rashard opinion merely noted that the portion of the rule permitting entry of judgment by default can only be applied against the defendant. Obviously you can not enter a default judgment against a plaintiff! The same rule does provide for the dismissal of an action. The Rashard opinion states that an action should not be dismissed unless the plaintiff wilfully fails to obey an order of court or where the dismissal is to be with prejudice and this act as an adjudication on the merits it must be for the violation of a court order and not for a mere failure to abide by a notice of a procedural step.

At the time of the plaintiff's scheduled deposition he was incarcerated in a Federal prison in Minnesota. It is obvious that the Plaintiff did not wilfully fail to appear at the deposition and since there was not a court order requiring him to appear he did not wilfully or in any way fail to comply with a court order. Further, the defendant did not obtain leave of court to take the plaintiff's deposition as required by Florida Rule of Civil Procedure 1.310(a) which provides in part:

"The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribe ."

The noticing of the deposition should therefore have been considered a nullity to begin with.

There are numerous other cases which support the Rashard decision. In Swindle v. Reid, 242 So.2d 751 (Fla. 4th DCA 1971) the Court adopted the views set forth in Rashard. The Court in Swindle also noted the importance of the fact that the order of dismissal in that case did not contain any finding by the trial court that the plaintiff's failure to fully comply with the order to produce was due to a refusal to do so. The court noted that the record was susceptible of the reasonable interpretation that plaintiff's failure to produce the documents was occasioned by events beyond her control. This is also the situation with the case at bar. The Court also stated:

"...dismissal of an action with prejudice is a drastic punishment and should not be invoked except in those cases where the conduct of the party shows a deliberate and contumacious disregard of court's authority." citing State v. Fattorusso, Fla. App. 1969, 228 So.2d 630.

Another case supporting the Plaintiff's position is Owens-Illinois, Inc. v. Lewis, 260 So.2d 221 (Fla. 1st DCA 1972). The case differs from the factual case at bar in that the defendant failed to comply with two separate court orders requiring the defendant to answer interrogatories. In reversing the trial court's striking of defenses and entry of default judgment on the issue of liability, the First District Court of Appeal noted that the

failure to comply with the court's order was not the result of wilful neglect or refusal in bad faith to comply with the court's directions.

The court in Owens-Illinois, Inc. v. Lewis, supra, went on to note that the Florida rule relating to the sanctions available against a party who disobeys a court's order regarding discovery is a counterpart and taken from Rule 37(b)(2), Federal Rules of Civil Procedure. The Court quotes the following comment on the rule by Barron and Holtzoff:

"For purposes of Rule 37(b)(2), a party 'refused to obey' a discovery order merely by failing to comply with it, whether or not the failure be willful. But the Supreme Court has held that where the failure to comply is not because of willfulness, bad faith, or any fault of the party, the action should not be dismissed and less drastic sanctions provided by the rule should be invoked. This merely emphasizes the fact that under the rule the court is to make 'such orders in regard to the refusal as are just' with the most drastic sanctions reserved for flagrant cases." 2A Barron and Holtzoff, Federal Practice and Procedure 543 § 853 (Rules Ed.).

Although the instant case does not involve the failure to comply with a court order, the Appellant asserts that this is even stronger evidence that the trial court not only made its ruling in conflict of the existing case law but also abused its discretion in dismissing the plaintiff's action for failure to appear at a deposition which he could not attend due to his incarceration in the Federal penitentiary and especially when there is a conflict of facts concerning whether the deposition had in fact been cancelled.

The Owens-Illinois, Inc. v. Lewis case also notes that Florida courts follow the construction placed upon the rule by Federal courts. The following is a lengthy excerpt from the court's

decision:

"In speaking of the rule and its proper application, the Second District Court of Appeal in a well-considered opinion by Judge Pierce said:

"This is known as the 'sanction' portion of the discovery Rules. It is not penal. It is not punitive. It is not aimed at punishment of of the litigant. The objective is compliance-compliance with the discovery Rules. The sanctions are set up as a means to an end, not the end itself. The end is compliance. The sanctions should be invoked only in flagrant cases, certainly in no less than aggravated cases, and then only after the Court has given the defaulting party a reasonable opportunity to conform after originally failing or even refusing to appear. This is unmistakably the trend of judicial thinking in Florida on the 'sanction' Rule." Hurley v. Werley, (Fla. App. 1967) 203 So.2d 530, 537.

"To similar effect is the holding of the Fourth District Court of Appeal which, in an opinion by Judge Owen, said:

"\* \* \* However, dismissal of an action with prejudice is a drastic punishment and should not be invoked except in those cases where the conduct of the party shows a deliberate and contumacious disregard of the court's authority." State v. Fattorusso, (Fla. App. 1969) 228 So.2d 630.

"\* \* \* Since the trial court did not expressly find, and the record does not conclusively reveal, that the plaintiff's failure to produce was a refusal to obey, we hold that the court abused its discretion in dismissing the complaint with prejudice. Cf. Metro Sporting Goods, Inc. v. Mutual Employees Trademart, Inc. (Fla. App. 1964) 176 So.2d 578." Swindle v. Reid, (Fla. App. 1971) 242 So.2d 751, 753.

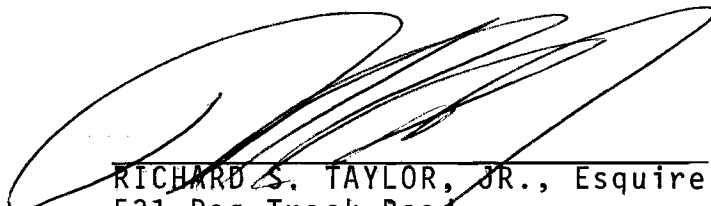
It is clear from the above case law that the other four district courts case law and the federal rules and cases applying the rules all support the Appellant's position. The Fifth District Court of Appeal in its decision has failed to recognize that there is an abundance of case law construing the proper application of the rule.

CONCLUSION

It is obvious that all of the case law in Florida as well as from the federal courts support the appellant's position that the trial court erred in dismissing the plaintiff's complaint for failure to attend his deposition. The Fifth District Court of Appeal is in conflict with all of the other four district courts of appeal in Florida as well as federal authorities construing the rule.

The Appellant therefore respectfully requests this Honorable Court to reverse the Fifth District Court of Appeal and trial court decisions.

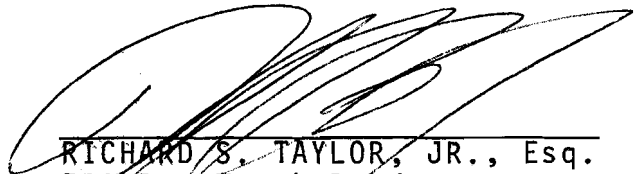
Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the  
Petitioner's Initial Brief has been furnished by U.S. mail  
to RONALD L. HARROP, Esquire, 203 North Magnolia Avenue, Post  
Office Box 1273, Orlando, Florida 32802, this 22nd day of  
July, 1995.



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