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Mercer v. Raine, 443 So. 2d 944 (Fla. 1983)

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Civil Procedure—DISCOVERY SANCTIONS—TRIAL COURT'S IMPOSITION OF DEFAULT JUDGMENT FOR WILLFUL NONCOMPLIANCE WITH DISCOVERY ORDER WILL BE AFFIRMED DESPITE SUBSEQUENT OFFER OF COMPLIANCE. APPLICABLE STANDARD OF APPELLATE REVIEW IS "CLEAR" ABUSE OF DISCRETION—*Mercer v. Raine*, 443 So. 2d 944 (Fla. 1983)

The Florida Rules of Civil Procedure are designed "to secure the just, speedy and inexpensive determination of every action."¹ Towards this end, the rules relating to discovery were promulgated in order to end litigation by surprise and to assist all parties in trial preparation.² While most attorneys comply with the discovery rules, there is occasional abuse. Perhaps the most frequent forms of abuse are delaying tactics: failure to answer interrogatories, refusal to respond to requests to admit, and blatant disregard for court orders. Such abuse not only makes litigation more burdensome and expensive, it also contributes to docket congestion.

To combat discovery abuse, both the federal and Florida rules of civil procedure provide for a wide variety of sanctions which may be used against a party who fails to comply with discovery procedure.³ Until recently, however, attorneys infrequently sought the imposition of the harshest discovery sanctions of dismissal or default, and trial courts were reluctant to impose them. Then, even when a trial judge did sanction a litigant, Florida's appellate courts would often reverse.⁴

Recently, the Florida Supreme Court served notice that a trial court's imposition of sanctions for noncompliance with the discovery rules should be upheld by appellate courts, absent a clear showing of abuse of discretion. In *Mercer v. Raine*⁵ the supreme court affirmed a trial court's decision to enter a default judgment where it found the litigant's failure to comply with discovery to be "willful." The court held that a delinquent party need not be given a subsequent opportunity to comply with discovery nor must a party moving for sanctions make a concrete showing of prejudice occasioned by the noncompliance before a default could be en-

1. FLA. R. CIV. P. 1.010.

2. FLA. R. CIV. P. 1.280-410.

3. FED. R. CIV. P. 37; FLA. R. CIV. P. 1.380.

4. A review of the "Notes of Decisions" for FLA. R. CIV. P. 1.380 in FLA. STAT. ANN. (West Supp. 1983) reveals that trial courts' impositions of default or dismissal as sanctions for discovery violations were reversed as frequently as they were affirmed. This note concentrates on the grounds given for appellate reversal and the legal viability of these grounds following the decision in *Mercer*.

5. 443 So. 2d 944 (Fla. 1983).

tered. Appellate reversal of the trial court could only be based on a finding of clear abuse of discretion.⁶

Mercer provides an opportunity to review the Florida law of discovery sanctions and a chance to remind attorneys that abuse of the discovery process need not be excused by the judiciary. This note will first review the law in Florida before *Mercer*, and will then set forth the procedural history of the case. Finally, it will analyze the reasoning of the Florida Supreme Court in *Mercer* in order to determine the current standards important in the imposition of discovery sanctions.

I. DISCOVERY SANCTIONS IN FLORIDA

Rule 1.380 of the Florida Rules of Civil Procedure, "Failure to Make Discovery, Sanctions," is virtually identical to its federal counterpart, Rule 37.⁷ Though these rules are explicitly written, they are difficult and confusing to read. This short summary is intended to identify the primary abuses which occur in the discovery process and to consider the sanctions available against the abusing party.

The first remedy available in the event of noncompliance with a discovery request is a court order compelling the disobedient party to respond. The trial court has discretion to either grant the motion or to issue such protective order as it deems necessary. If the motion is granted then "the court *shall* require the party . . . whose conduct necessitated the motion" to pay the other party's "reasonable expenses incurred in obtaining the order that may include attorney's fees, unless the court finds that the opposition to the motion was justified or that other circumstances make an award of expenses unjust."⁸

In the event that a party fails to obey a court order compelling discovery, there are a number of sanctions that may be imposed. These sanctions are: taking designated facts to be established, prohibiting the disobedient party from introducing certain matters into evidence, striking the pleadings, dismissing the action, entering a default judgment, and entering an order of contempt of court. The court is also authorized to require the payment of rea-

6. *Id.* at 945-46.

7. Any differences between the two rules reflect a preference for style and language more than any substantive distinction.

8. FLA. R. Civ. P. 1.380(a) (emphasis added).

sonable expenses, including attorney's fees.⁹ The rule provides that all of these sanctions (except for contempt) may be imposed for the *failure* of a party either to attend his own deposition, serve answers or objections to interrogatories, or serve a proper written response to a request for inspection. For these acts an order to compel need not be entered, and a party may be sanctioned even if noncompliance was inadvertent.¹⁰

9. FLA. R. CIV. P. 1.380(b):

Failure to Comply With Order.

(1) If a deponent fails to be sworn or to answer a question after being directed to do so by the court, the failure may be considered a contempt of the court.

(2) If a party or an officer, director, or managing agent of a party or a person designated under Rule 1.310(b)(6) or 1.320(a) to testify on behalf of a party fails to obey an order to provide or permit discovery including an order made under subdivision (a) of this rule or Rule 1.360, the court in which the action is pending may make any of the following orders:

(A) An order that the matters regarding which the questions were asked or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(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;

(D) Instead of any of the foregoing orders or in addition to them, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) When a party has failed to comply with an order under Rule 1.360(a) requiring him to produce another for examination, the orders listed in paragraphs (A), (B) and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce the person for examination.

(F) Instead of any of the foregoing orders or in addition to them, the court shall require the party failing to obey the order to pay the reasonable expenses caused by the failure that may include attorney's fees, unless the court finds that the failure was justified or that other circumstances make an award of expenses unjust.

10. FLA. R. CIV. P. 1.380(d):

Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection.

If a party or an officer, director, or managing agent of a party or a person designated under Rule 1.310(b)(6) or 1.320(a) to testify on behalf 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 submitted under Rule 1.340 after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 1.350 after proper service of the request. 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. Instead of any order or in addition to it, the court shall require the party

II. GROUNDS FOR REVERSAL

All of the sanctions available under Rule 1.380 are discretionary with the trial judge, but the limits to this discretion are in dispute. Appellate courts in Florida have frequently reversed a trial court's entry of dismissal or default, limiting the effectiveness of these sanctions. These courts have cited five primary grounds for their reversals.

By far the most frequent ground for reversal is the appellate court's determination that the sanctioned party's noncompliance did not constitute "willful disregard" of judicial authority. The rationale for such a requirement was summed up by the Fourth District Court of Appeal in *Herold v. Computer Components International, Inc.*,¹¹ where the court said:

The sanctions provided under this rule, particularly the striking of pleadings and dismissal of a cause should be imposed only in the exceptional case. . . . There have been indications that the exceptional case is where the recalcitrant party has acted in wilful disregard of or with gross indifference to an order of the court requiring discovery with such deliberate callousness or negligence as to occasion an inability to comply with the court's order.¹²

Absent an explicit finding by a trial judge that noncompliance with a discovery order was willful, an appellate court will almost certainly reverse the entry of default or dismissal.¹³ There have been cases, however, where an appellate court simply disagreed with a trial court's finding of willfulness.¹⁴

failing to act to pay the reasonable expenses caused by the failure that may include attorney's fees, unless the court finds that the failure was justified or that other circumstances make an award of expenses unjust. The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 1.280(c).

11. 252 So. 2d 576 (Fla. 4th DCA 1971).

12. *Id.* at 579. The court here was reviewing federal cases interpreting FED. R. CIV. P. 37, the counterpart to FLA. R. CIV. P. 1.380. The court adopted the federal analysis.

13. See *Santuoso v. McGrath & Assocs., Inc.*, 385 So. 2d 112 (Fla. 3d DCA 1980); *Reliance Builders, Inc. v. City of Coral Springs*, 373 So. 2d 410, 411 (Fla. 4th DCA 1979); *Ramos v. Sanchez*, 375 So. 2d 51, 52 (Fla. 2d DCA 1979); *Turner v. Anderson*, 376 So. 2d 899, 901 (Fla. 2d DCA 1979); *Owens-Illinois, Inc. v. Lewis*, 260 So. 2d 221, 226 (Fla. 1st DCA 1972). Federal appellate courts will also reverse a district court's imposition of dismissal or default as a sanction if there is no explicit finding of willfulness. See, e.g., *Dorsey v. Academy Moving & Storage, Inc.*, 423 F.2d 858, 860 (5th Cir. 1970).

14. E.g., *Beaver Crane Serv., Inc. v. National Sur. Corp.*, 373 So. 2d 88, 89 (Fla. 3d DCA 1979); *Trustee of Chase Manhattan Mortgage & Realty Trust v. Sailboat Apt. Corp.*, 323 So.

A second ground for reversing a trial court's imposition of sanctions was that the moving party had demonstrated no prejudice resulting from noncompliance. Without such a showing, the general rule was that a sanction of dismissal or default was too harsh and therefore an abuse of discretion.¹⁵ The Florida courts which reversed sanctions, in part because the moving party had shown no prejudice, were probably following the lead of some federal courts. In *Rogers v. Chicago Park District*,¹⁶ a federal district court discussed the rationale for such a requirement:

The proper sanction under Rule 37(b) for a party's failure to obey a court order regarding discovery should be no more severe than is necessary to prevent prejudice to the other party. . . . Thus, the extent to which one party's failure to produce documents impairs the other party's ability to prosecute or defend should be the focus of any attempt to frame sanctions under this rule.¹⁷

Third, Florida appellate courts have reversed trial judges who did not provide a subsequent opportunity for the delinquent party to comply with discovery before imposing sanctions. Although Rule 1.380 authorizes dismissal of an action for a party's first-time noncompliance with discovery, three of Florida's district courts of appeal have held that such dismissal would constitute abuse of discretion in these cases.¹⁸ The leading Florida case on this point is *Hurley v. Werly*,¹⁹ where the Second District Court discussed the underlying purpose of Rule 1.380:

It is not penal. It is not punitive. It is not aimed at punishment 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

2d 654, 657 (Fla. 3d DCA 1976).

15. This factor played a role in the following appellate decisions which reversed trial courts' impositions of sanctions: *Beaver Crane Serv.*, 373 So. 2d at 89; *W.G.C., Inc. v. Man Co.*, 360 So. 2d 1152, 1153 (Fla. 3d DCA 1978); *Travelers Ins. Co. v. Rodriguez*, 357 So. 2d 464, 465 (Fla. 2d DCA 1978).

16. 89 F.R.D. 716, 718-19 (N.D. Ill. 1981).

17. *Id.* at 718 (citations omitted). Other federal courts have also declared that the moving party must show prejudice before harsh discovery sanctions may be imposed. *See, e.g., Fox v. Studebaker-Worthington, Inc.*, 516 F.2d 989, 996 (8th Cir. 1975); *General Atomic Co. v. Exxon Nuclear Co.*, 90 F.R.D. 290 (S.D. Cal. 1981).

18. *See Goldstein v. Goldstein*, 284 So. 2d 225, 227 (Fla. 3d DCA 1973); *Hurley v. Werly*, 203 So. 2d 530, 537 (Fla. 2d DCA 1967); *Hyman v. Schwartz*, 177 So. 2d 750, 752 (Fla. 3d DCA 1965); *State Rd. Dept. v. Hufford*, 161 So. 2d 35, 40 (Fla. 1st DCA 1964).

19. 203 So. 2d 530 (Fla. 2d DCA 1967).

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.²⁰

Fourth, several appellate courts have held that a trial court may not enter a dismissal or default without first entering an order to compel, despite the provisions of the rule that indicate otherwise.²¹ The belief seems to be that a party should first seek a motion to compel discovery before seeking sanctions.²² In one case, a party was not allowed to introduce evidence as a sanction for failure to answer interrogatories, although no motion to compel had been filed or entered.²³ In a special concurring opinion, one judge stressed that "the bar needs to be put on notice that this court intends to comply with the Rules of Civil Procedure as they are written, which intention constitutes a departure to some extent from tradition."²⁴

One important consideration for appellate courts when the sanction of dismissal or default is involved is whether due process or access to the courts has been denied to the disobedient party. After all, it is a fundamental proposition that "there is a strong public policy favoring a trial on the merits and against depriving a party of his day in court."²⁵ This is particularly true in Florida in light of article I, section 21 of the Florida Constitution, which reads: "The courts shall be open to every person for redress of any injury." Furthermore, as the United States Supreme Court pointed out in the leading case on discovery sanctions, the provisions of the sanctions rule must be read in light of due process requirements.²⁶ The Court made clear in the same case, however, that willful abuse

20. *Id.* at 537.

21. See *Reliance Builders*, 373 So. 2d at 411; *Hyman*, 177 So. 2d at 752; *Remington Constr. Co. v. Hamilton Elec., Inc.*, 181 So. 2d 183, 184 (Fla. 3d DCA 1965); *Hufford*, 161 So. 2d at 40.

22. For instance, in *Hyman* the court said, "It is our view that . . . the defendant herein should have been given a fixed time in which to more fully reply to the interrogatories in question and that upon failure to do so the court could then properly strike the pleadings." 177 So. 2d at 752.

23. *Fearns v. Fearns*, 336 So. 2d 1263 (Fla. 4th DCA 1976).

24. *Id.* (Downey, J., concurring).

25. *Fox v. Studebaker-Worthington, Inc.*, 516 F.2d 989, 996 (8th Cir. 1975). For Florida cases expressing the same proposition, see *W.G.C., Inc. v. Man Co.*, 360 So. 2d 1152, 1153 (Fla. 3d DCA 1978); *Clark v. Suncoast Peach Corp.*, 263 So. 2d. 247, 248 (Fla. 2d DCA 1972).

26. *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 209 (1958).

of the discovery process justified dismissal or default, and such sanction would not offend due process.²⁷

Fifth, trial courts in Florida have also been reversed because appellate courts believed that the sanctions had been imposed for the wrong reason, holding that the severity of the sanctions must be commensurate with the violation.²⁸ Sanctions which punish the "litigant rather than the attorney" should not be imposed if non-compliance was the result of counsel's mistake. A less severe sanction is more appropriate in such cases.²⁹ If noncompliance with a discovery request is the result of the litigant's conduct, however, then the harshest sanction may be imposed.³⁰

While appellate courts in Florida frequently seem to delight in reversing the judgment of the trial court, the Florida Supreme Court has not shared this enthusiasm. That court has repeatedly held, in no uncertain terms, that the discretionary acts of the trial court should not be reversed on appeal absent a finding of abuse of discretion—meaning misinterpretation of the facts and applicable law by the trial judge.³¹ It was this standard of review in the context of discovery sanctions which was emphatically affirmed by the court in *Mercer v. Raine*.

III. THE PROCEDURAL HISTORY OF *Mercer v. Raine*

On September 14, 1979 the plaintiff, Raine, served the defendant, Mercer, with the complaint along with the first request to produce. The complaint alleged breach of contract, promissory estoppel and fraud stemming from the proposed sale of the Galt

27. *Id.* at 210. The case, however, is most often cited for the following proposition: "[W]e think that Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner." *Id.* at 212.

28. *E.g.*, *Hart v. Weaver*, 364 So. 2d 524, 525 (Fla. 2d DCA 1978).

29. *Goldman v. Tabor*, 239 So. 2d 529 (Fla. 2d DCA 1970). *See also* *Beasley v. Girten*, 61 So. 2d 179 (Fla. 1952); *Flanzbaum v. Stans Lounge*, 377 So. 2d 750, 751 (Fla. 4th DCA 1979) ("[A]ny failure to comply was due more to the withdrawal of counsel and appellants' subsequent difficulties in securing representation than to appellants' deliberate refusal to comply.").

30. Such was the case in *Mercer*, as shall be seen in the procedural history, *see infra* notes 32-40 and accompanying text.

31. *See, e.g.*, *Baptist Memorial Hosp., Inc. v. Bell*, 384 So. 2d 145, 146 (Fla. 1980) (power to grant or deny a new trial is discretionary with trial judge); *Canakaris v. Canakaris*, 382 So. 2d 1197, 1202 (Fla. 1980) (trial judge is vested with great discretion to do equity between the parties in a divorce action); *Farish v. Lum's Inc.*, 267 So. 2d 325, 328 (Fla. 1972) (trial court held material facts admitted because of failure to comply with FLA. R. Civ. P. 1.370 regarding form of responses and granted summary judgment).

Ocean Mile Hotel on Miami Beach. Raine sent the first set of interrogatories ten days later. Mercer responded by filing a motion to dismiss, along with a motion for extension of time to produce and to respond to requests for admissions. He objected to the interrogatories on the theory that he should not be forced to respond until after a hearing on the motion to dismiss.³²

The trial court heard oral arguments on the motion to dismiss on November 6. On November 27 the court entered an order denying Mercer's motion to dismiss and directing compliance with all discovery within twenty days. On December 6 Mercer filed his answer, as well as his affirmative defenses to the complaint. He did not, however, respond to discovery, so on December 26 Raine filed a motion to strike Mercer's affirmative defenses. Mercer still failed to respond to discovery, and Raine moved the court to enter a default judgment as a sanction.³³ In his motion Raine pointed out that four months had passed since discovery had first been sought. He alleged that he had "been damaged by this delay in the preparation and prosecution of [his] case," which increased his expenses and deprived him of the benefits of his attorney's efforts to discover necessary information.³⁴

On January 11, 1980, Mercer's counsel filed a motion to withdraw from the litigation.³⁵ In this motion the attorney alleged a deliberate disregard of fee arrangements, as well as "[t]hat defendant, by other conduct renders it unreasonably difficult for his counsel to carry out their employment effectively."³⁶ The trial judge consolidated the motion for sanctions with the motion to withdraw and set a hearing.

Mercer neglected to attend this hearing. Asked why Mercer was not present at the hearing, the attorney introduced a copy of the letter he had sent to Mercer informing him that he was withdrawing, advising him of the severe nature of the sanctions sought, and suggesting that Mercer immediately obtain other counsel to represent him.³⁷ Counsel was also asked the reasons for his with-

32. *Mercer v. Raine*, 443 So. 2d 944, 945 (Fla. 1983).

33. *Id.*

34. Plaintiff's Motion for Sanctions Under Rule 1.380 (Jan. 14, 1980), in Appendix to Brief of the Petitioner on the Merits, at 46 [hereinafter cited as Appendix].

35. *Mercer*, 443 So. 2d at 945.

36. Motion to Withdraw as Counsel for Defendant (Jan. 11, 1980), in Appendix, *supra* note 34, at 42. Both nonpayment of fees and conduct by the litigant rendering representation unreasonably difficult are grounds for withdrawal according to FLORIDA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(C)(1)(d) and (F).

37. Transcript of Hearing on Motion for Sanctions and Motion to Withdraw (Feb. 7,

drawal. Apart from the dispute over fees, counsel testified that Mercer had made no effort to contact him about discovery and had failed to keep an appointment set up for that purpose.³⁸ Based on this testimony the court made the following findings of fact:

Defendant . . . has failed to comply with the Order of this Court requiring response to discovery even by the date of this hearing on this motion. This Court, therefore, finds that Defendant was aware of the deadline imposed by the Court's Order of November 27, 1979, but chose to disregard that portion relating to discovery. The Court further finds, after inquiring of Counsel withdrawing herein, that the Defendant, Mercer, was well aware of the hearing on this Motion for Sanctions and the consequences of same . . . and Defendant has failed to appear or be represented at this hearing. It is further noted that Defendant has not only failed to appear but has also failed to communicate with this Court concerning his inability to appear.³⁹

Therefore, the court struck Mercer's answer, entered a default judgment against him on the issue of liability, and ordered him to pay Raine's costs and attorney's fees occasioned by his refusal to comply with the court order.⁴⁰

Following imposition of sanctions, Mercer obtained new counsel and complied with all discovery requests within six days.⁴¹ Mercer also filed a motion for a rehearing to which he attached an affidavit which attempted to explain his noncompliance. The motion for rehearing alleged, "No serious prejudice could have been suffered by the Plaintiffs. The Defendant is still here, the hotel is still here and nothing has happened which would have otherwise prejudiced Plaintiffs' rights."⁴² In the attached affidavit Mercer claimed that he was only in Fort Lauderdale three days a week, spending the remainder of his time in Philadelphia.⁴³ Mercer said he was advised by his former counsel "that there was no cause for alarm,

1980), in Appendix, *supra* note 34, at 71.

38. Transcript of Hearing on Motion for Sanctions and Motion to Withdraw (Feb. 7, 1980), in Appendix, *supra* note 34, at 58-59.

39. Order Granting Sanctions Under Rule 1.380 (Feb. 7, 1980), in Appendix, *supra* note 34, at 75-76.

40. *Mercer*, 443 So. 2d at 945.

41. Defendant's Motion for Rehearing and/or Motion to Set Aside and Vacate the Court's Order of February 7, 1980, With Attached Affidavit (Feb. 13, 1980), in Appendix, *supra* note 34, at 94.

42. *Id.* at 95.

43. Affidavit (Feb. 13, 1980), in Appendix, *supra* note 34, at 97.

that he could not imagine the Court not allowing five to ten or even twenty days for him to obtain new counsel and to provide the information which the Plaintiffs were seeking." Mercer said that he had been unable to obtain an attorney to represent him at the hearing on sanctions and had not believed that it was necessary for him to make an appearance. Mercer concluded by stating: "He at no time willfully failed to comply with orders of this Court compelling discovery or to otherwise obstruct the Plaintiffs in obtaining proper discovery [sic]."⁴⁴

The trial judge denied the motion for rehearing, and it was this order which Mercer appealed to the Fourth District Court. In a surprisingly brief per curiam opinion, the trial court's imposition of sanctions was affirmed:

The decision to impose sanctions for a discovery violation and the severity thereof are matters within the discretion of the trial judge. Absent clear abuse these discretionary acts will not be reversed on appeal. . . . We conclude that appellant has failed to make such a demonstration in this case and the order below is thus affirmed.⁴⁵

A dissent was filed by Judge Hurley who stressed that this was "the first time the defendant was brought before the court for the imposition of sanctions."⁴⁶ Judge Hurley also thought it important that Mercer had been involved in a fee dispute with his counsel and that he had fully complied with discovery six days after the default was entered. Though he agreed with the majority that a trial judge should not be reversed absent a clear showing of abuse of discretion, he believed that the sanctions in this case amounted to "overkill."⁴⁷ Hurley cited the case of *Santuoso v. McGrath & Associates*⁴⁸ as controlling:

The severity of a sanction must be commensurate with the violation, and should be imposed upon a defendant only in extreme situations for flagrant or aggravated cases of disobedience. The visitation of such an ultimate sanction should not be imposed for failure to timely comply with a discovery order especially where failure to comply does not operate to prejudice the opposing

44. *Id.*

45. *Mercer v. Raine*, 410 So. 2d 931 (Fla. 4th DCA 1982) (citation omitted).

46. *Id.* at 932 (Hurley, J., dissenting).

47. *Id.*

48. 385 So. 2d 112 (Fla. 3d DCA 1980).

party in any substantial manner.⁴⁹

The Florida Supreme Court granted certiorari in *Mercer* based on this perceived direct conflict.⁵⁰

IV. THE SUPREME COURT'S DECISION IN *Mercer*

Mercer's primary argument was that the trial court had abused its discretion by entering a default "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."⁵¹ *Mercer* also argued that the sanctions in this case violated due process because they were imposed merely to punish and because *Mercer* was unrepresented by counsel at the time the sanctions were entered.⁵²

Instead of addressing these arguments, however, Justice Adkins, writing for a six justice majority, discussed the rationale underlying the grant of discretionary power to the trial judge and the applicable standard of appellate review. According to Adkins, the exercise of discretion by a trial judge "is essential to the just and proper application of procedural rules"⁵³ because "it is impossible to establish rules for every possible sequence of events and types of violations that may ensue in the discovery process."⁵⁴ A trial judge is given this discretionary power because of his "superior vantage point" in that he has a firsthand opportunity to judge the conduct of the litigants before him.⁵⁵

In reviewing the decision of a trial court to impose sanctions, the court held, only clear abuse of discretion will justify reversal by the appellate courts. Abuse of discretion means that the trial court "clearly erred in its interpretation of the facts and the use of its judgment" or in its application of the law. Put another way, the

49. *Mercer*, 410 So. 2d at 932 (Hurley, J., dissenting) (quoting *Santuoso*, 385 So. 2d at 113).

50. It is somewhat difficult to understand why the court decided to exercise discretionary review in this case. After all, the Fourth District Court of Appeal had affirmed the trial court's decision, and at first glance it seems that the supreme court affirmed both decisions that were supposedly in conflict. It is this author's position that jurisdiction was taken so that the court could deliver its views on the scope of discovery sanctions, as they were dissatisfied with the frequent reversals of trial courts as evidenced by decisions like *Santuoso*.

51. *Mercer*, 443 So. 2d at 945.

52. Brief of the Petitioner on the Merits at 26-32.

53. *Mercer*, 443 So. 2d at 945 (quoting *Farish v. Lum's, Inc.*, 267 So. 2d 325, 328 (Fla. 1972)).

54. *Mercer*, 443 So. 2d at 945.

55. *Id.* (quoting *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980)).

test of reasonableness is the standard to be used in determining whether a trial court abused its discretion: "If 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."⁵⁶

The court then discussed the particular standards a trial judge should use in determining whether to impose sanctions. The severe sanctions of dismissal or default, said the court, were justified only by "a deliberate and contumacious disregard of the court's authority"⁵⁷ or by "bad faith, willful disregard or gross indifference to an order of the court, or conduct which evinces deliberate callousness."⁵⁸ Though the trial judge in *Mercer* had not explicitly stated that the noncompliance by Mercer was willful, his finding that the "defendant 'knew what was going on' and had 'total disregard for the consequences' . . . would support an interpretation that his noncompliance was willful."⁵⁹

The supreme court therefore implicitly overruled the appellate decisions which had held that the record must be "clear" that noncompliance was willful before a sanction of dismissal or default could be justified. Though the court distinguished *Santuoso* on the ground that the trial court in that case had *not* made an explicit finding of willful noncompliance, it is clear that the decision of the Third District Court of Appeal was disapproved. This conclusion follows from the fact that while the court in *Santuoso* held that the record must be clear that noncompliance was willful and had also stressed that prejudice to the moving party must be shown, the supreme court did not find these factors to be controlling.

Furthermore, the court held that a trial court's failure to grant a subsequent opportunity to comply with discovery is not grounds for appellate reversal, nor should reversal be predicated on the grounds that no concrete showing of prejudice was made by the party moving for sanctions. (The court disagreed with appellant's arguments on these points.)⁶⁰ Mercer's after-the-fact compliance with discovery was irrelevant because he had already had his second chance to comply with the rules. If litigants were always given

56. *Id.*

57. *Mercer*, 443 So. 2d at 946 (citing *Swindle v. Reid*, 242 So. 2d 751 (Fla. 4th DCA 1970)).

58. *Mercer*, 443 So. 2d at 946 (citing *Herold v. Computer Components Int'l, Inc.*, 252 So. 2d 576 (Fla. 4th DCA 1971)).

59. *Mercer*, 443 So. 2d at 946.

60. *Id.* at 945.

"one more chance" to comply, then the sanction of Rule 1.380 would be rendered meaningless.

Every delay in discovery undoubtedly prejudices the other party, but it is the rare case where a litigant could conclusively demonstrate that delay has operated to prejudice him in a meaningful way. Such a case would likely be a declaratory action or a criminal prosecution where delay in the course of the trial would adversely affect the rights of one party while proving advantageous to the other. More frequently, though, in the general civil action, a litigant may wish to delay payment of a judgment in order to control a sum of money for a longer period of time. In *Mercer*, plaintiff's counsel strenuously argued that Mercer was deliberately engaging in delaying tactics in order to achieve this result. The supreme court has implicitly held that a litigant should not be allowed to abuse the judicial process and then escape consequences because the opposing party is unable to make a concrete showing of prejudice.

What emerges from *Mercer* is that the sanctions provided for by Rule 1.380 may be used to punish a litigant who willfully abuses the discovery process. The purpose of such punishment is twofold: first, to maintain the integrity of the courts by providing a trial judge with effective tools to control the progress of litigation, and, second, to deter those who might be tempted to ignore discovery requests and orders. Thus, the old rationale enunciated by *Hurley v. Werly*⁶¹ has been set aside in favor of this new idea. This shift in emphasis, from compliance to punishment and deterrence, has been wrought because of the continuing abuse of the discovery process, the frequent reversals of trial judges by the appellate courts, and the lingering problem of docket congestion.⁶²

In light of this changing rationale it is disappointing that the court did not address the competing policy interests of ensuring that due process is provided and that every case is litigated on the merits. *Mercer* would have been an appropriate case in which to discuss these competing interests, particularly in view of the

61. 203 So. 2d 530 (Fla. 2d DCA 1967). See *supra* notes 18-20 and accompanying text.

62. For a good general overview of the deterrence rationale in federal courts, see Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 HARV. L. REV. 1033 (1978). This note argues that the case of *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976) (per curiam) (a case cited as persuasive by the Florida Supreme Court in *Mercer*), signaled that "general deterrence is a permissible, and perhaps even mandatory, goal under rule 37." Note, *supra*, at 1047.

amount in controversy⁶³ and the fact that Mercer was unrepresented by counsel at the time the sanctions were imposed. Although the discretionary rulings of the trial judge should generally be affirmed, the requirements of due process do impose limitations on that discretion. These limitations are best addressed by the supreme court, which is possessed with a clearer vision of the needs of litigants throughout the state. Likewise, in light of the general reluctance of trial courts to impose the harshest of sanctions, it would have been appropriate for the supreme court to address access to the court concerns and explain the justification for the imposition of discovery sanctions. Instead, these arguments are left to be made by future litigants and resolved by appellate courts.

V. APPELLATE APPLICATION OF *Mercer*

The Fourth District Court of Appeal has commented on the scope of the *Mercer* decision in two recent opinions. In *Florida Physicians Insurance Reciprocal v. Baliton*,⁶⁴ the court affirmed the trial court's finding of bad faith in failing to make discovery on the basis of *Mercer*. The court reversed the trial judge's imposition of a \$150,000 fine as a sanction, however, holding that Rule 1.380 did not authorize fines except when a party is found in contempt of court.⁶⁵ In *Cem-A-Care, Inc. v. Automated Planning Systems, Inc.*,⁶⁶ the defendant obtained a continuance. The trial court found that those actions were a "flagrant, persistent, aggravated and willful attempt to delay and avoid the trial of the case," and struck the defendant's pleadings.⁶⁷ The court of appeal affirmed on the basis of *Mercer*, holding: "When a trial judge expressly finds that a party has willfully and flagrantly abused the system and violated court orders, then the severity of the sanction is within the very broad discretionary area [of the trial court]."⁶⁸ The court gave no citation to the Florida Rules of Civil Procedure, which is just as well since no rule authorizes the striking of *defensive* pleadings as a sanction for noncompliance with a trial court's order not concerned with discovery.

Thus, initially, *Mercer* appears to be receiving an expansive in-

63. The case was characterized as a "multimillion dollar" one by Mercer's attorney, Mr. Finkle. Transcript of Hearing (Feb. 7, 1980), in Appendix, *supra* note 34, at 54.

64. 436 So. 2d 1110 (Fla. 4th DCA 1983).

65. *Id.* at 1112.

66. 442 So. 2d 1048 (Fla. 4th DCA 1983).

67. *Id.* at 1049.

68. *Id.*

terpretation by the Fourth District Court of Appeal, and other appellate courts in Florida should follow. The real impact of *Mercer* is that the discretionary acts of the trial judge, especially with respect to sanctions, are not subject to appellate reversal in most cases.

VI. CONCLUSION

The trial court's authority to impose discovery sanctions has been emphatically affirmed by the supreme court's decision in *Mercer*. The only limitation upon that authority is that the litigant's noncompliance must be found to be willful or flagrant before the ultimate sanctions of dismissal or default can be imposed. The other grounds traditionally relied upon by Florida appellate courts for reversal of trial courts are no longer legally viable. If the recent appellate decisions are any evidence, then the *Mercer* decision will be given an expansive interpretation and a trial court's discretionary rulings will be affirmed. This decision should prompt tardy litigants and attorneys to end abuse of the discovery process once the possible consequences are clearly realized. If so, *Mercer* will rank as an important statement by the Florida Supreme Court which will provide persuasive authority in future years.

ADAM TEBRUGGE

