# SEEKING SANCTIONS UNDER FLORIDA RULE OF CIVIL PROCEDURE 1.380: A MORE ARDUOUS ENDEAVOR THAN PORTENDED BY A READING OF THE RULE

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## *I. INTRODUCTION*

"[A]ll actions of a civil nature"[1] litigated in Florida state courts are conducted under the purview of the Florida Rules of Civil Procedure[2] unless otherwise directed by statute.[3] Litigation is initiated by a pleading: a short and plain statement of the ultimate facts.[4] Often, a plaintiff or defendant in such civil

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

2. "Civil procedure" can be defined as:

> [T]he body of law that sets out the rules and standards that courts follow when adjudicating civil lawsuits. The Florida Rules of Civil Procedure govern, in the Florida Court system, how a lawsuit or case may be commenced, what kind of service of process (if any) is required, the types of pleadings or statements of case, motions or applications, and orders allowed in civil cases, the timing and manner of depositions and discovery or disclosure, the conduct of trials, the process for judgment, various available remedies, and how the courts and clerks must function.

Brian Willis, *Florida Rules of Civil Procedure 1.510 Summary Judgment*, MEDIUM, https://medium.com/@JennCo/florida-rules-of-civil-procedure-589546b62717 (last visited Aug. 27, 2022); *see also* FLA. R. CIV. P. 1.010.

3. *See* FLA. R. CIV. P. 1.010 (explaining the rule does not apply to courts with distinct procedures in Florida to include "the Florida Probate Rules, the Florida Family Law Rules of Procedure, or the Small Claims Rules").

4. FLA. R. CIV. P. 1.110. ("A pleading which sets forth a claim for relief, . . . must state a cause of action and shall contain (1) a short and plain statement of . . . jurisdiction . . . (2)

lawsuits does not have access to all the information and documentation that would provide for an orderly and logical demonstration for relief or defense against the allegations.[5] When information and documentation are controlled by an adversary, a party litigant may obtain such responses to inquiries and documents through the process of discovery.[6] Discovery is the "[c]ompulsory disclosure, at a party's request, of information that relates to the litigation."[7] Often, the litigation opponent is resistant to providing their litigation adversary with information and documents, and their initial reply is insufficient, non-responsive, overly delayed, or non-existent.[8] When such is the state of affairs, the aggrieved litigant may ask the court to apply its authority to coerce improved responses.[9] Such a request is governed by Florida Rule of Civil Procedure 1.380 ("the Rule"). The Rule describes the proper jurisdiction for where to seek coercive enforcement, the procedure to follow in obtaining court support, and what sanctions may be applied by the trial court for continued recalcitrance to a trial court discovery order.[10]

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a short and plain statement of the ultimate facts showing that the pleader is entitled to relief, and (3) a demand for . . . the relief to which the pleader deems himself or herself entitled.").

5. William Hopwood, Carl Pacini & George Young, *Fighting Discovery Abuse in Litigation*, 6 J. FORENSIC & INVESTIGATIVE ACCT. 52, 53 (2014).

6. *See* FLA. R. CIV. P. 1.280.

7. *Discovery*, BLACK'S LAW DICTIONARY (11th ed. 2019).

8. Hopwood et al., *supra* note 5, at 53.

9. *See* FLA. R. CIV. P. 1.380 (The actual term "coerce" is used in few of the cases to be cited in this Article. The concept of "coercive" relief in the circumstance of a discovery order by a court is a nomenclature of this Article, meaning a remedial sanction that if not purged by the recalcitrant litigant can result in the trial court entering findings that in themselves may be litigation effecting or ending."); *see also Coercive Relief*, BLACK'S LAW DICTIONARY (11th ed. 2019) (discussing 'coercive relief' under the comparable term, "[j]udicial relief, either legal or equitable, in the form of a personal command to the defendant that is enforceable by physical restraint."); Channel Components, Inc. v. Am. II Elecs., Inc., 915 So. 2d 1278 (Fla. 2d Dist. Ct. App. 2005) (addressing the coercive nature of civil contempt).

10. Florida Rule of Civil Procedure 1.380 addresses the following matters: Part (a) concerns the making of a motion to redress a discovery wrong. Part (a)(1) instructs on jurisdiction. Part (a)(2) lists the wrongs that may be addressed, and what actions a trial court may issue to coerce compliance. Part (a)(2) also requires a proponent seeking a discovery order provide a certification that the movant attempted to resolve the matter. Part (a)(2) instructs on how to manage a recalcitrant deponent. Part (a)(3) lays out how an evasive or incomplete answer is a failure to answer. Part (a)(4) directs how costs are awarded.

Whereas Part (a) concerns failure to comply with a party's discovery request, Part (b) deals with failure to comply with a trial court discovery order. Part (b)(1) makes

The Rule, however, does not indicate what a trial court will seek to determine before issuing a coercive discovery order or enforcement of an earlier issued order.[11] This Article identifies what trial courts should consider and traces the history of caselaw engendering the willfulness criteria in seeking sanctions against discovery recalcitrance including the complexity, if not distortion, it has caused to the state trial court litigation process. This Article aims to guide how to manage one's affairs when seeking sanctions against a party litigant being recalcitrant to proper discovery practices.[12]

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disobedience of a court order contempt. Failure to obey the trial court under either Parts (a) or (b) will enable the trial court to issue delineated sanctions.

Part (c) deals with failure to admit the genuineness of any document or the truth of any matter as requested. Part (d) attends to the failure of a party to attend their deposition, serve answers to interrogatories, or respond to request for inspection. Finally, Part (e) forgives the loss of electronic records if the loss was because of routine, good faith operation of an electronic information system. The Rule itself, as written, will be further discussed. *See* discussion *infra* pt. II.

11. *See generally* FLA. R. CIV. P. 1.380 (failing to enumerate the need to demonstrate a "willful disdain for the court or its process" by the Rule's verbiage before a case-effecting sanction can be put forth against a discovery-resistant party litigant and Florida case law being ubiquitous in the requirement of *willful* recalcitrance before sanctioning); Mercer v. Raine, 443 So. 2d 944, 946 (Fla. 1983) (announcing for the first time the willful required standard as "[n]or is this a case where the record was devoid of any evidence reflecting willful disregard of an order of court, . . ."); *see* discussion *infra* pt. IV.C.1.

12. On November 15, 2021, the Workgroup on Improved Resolution of Civil Cases issued its "Final Report" to the Florida Supreme Court. Florida's Judicial Management Council, Workgroup on Improved Resolution of Civil Cases (Nov. 15, 2021), https://www.flcourts.org /content/download/824687/file/final-report-of-the-workgroup-on-improved-resolution-of-civil-cases.pdf. (last visited Aug. 27, 2022) [hereinafter JMC, Workgroup, Imp. Reso. Civ. Cases]. The report provided its research, findings, and recommendations, assembling suggested changes to the administration of civil cases to provide more efficient case management in the trial courts. The Final Report, *inter alia*, proposes new and supplemental *case management* sanctions by way of proposed rule 1.275 in addition to retaining, but amending, the *discovery* sanctions rule, Florida Rule of Civil Procedure 1.380. *Id.* at 14. The Report denotes proposed 1.275, which will become the sanctioning rule for all case management, but ostensibly by its terms will not require a finding of willfulness. *Id.* In the meantime, Florida Rule of Civil Procedure 1.380 will continue to be the Rules' primary "discovery" sanctioning tool and will also continue to require the willfulness criteria explained in this Article.

Further, the proposed rule and other amendments provide more penalties where necessary to better advance case management. It also acknowledges that the proposed rule, 1.275, engenders continued consideration of the Kozel factors. *See* discussion *infra* pt. IV.C.4; *see generally* FLA. R. CIV. P. 1.380.

The proposed Fla. R. Civ. P. 1.380, recognizes, as does this Article, that discovery enforcement is usually a two-part effort. Discovery Rule enforcement requires first obtaining a court order to provide discovery and then sanctions for failure to provide discovery in accordance with a previously secured court order. The proposed rule makes case-ending sanctions to a recalcitrant discovery litigant more propositional (whatever that may mean) than exists in the present law presented in this Article. The proposed rule(s)

Florida discovery enforcement requires true resolve and steadfastness by the litigant seeking to enforce discovery against a recalcitrant opposing party or their counsel.[13] A long line of caselaw from the Florida Supreme Court and the District Courts of Appeal requires the proponent seeking discovery enforcement to provide the trial court insight into the recalcitrance by the uncooperative discovery party litigant. That showing must demonstrate to the trial court that the recalcitrant discovery deponent,[14] by not adequately responding to a discovery request, is showing disrespect for the court or its process. A mere failure to produce relevant discovery is not sufficient ground upon which to sanction a discovery breakdown.[15] Knowing in advance the true burden and the nature of the duty put upon the enforcing litigant may help in achieving the required burdens of proof, and attaining needed enforcement actions from cautious trial courts.

Although the law is clear from reading the cases, there are two reasons this Article is important as a tool for litigation counsel. First, there are many cases to review from the Florida Supreme Court and each of the District Courts of Appeal. In this Article alone, we review over one hundred such cases. That can be an insurmountable number of cases to review for litigation counsel. This Article does that for the researching counsel and focuses on the cases that should be carefully reviewed. The second purpose of this Article is to bundle those cases into related groups, arranged by court systems, and provide uniform standards for presenting a motion to compel discovery or seek sanctions in any Florida court.

The Article first reviews the Rule's concept of an enforceable discovery violation without consideration of caselaw paying special attention to discovery under the Florida Revised Limited Liability

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would also support automatic disclosure of basic relevant information, and more civility in case conduct by attorneys and clients. JMC, Workgroup, Imp. Reso. Civ. Cases, *supra* note 12 at 100–03.

13. *See* Kozel v. Ostendorf, 629 So. 2d 817, 818 (Fla. 1993). (The initial Florida Supreme Court cases on this subject do not denote a distinction between recalcitrance of a party versus that of their counsel. Such a distinction will become a relevant factor in later cases.).

14. *See generally* FLA. R. CIV. P. 1.380. *Deponent*, THE FREE DICTIONARY BY FARLEX, https://www.thefreedictionary.com/deponent (last visited Aug. 27, 2022) (The term "deponent" will be used in this Article to mean "a person who gives evidence."); *Deponent*, BLACK'S LAW DICTIONARY (11th ed. 2019) (As opposed to its traditional meaning, "1. Someone who testifies by deposition. 2. A witness who gives written testimony for later use in court . . . .").

15. *See Mercer*, 443 So. 2d at 946 (Keep in mind the proposed to-be-revamped Fla. R. Civ. P. 1.380 and pending Fla. R. Civ. P. 1.275 may make case-ending sanctions on a recalcitrant discovery litigant more propositional than exists in the present law.).

Company Act ("FRLLCA") because discovery under FRLLCA is a bit inconsistent when examined against Florida Rule of Civil Procedure 1.380.[16] The LLC enactment contemplates allowing a three-year lookback under its permitted discovery rule, while the civil procedural rules have no such limit on the timeline for lookbacks.[17] The Article then reviews the Rule's concept of an enforceable discovery violation, considering caselaw, first in the Florida Supreme Court, then the Supreme Court of the United States on litigation-effecting or case-ending discovery orders. Next, the Article samples the Eleventh Circuit Court of Appeal's decisions. Those federal rulings are subject to limited review only to alert the reader that the federal process is distinct from the process laid out by the Florida system. Then each related District Courts of Appeal case is presented, reviewed, and analyzed.

## *II. ENFORCING A DISCOVERY VIOLATION BY A RECALCITRANT LITIGANT (WITHOUT CONSIDERATION OF CASELAW)*

Under Florida Rule of Civil Procedure 1.380(a)(1), the first step in responding to a recalcitrant discovery litigant is to determine the correct court to present with the motion.[18] When the recalcitrant is a litigant, the motion "may be made to the court in which the action is pending or . . . for an order to a deponent who is not a party shall be made to the circuit court where the [discovery] is being taken."[19] Part (a)(2) of the Rule is the pivot point for addressing all recalcitrant discoveries.[20] When a person subject to litigation discovery resists without first getting a protective order, "the discovering party may move for an order

16. *See generally* Louis T.M. Conti & Gregory M. Marks, *Florida's New Revised LLC Act, Part I*, FLA. B.J., Sept./Oct. 2013, at 52 (identifying changes made by the act to include management structure, voting rights, fiduciary duties, conflicts of interest, recordkeeping and inspection rights, transfer and charging orders, member dissociation, dissolution and winding up, reinstatement after dissolution, and actions by members, foreign LLCs, mergers, conversions, domestications, interest exchanges, and appraisal rights).

17. FLA. STAT. § 605.0410 (2022) (Records to be kept; rights of member, manager, and person dissociated to information). The statute sets out what records are to be kept at the principal office including information on members, the operating agreement if any, like documents, tax documentation, financial statements, and value of contributions. *Id.* It also lays out what rights each member-managed, or manager-managed, LLC participant has to access company records. *Id.*

18. *See generally* FLA. R. CIV. P. 1.380(a)(1).

19. *Id.*

20. FLA. R. CIV. P. 1.380(a)(2).

compelling an answer, or a designation or an order compelling inspection, or an order compelling an examination in accordance with the request."[21] Part (b), addressing the failure to comply with orders issued under Part (a), provides the steps a court may take in enforcing its previously issued discovery orders.[22] The enforcement process is found in Florida Rule of Civil Procedure 1.380(b)(2).[23] Under the Rule, a litigant denied their rightful access to court-ordered discovery after notice to all parties can get designated sanctions to cure the discovery disobedience.[24] The referenced sanctions are found in Florida Rule of Civil Procedure 1.380(b)(2)(A) through (b)(2)(D):

> (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 that party from introducing designated matters in evidence.
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> (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.
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> (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 an examination made pursuant to rule 1.360(a)(1)(B) or subdivision (a)(2) of this rule.[25]

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21. *Id.* An actual review of the Rule itself is recommended as the Rule provides a distinction between each form of discovery. The words supporting enforcement of a deposition are used in the above text as exemplary.

22. FLA. R. CIV. P. 1.380(b).

23. FLA. R. CIV. P. 1.380(b)(2).

24. FLA. R. CIV. P. 1.380(a)(3) (speaking directly to evasive responses by stating "[f]or purposes of this subdivision an evasive or incomplete answer shall be treated as a failure to answer").

25. FLA. R. CIV. P. 1.360 (Examination of Persons when the condition that is the subject of the requested examination is in controversy in the suit. "An examination under this rule is authorized only when the party submitting the request has good cause for the examination."); *see generally* FLA. R. CIV. P. 1.380(b)(2)(D); FLA. STAT. § 38.23 (2022) (The

On the issue of contempt, there is both criminal and civil contempt.[26] "Civil contempt fines are levied to coerce the violator into complying with the terms of the injunction."[27]

Therefore, when an aggrieved movant in discovery contests an adversary's lack of evidence, failure to deliver evidence, or imperfect evidence, they need to ask an opponent to respond properly. If that request does not resolve the matter, they can move the proper court to provide an order requiring the discovery. If the matter still is not resolved, they can ask the trial court for sanctions such as (a) designating facts as established, (b) prohibiting proof on issues before the court, or (c) striking the pleadings or dismissing an action.[28] Sanctions only come into effect if a recalcitrant discovery opponent does not comply with the trial court's order.[29] Additionally, the trial court may hold the offending discovery litigant in contempt.[30]

## *III. WEIGHING FLORIDA STATUTE SECTION 605.0411 AGAINST FLORIDA RULE CIVIL PROCEDURE 1.380*

When seeking enforcement in an FRLLCA litigation under Court-Ordered Inspection Florida Statute Section 605.0411 ("§ 605.0411"), one should be aware there is a jump between those statutory powers, provided in § 605.0411 and the powers for enforcement of discovery under Florida Rule of Civil Procedure 1.380.[31] First, the enforcement authority under the court-ordered inspection terms of § 605.0411 does not specifically refer to the

word "contempt" in Fla. R. Civ. P. 1.380(b)(2)(D), is defined in Fla. Stat. § 38.23 as, "[a] refusal to obey any legal order, mandate, or decree, made or given by any judge relative to any of the business of the court, after due notice thereof, is a contempt, punishable accordingly."); FLA. STAT. § 38.22 (2022) (The actual power to punish for contempt is found in Fla. Stat. § 38.22, and states, "[e]very court may punish contempts against it whether such contempts be direct, indirect, or constructive, and in any such proceeding the court shall proceed to hear and determine all questions of law and fact.").

26. *Contempt of Court*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/contempt_of_court (last visited Aug. 27, 2022).

27. *See* Politz v. Booth, 910 So. 2d 397, 398 (Fla. 4th Dist. Ct. App. 2005) (citing Gregory v. Rice, 727 So. 2d 251, 254 (Fla. 1999)). *Politz* furthered its description of civil contempt, when it requoted, "[t]o be a valid civil contempt fine, the order imposing the fine must include a purge provision." *Id.* (citing Parisi v. Broward County, 769 So. 2d 359, 366 (Fla. 2000)). The holding as quoted does not seem to be universally held by the statements in other cases, but as a concept it makes litigation sense.

28. *See generally* FLA. R. CIV. P. 1.380.

29. *Id.*

30. *Id.*

31. *See generally* FLA. STAT. § 605.0411 (2022); FLA. R. CIV. P. 1.380.

court-ordered inspection terms in Florida Rule of Civil Procedure 1.380 as the "how-to" for resolving less than adequate responses to court-ordered access to LLC books and records.[32] The relevant part of § 605.0411 of the FRLLCA statute reads:

> [T]he circuit court in the county where the limited liability company's principal office is or was last located, as shown by the records of the department or, if there is no principal office in this state, where its registered office is or was last located, may summarily order inspection and copying of the records demanded, at the limited liability company's expense, upon application of the member, manager, or other person.[33]

Other than issuing its order and providing for costs, the statute does not provide instruction on how to force compliance if necessary.[34] Stated otherwise, the FRLLCA statute for enforcement of a non-producing deponent does not say what punishing acts the court can employ to enforce the order requiring access to the LLC books and records.[35] Can the trial court designate facts to be taken as established, stay further proceedings until the order is obeyed, dismiss the action or proceeding or any part of it, or render a judgment by default against the disobedient party? The answer likely is yes, because the proceeding authorized by § 605.0411 is a civil proceeding, and all civil proceedings must be undertaken according to the Florida Rules of Civil Procedure.[36]

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32. *See* FLA. STAT. § 605.0411; *see generally* FLA. R. CIV. P. 1.380.
33. FLA. STAT. § 605.0411.
34. *See id.*
35. *See generally id.*
36. *See* FLA. R. CIV. P. 1.010:

> These rules apply to all actions of a civil nature and all special statutory proceedings in the circuit courts and county courts except those to which the Florida Probate Rules, the Florida Family Law Rules of Procedure, or the Small Claims Rules apply. The form, content, procedure, and time for pleading in all special statutory proceedings shall be as prescribed by the statutes governing the proceeding unless these rules specifically provide to the contrary. These rules shall be construed to secure the just, speedy, and inexpensive determination of every action. These rules shall be known as the Florida Rules of Civil Procedure and abbreviated as [FLA. R. CIV. P.].

Florida Rule of Civil Procedure 1.380, though, is not concomitant with all litigations as claimed in Florida Rule of Civil Procedure 1.010. states that the procedural rules are available for all civil proceedings, not specifically excluded, such as probate. But Rule 1.380 is limited to failures to respond to discovery pursuant to specific sections of the Florida Rule of Civil Procedure discovery rules. The Rule literally says it applies to discovery authorized

## *IV. ENFORCING A DISCOVERY VIOLATION BY RECALCITRANT LITIGANT (WITH CONSIDERATION OF CASELAW)*

### A. A Preliminary Caution

The cases reviewed developed a disparate set of elements for a trial court to consider whether coercion to produce, or a sanction for not producing, is required. As noted above, to obtain support against a recalcitrant deponent, the advocate of a coercive order to persuade discovery or a sanction for not obeying a trial court discovery order is to provide the trial court insight into the recalcitrance by the uncooperative discovery party litigant.[37] Florida's problem is that *each* of the more than one hundred cases we will review uses unique terminology to lay out a standard for discovery enforcement analysis. The first contemporary Florida Supreme Court case, *Mercer v. Raine*, used a plethora of terminology to delineate what acts would authorize a trial court to issue sanctions.[38] *Mercer*, its predecessor cases, and its progeny did not set a uniform set of words such as "willful disregard" or "bad faith" to be regularly employed to determine whether a trial court should apply coercion to produce, or a penalty for not producing.[39] *Mercer* used the words "willful" singularly, then "willful disregard," "bad faith" and "[a] deliberate and contumacious disregard of the court's authority will justify the application of this severest of sanctions," or "gross indifference to an order of the court, or conduct which evinces deliberate callousness"

by other sections of the Rules not to ad hoc sections of the Florida statutes. The Rule does not authorize enforcement of discovery set by the FRLLCA statute.

What does that mean? Could it be there is no method for a wronged LLC member to enforce their rights under § 605.0411? That cannot or at least should not be, which brings us to advocating circular reasoning. As stated, *supra*, "[t]he answer likely is yes because the proceeding that is authorized by § 605.0411 is a civil proceeding and all civil proceedings are to be undertaken according to the Florida Rules of Civil Procedure." That may be so even if the equilibrium between Florida Rule of Civil Procedure 1.380(B)(2) and § 605.0411 does not balance out precisely.

37. FLA. R. CIV. P. 1.380(a).

38. 443 So. 2d 944, 945–47 (Fla. 1983).

39. The District Court of Appeal cases that preceded the *Mercer* Florida Rule of Civil Procedure 1.380 decision used their own verbiage to set the measuring standard for issuing sanctions under the Rule. *See* case briefs *infra* pts. IV.G–K.

interchangeably throughout the opinion. [40] The *Mercer* court's conglomeration of words leaves no doubt about the state of mind of the recalcitrant deponent.[41] But the effect of using sets of words, each having its distinct denotation and connotation, is troublesome because that allows each court to find words to its liking to make conclusions distinct from the original intent of the *Mercer* court. Later cases depending on *Mercer* still use different, and sometimes inconsistent, sets of words to set out the wrongful discovery behavior to be found before a trial court applies sanctions. In this Article, however, the author uses the singular standard, "willful disdain for either the court or its process," when assessing or commenting upon each court's distinct set of measuring words.

### B. A Generalized Statement

The Florida Supreme Court's analysis would eventually be applied by all the trial courts when considering how to respond to a litigant's disappointment in the opposing party's performance of their discovery.[42] Those elements are whether: (1) there was a showing the defendant attempted to comply or explain its failure to comply; (2) the record was not devoid of evidence of willful disregard of the court order; and (3) the sanction will not punish the defendant too severely.[43]

40. *Mercer* attributed "[a] deliberate and contumacious disregard of the court's authority will justify application of this severest of sanctions," to *Swindle*, and "bad faith, willful disregard or gross indifference to an order of the court, or conduct which evinces deliberate callousness," to *Herold*. *Mercer*, 443 So. 2d at 946 (first citing Swindle v. Reid, 242 So. 2d 751 (Fla. 4th Dist. Ct. App. 1970); and the citing Herold v. Comput. Components Int'l, Inc., 252 So. 2d 576 (Fla. 4th Dist. Ct. App. 1971).

41. *Id.*

42. *Id.*

43. *See id.* at 945–47. To be "devoid" is to be, "entirely lacking or free from." *Devoid*, OXFORD DICTIONARY OF ENGLISH, OXFORD UNIVERSITY PRESS, (2020 MSDict Viewer Version). Why the court used the contradictory "not devoid" a grammatically awkward negation of the negative nature of the word devoid, instead of just directly saying there was evidence of willful disregard of the court order is not understood. *Mercer*, 443 So. 2d at 946.

## C. Florida Supreme Court Cases

### *1.* Mercer v. Raine*, 443 So. 2d 944 (Fla. 1983).*[44]

Soon after the litigation began, the *Mercer* plaintiff found themself in a quagmire of discovery requests and motions, juxtaposed against the defense's repeated requests for extension of time and non-production.[45] In addition, the defendant did not pay the plaintiff's court costs previously ordered by the court.[46] Contemporaneously, the defendant's counsel was permitted to withdraw from representation for issues concerning fees and other matters (likely including recalcitrant discovery).[47] As a sanction against the defendant for failure to abide by court orders, the trial court struck the defendant's answer and entered a default judgment against the defendant.[48] On appeal, the recalcitrant discovery defendant claimed sanctioning would amount to an abuse of discretion without providing an opportunity to cure the recalcitrance.[49] The issue was whether the trial court issued a reasonable litigation-effecting or case-ending discovery order or did it abuse its discretion under Florida Rule of Civil Procedure 1.380.[50]

*Mercer* relied upon an earlier criterion from *Canakaris* for determining if the trial court abused its discretion, which read:

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44. In *Mercer*, the Florida Supreme Court resolved a discovery conflict between the Third and Fourth District Courts of Appeal. *Mercer*, 443 So. 2d at 944; *see* Santuoso v. McGrath & Assocs., Inc., 385 So. 2d 112, 114 (Fla. 3d Dist. Ct. App. 1980); Mercer v. Raine, 410 So. 2d 931 (Fla. 4th Dist. Ct. App. 1981). The review right is found at Art. V, § 3(b)(3), Florida Constitution, which reads:

> May review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

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

46. *Id.*

47. *Id.*

48. *Id.*

49. Florida Rule of Civil Procedure 1.380(b)(2) discusses the sanction of striking pleadings "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." FLA R. CIV. P. 1.380(b)(2). In practice, many sanctioning orders are retributive for past failures to act pursuant to proper discovery and do not contain rehabilitative orders such as, "until the order is obeyed." *Id.*

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

> In reviewing a true discretionary act, the appellate court must fully recognize the superior vantage point of the trial judge and should apply the "reasonableness" test to determine whether the trial judge abused his 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. The discretionary ruling of the trial judge should be disturbed only when his decision fails to satisfy this test of reasonableness.[51]

The Florida test for reasonableness of a sanction order is whether reasonable men could differ as to the propriety of the action.[52] If they can, the action is reasonable.[53] This determination of abuse of discretion is an essential component, a must consideration, whenever any discovery sanction is issued by a trial court and contested before an appellate court.[54]

After announcing how the appellate courts are to review a trial court's discovery rulings, the *Mercer* court did its examination of the trial court's findings to determine whether its sanctions were reasonable under the *Canakaris* test.[55] That analysis started with the statement by the Florida Supreme Court, that what is proper for a trial court to do is documented in Florida Rule of Civil Procedure 1.380.[56] It then noted the default sanction and fines imposed here were severe but not inappropriate because they were provided for in the Rule.[57] Then, in breaking down the case facts, the court went first to the fact that the recalcitrant discovery litigant did not demonstrate "either [he] attempted to comply with the discovery order or communicated any explanation or excuse to the court by the time the plaintiffs' motion was heard." [58] The court then made a point of directing the reader's attention to the fact the record indicated there was "willful disregard of an order of court."[59]

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51. *Id.* at 946 (quoting Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980)).
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.* (comparing its consideration to Herold v. Comput. Components Int'l, Inc., 252 So. 2d 576, 581 (Fla. 4th Dist. Ct. App. 1971), briefed at, *infra* pt. IV.J.2)).
59. *Id.* (first citing Crystal Lake Golf Course, Inc. v. Kalin, 252 So. 2d 379 (Fla. 4th Dist. Ct. App. 1971); then citing Travelers Ins. Co. v. Rodriguez, 357 So. 2d 464, 465 (Fla. 2d Dist. Ct. App. 1978); and then citing Swindle v. Reid, 242 So. 2d 751, 753 (Fla. 4th Dist. Ct. App. 1970), briefed at *infra* pt. IV.J.1).

Finally, the punishment was not too severe given the failure on the part of the defendant's counsel, although the court provided no indication the discovery failure had anything to do with the counsel.[60]

In supporting the trial court's sanctions, the Florida Supreme Court stated, "[n]or is this a case where the record was devoid of any evidence reflecting willful disregard of an order of court . . . ."[61] The Florida Supreme Court anchors its *Mercer* decision in the concept of a willful disregard for the authority of the court or its process before applying Florida Rule of Civil Procedure 1.380(b)(2)(A)–(D) sanctions.[62] That criterion, as noted earlier in this Article, willfulness, cannot be found in Florida Rule of Civil Procedure 1.380.[63] The *Mercer* court, nevertheless, and albeit in a sentence structure making its communication difficult to grasp, cannot be read to do anything other than introduce a requirement that to proceed with discovery orders or sanctions the court must find the recalcitrant litigant had a willful disregard for the court or its process.[64]

The *Mercer* court provides a means that when applied will permit trial courts to employ, in a fair and balanced manner, an aid in deciding whether a discovery violation should be sanctioned, and, if so, to no greater extent than necessary to correct the discovery failings by the recalcitrant litigant.[65] Again, the trial court is obligated to exercise its powers subject to three distinct limitations on its judgment.[66] First, the action sanctioning measures cannot be issued against a non-producing discovery litigant if their failure to comply was because they could not comply, or they provide a reasonable explanation for their failure to comply.[67] Second, a determination of the record must demonstrate evidence of willful disdain for the court or its process.[68] The third and final principle is the sanction may not

60. *Id.* The issue of whether the discovery recalcitrance should be attributed to the litigant or their counsel will be discussed further when we review Kozel v. Ostendorf, 629 So. 2d 817 (Fla. 1993).

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

62. *Id.* at 947.

63. FLA. R. CIV. P. 1.380(b).

64. *Mercer*, 443 So. 2d at 946–47.

65. *Id.*

66. *Id.* at 946.

67. *Id.*

68. *Id.*

punish the recalcitrant litigant too severely for an act or failure on the part of their counsel.[69]

### *2.* Wallraff v. T.G.I. Friday's, Inc.*, 490 So. 2d 50 (Fla. 1986).*[70]

In *Wallraff*, the plaintiff failed to appear for a deposition.[71] This was the second filing and rendition of a like complaint concerning the cause of action, and the second occasion, running from the original complaint of the plaintiff failing to show for deposition notwithstanding the issuance of a court order.[72] The second trial court dismissed the complaint with prejudice, pursuant to Florida Rule of Civil Procedure 1.380(d), Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection.[73] The Florida Supreme Court took note the Rule does permit "dismissal with prejudice under appropriate circumstances, and it does not require violation of a direct court order."[74] It nevertheless reinstated the litigation, arguing the second trial court, in its dismissal with prejudice, did not demonstrate there was a "deliberate and contumacious disregard of the court's authority," referencing the quoted language as coming from *Mercer*.[75] *Mercer* did discuss the trial court's findings but provided no precise requirement about what must be in those findings nor how that was to be reported in the record.[76] The *Wallraff* court found any sanction must include a finding of "deliberate and contumacious disregard of the court's authority."[77] Additionally, the court found the second trial court's

69. Neither *Mercer* nor later cases provide specifically which litigant carries the burden of proof for each of the three elements. It may be smart for the litigant proposing the coercive sanctions to provide proof that all three elements are in favor of issuing a proper coercive sanction.

70. In *Wallraff*, the Florida Supreme Court resolved a discovery conflict between the Third and Fourth District Courts of Appeal. Wallraff v. T.G.I. Friday's, Inc., 490 So. 2d 50 (Fla. 1986); *see* Rashard v. Cappiali, 171 So. 2d 581 (Fla. 3d Dist. Ct. App. 1965); Reliance Builders, Inc. v. City of Coral Springs, 373 So. 2d 410 (Fla. 4th Dist. Ct. App. 1979).

71. *Wallraff*, 490 So. 2d at 50.

72. *Id.*

73. *Id.* at 50–51

74. *Id.* at 51.

75. *Id.* (citing Mercer v. Raine, 443 So. 2d 944,946 (Fla. 1983)).

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

77. *Wallraff*, 490 So. 2d at 51.

consideration of the first trial court's activities was improper and it should not have been a factor in issuing a sanction.[78]

The *Mercer* analysis of the right to sanction "willful disobedience of the court" became the *Wallraff* analysis of "deliberate and contumacious disregard of the court's authority."[79] The difference between the two criteria is unknown and, frankly, cannot be known.[80] Neither court discussed that its willful disobedience criterion was a mishmash of words differing from case to case, nor that the willful disobedience concept was above and beyond the language of the enforcement rule, Florida Rule of Civil Procedure 1.380.[81] The Florida Supreme Court, by way of the *Wallraff* appeal, enrooted the *Mercer* to sanction or not to sanction concepts as a requirement of Florida Rule of Civil Procedure 1.380 sanction jurisprudence.[82]

### *3.* Commonwealth Federal Savings & Loan Association v. Tubero*, 569 So. 2d 1271 (Fla. 1990).*

In *Tubero*, the Florida Supreme Court recognized its *Mercer* ruling caused much discussion amongst the lower courts, particularly in the Fourth District Court of Appeal, as to whether a *written* finding of "willful or deliberate refusal" was required to support the issuing of a discovery sanction.[83] The court in *Tubero*, reviewing the Fourth District Court of Appeal cases succeeding

78. *Id.*
79. *Id.*
80. *Id.*; *Mercer*, 443 So. 2d at 946.
81. *Wallraff*, 490 So. 2d. at 51; *Mercer*, 443 So. 2d at 946.
82. *Wallraff*, 490 So. 2d at 51–52.
83. Once again, the Author is using the case language, which in *Tubero* is, "willful or deliberate refusal." *Tubero*, 569 So. 2d at 1272. This inconsistent use of words to show willful disdain for the court or its process will be a consistent issue, i.e., the non-preciseness of the standard throughout all the caselaw we will review in this Article. The *Tubero* Court, though, was dramatically inconsistent in setting out the willful or deliberate standard as its measuring tool because in this single decision the Court used a plethora of verbiage when referring to its therein announced standard measuring criteria. "Willful disregard," "willful or deliberate," "willful," "willful failure," "willful refusal," "willful noncompliance," "willfulness," and "willfulness" or "deliberate disregard," *Id.* at 1272–73. The Supreme Court of Florida wrote a decision using various terminology presuming everyone will get their meaning. One can argue willful disregard and willful failure may be contrasting standards. Disregard may mean to treat with no respect, whereas willful failure can be interpreted to mean not to perform as anticipated. How does one distinguish between the two distinct acts?

In any case, the ensuing decisions discussed in this Article will each use their own willful concept or like language. The author uses his created term, "willful disdain for the court or its process."

*Mercer* (*Wallraff*)[84] brought to light just how a written finding of willful or deliberate refusal was necessary to support a sanction.[85] In confirming the Fourth District Court of Appeal's cases, the Florida Supreme Court stated, having required a finding of willfulness, litigants can be assured that an adverse order on discovery will provide confidence to all that a discovery order was "a conscious determination that the noncompliance was more than mere neglect or inadvertence."[86]

The *Tubero* ruling, however, did not resolve the mix and match combination of words discussed in Part IV.B, and the broad swath of phraseologies being used by the Florida courts to denote the willful disdain for the court or its process.[87] Despite the diversity of the measuring criteria, the *Tubero* court explained, the issue was the "severity" of the sanction in *Mercer* (striking of the pleadings).[88] Such severe punishments require a disdainful act, i.e., some standard of deliberate and contumacious disregard needs to be demonstrated before striking a pleading.[89] From this, one may read that the *Tubero* court sought to deter the deliberate refusal to obey court orders and processes.

### *4.* Kozel v. Ostendorf*, 629 So. 2d 817 (Fla. 1993).*[90]

*Kozel* is a horse of a different color from *Mercer* and *Tubero*. Those cases talked generically of a party's disdain for the court or its process and did not distinguish between the acts of a litigant and those of their counsel.[91] The *Kozel* case developed guidelines for sanctioning a party's *attorney*, distinct from the acts of the

84. The Court itself listed the following cases as included in its review: In re Forfeiture of Twenty Thousand Nine Hundred Dollars ($20,900) U.S. Currency, 539 So. 2d 14 (Fla. 4th Dist. Ct. App. 1989); Bernaad v. Hintz, 530 So. 2d 1055 (Fla. 4th Dist. Ct. App. 1988); Arviv v. Perlow, 528 So. 2d 139 (Fla. 4th Dist. Ct. App. 1988); Donner v. Smith, 517 So. 2d 709 (Fla. 4th Dist. Ct. App. 1987); Championship Wrestling from Fla., Inc. v. DeBlasio, 508 So. 2d 1274 (Fla. 4th Dist. Ct. App.), *review denied*, 518 So. 2d 1274 (Fla. 1987); McNamara v. Bradley Realty, Inc., 504 So. 2d 814 (Fla. 4th Dist. Ct. App. 1987); Stoner v. Verkaden, 493 So. 2d 1126 (Fla. 4th Dist. Ct. App. 1986).

85. *Tubero*, 569 So. 2d at 1272–73.

86. *Id.* at 1273.

87. *Id.* at 1272.

88. *Id.*

89. *Id.*

90. This was a District Court of Appeal conflict matter between Kozel v. Ostendorf, 603 So. 2d 602 (Fla. 2d Dist. Ct. App. 1992), and Clay v. City of Margate, 546 So. 2d 434 (Fla. 4th Dist. Ct. App.), *review denied*, 553 So. 2d 1164 (Fla. 1989).

91. Kozel, 603 So. 2d 602; Mercer v. Raine, 443 So. 2d. 944, 945–47 (Fla. 1983); *Tubero*, 569 So. 2d at 1271–73.

client, for malfeasance and disobedience of the trial court's authority.[92] The Florida Supreme Court identified the factors to be considered before issuing litigation-effecting or case-ending orders resulting from counsel's malfeasance.[93] The well-known *Kozel* factors are:

> 1) whether the attorney's disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience; 2) whether the attorney has been previously sanctioned; 3) whether the client was personally involved in the act of disobedience; 4) whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion; 5) whether the attorney offered reasonable justification for noncompliance; and 6) whether the delay created significant problems of judicial administration. Upon consideration of these factors, if a sanction less severe than dismissal with prejudice appears to be a viable alternative, the trial court should employ such an alternative.[94]

It should be noted that the concern of the *Kozel* court, as well as that of the *Mercer* court, was to provide efficient resolution tools for case management disputes caused by poor legal administration by a party litigant or their counsel.[95] In *Kozel*, the Florida Supreme Court was firm in its direction that the imposition of a fine for the malfeasance of an attorney should be focused on the attorney and not unduly punish an otherwise untarnished litigant.[96]

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92. *Kozel*, 629 So. 2d at 817–18. *Kozel* was not a discovery issue case. It concerned a counsel's failure to timely bring a matter before the courts. Nevertheless, one will find it cited and included as the proper analysis in all post-*Kozel* discovery sanction cases examining a counsel versus a party discovery sanction circumstance.

93. *Id.*

94. *Id.* at 818.

95. *Id.*

96. *Id.* There is an earlier case concerning pre-trial conference relied on by the *Kozel* court, Beasley v. Girten, 61 So. 2d 179 (Fla. 1952). *Beasley* considered how to distinguish failure to abide by trial court orders when the malfeasance is that of the counsel, or perhaps counsel and the party litigant. The *Beasley* court stated the issue thusly, "[w]e are not unmindful of the rule that counsel is the litigant's agent and that his acts are the acts of the principal, but since the rule is primarily for the governance of counsel, dismissal 'with prejudice' would in effect punish the litigant instead of his counsel." *Beasley*, 61 So. 2d at 181. *Beasley*, though, was not decided under the modern Florida Rule of Civil Procedure 1.380.

In a later First District Court of Appeal case distinguishing its ruling from *Beasley*, the court noted the repeated violations should have been perceived by the litigant. Mahmoud v. Int'l Islamic Trading (IIT), Ltd., 572 So. 2d 979 (Fla. 1st Dist. Ct. App. 1990). *Mahmoud* is briefed at, *infra* pt. IV.G.4.

The *Kozel* court directed that trial courts may sanction an attorney's conduct where the components of the *Kozel* factors lead the trial court to conclude that the attorney was the wrongdoer, not the client.[97] As stated in *Kozel:*

> In our view, though, the court's decision to dismiss the case based solely on the attorney's neglect unduly punishes the litigant and espouses a policy that this Court does not wish to promote . . . This purpose usually can be accomplished by the imposition of a sanction that is less harsh than dismissal and that is directed toward the person responsible for the delayed filing of the complaint.[98]

The court made its perspective abundantly clear when it said, "a fine, public reprimand or contempt order may often be the appropriate sanction to impose on an attorney in those situations where the attorney, and not the client, is responsible for the error."[99]

*Kozel* is also important because of its closing comment to litigation counsel and trial courts. "Upon consideration of these [*Kozel*] factors, if a sanction less severe than dismissal with prejudice appears to be a viable alternative, the trial court should employ such an alternative."[100]

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97. *Kozel*, 629 So. 2d at 818.

98. *Id.*

99. *Id.*

100. *Id.* The JMC, Workgroup, Imp. Reso. Civ. Cases Final Report makes two assertions about *Kozel* that does not necessarily align with this Article. First, whether *Kozel* is limited to dismissal with prejudice matters. Second, whether all six *Kozel* factors are to be given equal weight in an analysis of whether to issue sanctions. *See* JMC, Workgroup, Imp. Reso. Civ. Cases, *supra* note 12, at 77–78, 77 n. 355.

On the first issue, the Final Report sees "a split between the District Courts of Appeal as to whether the *Kozel* analysis should apply to dismissal with prejudice only, or dismissals without prejudice . . ." as well. *See id.* at 77–78, 77 n. 355. The Final Report compares Fed. Nat. Mortg. Ass'n v. Linner, 193 So. 3d 1010 (Fla. 2d Dist. Ct. App. 2016) and SRMOF II 2012–1 Trust v. Garcia, 209 So. 3d 681 (Mem) (Fla. 5th Dist. Ct. App. 2017) as applying *Kozel* to dismissals with prejudice only and BAC Home Loans Servicing, L.P. v. Ellison, 141 So. 3d 1290 (Mem) (Fla. 1st Dist. Ct. App. 2014) and Fed. Nat'l Mortg. Ass'n v. Wild, 164 So. 3d 94 (Fla. 3d Dist. Ct. App. 2015) expanding the *Kozel* analysis to all dismissals. In this Article, a like issue is considered where "litigation-effecting or case-ending" discovery language is used. Distinct from the Final Report's perspective this Article contends the courts apply *Kozel* where sanctions are to be issued because of an attorney's recalcitrance, not as a factor of dismissals with or without prejudice. *BAC* and *Linner* do not prohibit the use of *Kozel* factors in any dismissal, but rather they just do not require *Kozel* dismissals in without prejudice orders. Yet even the *Linner* case instructed, "[i]t is not reversible error for a trial court to fail to consider the *Kozel* factors before dismissing a case

### *5.* Moakley v. Smallwood*, 826 So. 2d 221 (Fla. 2002).*[101]

*Moakley* introduced the concept of "inherent power" as an authority embedded in any Florida trial court's jurisdiction.[102] It does so by way of examining and comparing the various means by which a trial court can assess attorneys' fees as a sanction against an attorney and litigant for counsel's *bad faith* conduct during post-marriage dissolution proceedings.[103] The activity in question arose from a subpoena *duces tecum* issued upon a former opposing counsel in an earlier phase of the matter.[104] The trial court found the subpoena *duces tecum* was unnecessary and awarded costs to the aggrieved party.[105]

The Florida Supreme Court held that attorney fees are customarily authorized by statute.[106] The court then added that, at least since the 1920s, Florida trial courts have held a like authority through inherent powers, i.e., "to assess attorneys' fees for the

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without prejudice." *Linner*, 193 So. 3d at 1013. As reported in this Article, the Final Report's distinction does not seem to be a factor found in the Supreme Court of Florida cases instructing how and when to apply the *Kozel* factors.

Second, the Final Report claims the courts are concentrating too heavily on the willful factor of *Kozel* and must consider all six factors in equal measurements. The Final Report does this by criticizing the cases of Ham v. Dunmire, 891 So. 2d 492, 495 (Fla. 2004) and Rice v. Raymond, 17 So. 3d 1284, 1285 (Fla. 4th Dist. Ct. App. 2009), for placing too much concern on the willfulness factor. JMC, Workgroup, Imp. Reso. Civ. Cases, *supra* note 12, at 78 & n. 357. This Article disagrees. The *Kozel* court itself, after announcing the factors for a court to consider, commented, "[u]pon consideration of these factors, if a sanction less severe than dismissal with prejudice appears to be a viable alternative, the trial court should employ such an alternative." *Kozel*, 629 So. 2d at 818. The weight to be applied to each *Kozel* factor seems to be left to the trial court and the context of the case.

101. Moakley v. Smallwood, 826 So. 2d 221 (Fla. 2002). (resolving a conflict between the Second District Courts of Appeal's Israel v. Lee, 470 So. 2d 861 (Fla. 2d Dist. Ct. App. 1985) and the First District Court of Appeal's Miller v. Colonial Baking Co., 402 So. 2d 1365 (Fla. 1st Dist. Ct. App. 1981)).

102. *Moakley*, 826 So. 2d at 222–23. "Inherent" can be defined as "innate; existing as a permanent, inseparable element or quality." *Inherent*, FREE DICTIONARY, https://www.thefreedictionary.com/inherent. (last visited Aug. 27, 2022). Black's Law Dictionary provides a multitude of definitions including for inherent power, "[a] power that necessarily derives from an office, position, or status" and also, "3. The legal right or authorization to act or not act; a person's or organization's ability to alter, by an act of will, the rights, duties, liabilities, or other legal relations either of that person or of another." *Inherent*, BLACK'S LAW DICTIONARY (11th ed. 2019).

103. *Moakley*, 826 So. 2d at 222–23.

104. *Id.* at 222.

105. *Id.*

106. *Id.*

*misconduct* of an attorney in the course of litigation."[107] *Moakley* devises the concept of inherent power into an alternative tool, available along with or in addition to the powers given in Florida Rule of Civil Procedure 1.380 to control recalcitrant discovery litigants.[108]

In *Moakley,* the Florida Supreme Court surveyed Florida and relevant federal holdings and found that its trial courts have a historical power, an inherent power, to award attorneys' fees for bad faith conduct against an attorney, where no statute authorized such awards.[109] The Florida Supreme Court, quoting from an earlier case, reiterated, "a trial judge has the inherent power to do those things necessary to enforce its orders, to conduct its business in a proper manner, and to protect the court from party acts obstructing the administration of justice."[110] Florida trial courts have inherent power and authority if supported with express findings to determine and sanction willful disdain for the court or its process by a litigant's counsel.[111]

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107. *Id.* at 224 (citing U.S. Sav. Bank v. Pittman, 86 So. 567, 572 (Fla. 1920)) (emphasis added). This case explained when a court awards fees to a prevailing party it is "generally" an authority originating in statutes. *Id.* The *Moakley* opinion continued and cited U.S. Sav. Bank v. Pittman, 86 So. 567, 572 (Fla. 1920) for the proposition that, "[w]here an attorney performs services for which there is no agreement as to his fee, he will be entitled to recover a quantum meruit."

The Florida Supreme Court, after reviewing *Bane* and *Pittman*, projected those rules into meaning Florida law provided inherent power to trial courts to regulate items in their jurisdiction, including the awarding of fees (*Moakley's* review of *Pittman* caused it to review nine other cases cited by *Pittman*.).

108. *Moakley*, 826 So. 2d at 224. Black's Law Dictionary defines federal inherent-power as the "inherent-powers doctrine" (1937) from Constitutional law. The inherent-powers doctrine is defined as:

> the principle that allows courts to deal with diverse matters over which they are thought to have intrinsic authority, such as (1) procedural rulemaking, (2) internal budgeting of the courts, (3) regulating the practice of law; and (4) general judicial housekeeping. The power is based on interpretations of art. I, § 8, cl. 18 of the Constitution.

*Inherent-Powers Doctrine*, BLACK'S LAW DICTIONARY (11th ed. 2019). It also provides under the interpretation of the word "power" that an inherent power is one that is "[a] power that necessarily derives from an office, position, or status." *Power*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see* Chambers v. NASCO, Inc., 501 U.S. 32 (1991) (discussing use of inherent powers when other statutorily enacted procedural rules are available).

109. *Moakley*, 826 So. 2d at 224.

110. *Id.* (citing Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins. Co., 639 So. 2d 606, 608–09 (Fla. 1994)).

111. *Id.* at 226.

### *6.* Ham v. Dunmire*, 891 So. 2d 492 (Fla. 2004).*[112]

In *Ham*, the facts included a failure to answer the initial pleadings, in which default was entered.[113] Almost two years later, the defendants then sought reinstatement of the case, claiming failure to respond to the pleadings was a result of inadvertence and mistake.[114] The trial court restarted the litigation, and the case was set for a jury trial.[115] During pretrial proceedings, the plaintiff failed to answer the second set of interrogatories and provide an updated witness list.[116] As a result, the complaint was dismissed in a telephone hearing.[117]

The opinion started with confirmation of the court's earlier findings in *Mercer* and *Canakaris*, calling for use of the "reasonableness test" for determining whether a court abused its discretion in issuing discovery sanctions, i.e., if reasonable people could differ as to the propriety of the trial court's action, the action is reasonable.[118] On appeal, the plaintiff argued she should not be sanctioned for the misbehavior of her counsel.[119] The Florida Supreme Court disagreed,[120] and in dictum wrote "[t]o the contrary, this Court has long recognized the existence of circumstances where it may be appropriate to dismiss a litigant's action based upon an attorney's neglect."[121]

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112. This case resolves the First District Court of Appeals, Ham v. Dunmire, 855 So. 2d 1238 (Fla. 1st Dist. Ct. App. 2003), and the Third District Court of Appeal's decisions in Marin v. Batista, 639 So. 2d 630 (Fla. 3d Dist. Ct. App. 1994), Dave's Aluminum Siding, Inc. v. C & M Ventures, 582 So. 2d 147 (Fla. 3d Dist. Ct. App. 1991), and U.S. Fidelity & Guaranty Co. v. Herr, 539 So. 2d 542 (Fla. 3d Dist. Ct. App. 1989). The Ham v. Dunmire, 891 So. 2d 492 (Fla. 2004) case includes a survey of prior rulings on discovery sanctions in Florida.

113. *Ham*, 891 So. 2d at 494.

114. *Id.*

115. *Id.*

116. *Id.* at 495. In Florida, a party has no duty to update a discovery response if the initial response was complete at the time it was provided. FLA. R. CIV. P. 1.280(f). In the Final Report, its authors commented that Florida is unique in having no duty to update a discovery response and propose a reversal of that position in the proposed rules. JMC, Workgroup, Imp. Res. Civ. Cases, *supra* note 12, at 95.

117. *Ham*, 891 So. 2d at 495.

118. *Id.*

119. *Id.* at 494–95.

120. *Id.* at 498.

121. *Id.* at 497 (internal citations omitted). The court also added, later in the paragraph:

> Therefore, because we hold that there may be circumstances involving such misbehavior by counsel in which dismissal is appropriate even absent the litigant's involvement in an attorney's misconduct, we must reject Ham's contention that her

The decision was nevertheless rendered in plaintiff Ham's favor on other grounds, like the trial court's failure to issue findings and document its reasoning in the application of those findings.[122] In reaching that result, the *Ham* court applied the *Tubero* holding, stating that "[t]he dismissal of an action based on the violation of a discovery order will constitute an abuse of discretion where the trial court fails to make express written findings of fact supporting the conclusion that the failure to obey the court order demonstrated willful or deliberate disregard."[123] According to the opinion, however, there was no need for a "complete formal evidentiary hearing" justifying the required findings.[124] In the end, the case was remanded to permit the trial court to consider the *Kozel* factors to determine what, if any, sanctions were appropriate.[125] One must follow the designated process of a written finding in a case-ending discovery order.[126]

### *7. Summary of Florida Supreme Court Cases*

The *Mercer* court acknowledged that Florida Rule of Civil Procedure 1.380 authorizes case-effecting or case-ending sanctions where the trial court finds willful disdain for the court or its process, or declarations of like import.[127] The court can authorize sanctions proportionate to the wrongful nature of the discovery recalcitrance when it finds the requisite willfulness.[128] *Wallraff* set out that the trial court is obligated to make a written finding on that willful disdain for the court or its process.[129] *Tubero* explained that a *written* finding on willful disdain for the court or its process is required for all litigation-effecting or case-ending discovery

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lack of personal involvement in the discovery infractions at issue alone precludes a dismissal of her personal injury action.

*Id.* at 498.

122. *Id.* at 500–01.

123. *Id.* at 495–96 (citing Commonwealth Fed. Sav. and Loan Ass'n v. Tubero, 569 So. 2d 1271 (Fla. 1990).

124. *Id.* at 500.

125. *Id.* at 501. In concluding its analysis, the Supreme Court of Florida disapproved the following cases violating the finding prerequisite for imposing the sanction of dismissal: Schlitt v. Currier, 763 So. 2d 491 (Fla. 4th Dist. Ct. App. 2000); Elder v. Norton, 711 So. 2d 586 (Fla. 2d Dist. Ct. App. 1998); Marin v. Batista, 639 So. 2d 630 (Fla. 3d Dist. Ct. App. 1994); U.S. Fidelity & Guaranty Co. v. Herr, 539 So. 2d 542 (Fla. 3d Dist. Ct. App. 1989).

126. *Ham*, 891 So. 2d at 495–96.

127. Mercer v. Raine, 443 So. 2d 944, 946–97 (Fla. 1983).

128. *Id.*

129. Wallraff v. T.G.I. Friday's, Inc., 490 So. 2d 50, 52 (Fla. 1986).

orders.[130] *Kozel* established factors to consider when issuing sanctions associated with a representing counsel's malfeasance.[131] Notwithstanding the provisions of the Rule, the *Moakley* court held that trial courts have an inherent power to sanction attorneys, and courts can use that power to protect against the obstruction of justice or willful disdain for the court.[132] In *Ham*, the court provided further instruction on the *Kozel* factors when addressing a counsel's actions versus the client's recalcitrance.[133]

The *Ham* court quoted the Second District Court of Appeal, saying, "[w]e see no utility in punishing a faultless plaintiff when his or her attorney is solely responsible for the abusive conduct."[134] The *Ham* court also addressed just how and when a trial court should consider the litigant's involvement, occurring whether the client actively participates in the recalcitrance or merely because the party litigant has a responsibility to know what is occurring in their litigation.[135] As stated, "[t]o the contrary, this Court has long recognized the existence of circumstances where it may be appropriate to dismiss a litigant's action based upon an attorney's neglect."[136] The court's preference as stated in *Ham* is for trial courts to apply a less severe sanction where such is a viable alternative.[137] *Ham* does not provide any examples of what may be less severe.[138]

Penalties can be issued for willful conduct but must be proportionate to the acts being sanctioned.[139] A punishment may be issued affecting a party litigant for their counsel's acts, but such a punishment must be examined against the *Kozel* factors.[140]

130. Commonwealth Fed. Sav. & Loan Ass'n v. Tubero, 569 So. 2d 1271, 1271, 1273 (Fla. 1990).
131. Kozel v. Ostendorf, 629 So. 2d 817, 818 (Fla. 1993).
132. Moakley v. Smallwood, 826 So. 2d 221, 224, 226 (Fla. 2002).
133. Ham v. Dunmire, 891 So. 2d 492, 496–97 (Fla. 2004).
134. *Id.* at 497 (citing Elder v. Norton, 711 So. 2d 586, 587 (Fla. 2d Dist. Ct. App. 1998)).
135. *Id.* at 497–98.
136. *Id.* at 497 (referencing Beasley v. Girten, 61 So. 2d 179, 181 (Fla. 1952)).
137. *Id.*
138. *Id.* at 498.
139. Mercer v. Raine, 443 So. 2d 944, 946 (Fla. 1983).
140. Kozel v. Ostendorf, 629 So. 2d 817, 818 (Fla. 1993).

### D. Supreme Court of the United States and Litigation-Effecting or Case-Ending Discovery Orders

This Article studies Florida's judicial discovery process and its enforcement and does not study the federal judicial discovery process or its enforcement. The Author's personal litigation experiences lead him to perceive that the federal and state court systems for enforcing discovery deficiencies are not necessarily replicas of the federal system, and its trial courts have a broader discretion to coerce and sanction. In many cases, the federal trial courts do not have to find a willful disdain for the court or its process. The federal trial courts are free to sanction any failure to abide by Federal Rule of Civil Procedure 37 ("Rule 37"), Failure to Make Disclosures, or to Cooperate in Discovery, requirements.[141] Such a complete comparison of the federal system's sanction specifics is a study of its own and perhaps the subject of a follow-up article but will not be examined in this Article. This Article does not intend to make a distinctive comparative examination of Rule 37 as a preferred source for measuring what Florida Rule of Civil Procedure 1.380 requires. The federal cases reviewed should be regarded as anecdotal and are provided to enable the reader to get the gestalt of the distinction between the two systems instead of a measured and complete analysis.[142]

The structure of the Florida discovery sanction rule, Florida Rule of Civil Procedure 1.380, however, largely compares to its federal counterpart, Rule 37.[143] The comparison between the two is not always balanced.[144] The rules may look the same but are treated distinctly by their respective judicial systems.[145] The reader should be mindful that although Florida courts often look to federal interpretations for like or comparable rules to obtain a broader scope when looking for guidance in applying a Florida rule's operation, the two systems are not guaranteed to operate in

141. FED. R. CIV. P. 37(b).

142. Yet, the reader should keep in mind that if the Judicial Management Council, Workgroup on Improved Resolution of Civil Cases Final Report, found *inter alia*, in *supra* note 12., changes the enforcement regime, and if the author's reading of the proposed changes is correct, the federal enforcement criteria for Florida discovery issues may look more like the federal criteria. JMC, Workgroup, Imp. Res. Civ. Cases, *supra* note 12, at 63, 117.

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

144. *See, e.g.*, Owens-Illinois, Inc. v. Lewis, 260 So. 2d 221, 224–25 (Fla. 1st Dist. Ct. App. 1972).

145. *Id.*

tandem.[146] Because of the subtle distinctions reviewed below, comparatively examining federal cases alongside the Florida system would create confusion. Yet, before reviewing each Florida District Court of Appeal Florida Rule of Civil Procedure 1.380 ruling, this Article will explore a cherry-picked survey of Florida state and federal holdings to help demonstrate their comparability as well as incomparability.

One Florida case that compared the two-discovery court system's sanction rules is *Owens-Illinois, Inc. v. Lewis*.[147] In *Owens-Illinois*, the court was confronted with issues concerning the enforcement of a discovery contest.[148] In solving the matter, it likened Florida Rule of Civil Procedure 1.380 to its comparable federal rule, Rule 37.[149] Yet, the *Owens-Illinois* comparison, at least in the case of this single rule, demonstrated that the federal system represents both a contrarian view as well as a conforming view to the Florida practice.[150] *Owens-Illinois* drew this set of distinctions by first looking at the comparison made in Federal Practice and Procedure.[151] That hornbook reads:

> For purposes of Rule 37(b)(2), a party 'refuses to obey' a discovery order *merely by failing to comply with it, whether or not the failure be willful*. But the Supreme Court [of Florida] has held that where the failure to comply is because of inability to do so, rather than 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

146. Notwithstanding the distinction being made by the author, the Florida courts have often spoken of the two rules systems as conjunctive. "Although the Federal Rules of Civil Procedure and the Florida Rules of Civil Procedure differ in some respects, 'the objective in promulgating the Florida rules has been to harmonize our rules with the federal rules.'" Gleneagle Ship Mgmt. Co. v. Leondakos, 602 So. 2d 1282, 1283–84 (Fla. 1992) (citing Miami Transit Co. v. Ford, 155 So. 2d 360, 362 (Fla. 1963)); *see also* Fontainebleau Hotel Corp. v. Walters, 246 So. 2d 563, 565 (Fla. 1971) (Florida's rules modeled after federal rules of civil procedure). Thus, we look to the federal rules and decisions for guidance in interpreting Florida's civil procedure rules. *See* Zuberbuhler v. Div. of Admin., State Dep't of Transp., 344 So. 2d 1304, 1306 (Fla. 2d Dist. Ct. App. 1977) (citing Edgewater Drugs, Inc. v. Jax Drugs, Inc., 138 So. 2d 525 (Fla. 1st Dist. Ct. App. 1962)) ("Generally, it must be assumed that in adopting a rule identical to a Federal rule that our Supreme Court intended to achieve the same results that would inure under the Federal rule.").

147. 260 So. 2d 221, 225 (Fla. 1st Dist. Ct. App. 1972); *see infra* pt. G.1 (discussing the factual background and further details of the case).

148. *Owens-Illinois, Inc.*, 260 So. 2d at 225.

149. *Id.* at 224.

150. *Id.* at 224–25.

151. *Id.* at 224.

> make 'such orders in regard to the refusal as are just,' with the most drastic sanctions reserved for flagrant cases.[152]

In the federal system, merely failing to comply is a sanctionable violation.[153] The federal trial court is then responsible for fashioning a proportionate sanction whether the failure is willful or innocent.[154] The *Mercer* court settled the Florida concept that litigation-effecting or case-ending discovery orders are permissible in Florida proceedings where the trial court recognizes willful disobedience of the court or its process, then and only then, a proportionate sanction aligned with the wrongful nature of the discovery impertinence is permitted.[155] Are the two positions of Florida and federal systems comparable? Florida considers a rule violation only where willful disdain for the court or its process can be determined.[156] Federal judges consider a rule violation where a litigant merely fails to comply with the rule's terms or court order whether the failure was willful or not.[157] Federal judges, the legend goes, lay heavier hands on a recalcitrant in discovery. No one wants to face a federal judge who has ordered production and whose directions have not been obeyed. The Florida state system encourages litigation counsel to worry about the third or fourth hearing requesting sanctions for failing to produce.

### E. Select Supreme Court of the United States Cases

#### *1.* Societe Internationale Pour Participations Industrielles Et Commerciales*, S. A. v. Rogers, 357 U.S. 197 (1958).*

The essential facts concerned the failure of a Swiss company to comply with a pretrial production order.[158] The non-compliance was not due to willful disdain for the court or its process, but rather an inability to produce, as to do so would likely cause the company to violate Swiss laws.[159] The argument upon which the trial court

152. *Id.* (quoting 2A WILLIAM W. BARRON & ALEXANDER HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE 543, 853 (Rules ed.)) (emphasis added).
153. *Id.*
154. *Id.*
155. Mercer v. Raine, 443 So. 2d 944, 946–47 (Fla. 1983).
156. *Id.*
157. *See, e.g.*, *Owens-Illinois, Inc.*, 260 So. 2d at 224–25.
158. Societe Internationale Pour Participations Industrielles Et Commerciales, S. A. v. Rogers, 357 U.S. 197, 198 (1958).
159. *Id.* at 200.

dismissed the matter was for failure to respond to a valid production request.[160] The dismissal was allegedly rooted in the federal trial court's inherent powers, as remodeled in Federal Rule of Civil Procedure 41(b), Dismissal of Actions.[161] The Court ruled that "dismissal of the complaint with prejudice was not justified."[162] The Court then negated the particular use of Federal Rule of Civil Procedure 41(b) and limited discovery sanctioning to Rule 37, singularly.[163] The Court's instructions were direct and are extensively cited below:

> In our opinion, whether a court has the power to dismiss a complaint because of noncompliance with a production order depends exclusively upon Rule 37, which addresses itself with particularity to the consequences of a failure to discover by listing a variety of remedies which a court may employ as well as by authorizing any order which is 'just.' There is no need to resort to Rule 41(b), which appears in that part of the Rules concerned with *trials* and which lacks such specific references to discovery. Further, that Rule is on its face appropriate only as a defendant's remedy, while Rule 37 provides more expansive coverage by comprehending disobedience of production orders by any party. Reliance upon Rule 41, which cannot easily be interpreted to afford a court more expansive powers than does Rule 37, or upon 'inherent power,' can only obscure analysis of the problem before us.
>
> It may be that the Court of Appeals invoked Rule 41(b), which uses the word 'failure,' and hesitated to draw upon Rule 37(b) because of doubt that Rule 37 would cover this situation since it applies only where a party '*refuses* to obey.' (Italics added.) Petitioner has urged that the word 'refuses' implies willfulness and that it simply *failed* and did not *refuse* to obey since it was not in willful disobedience. But this argument turns on too fine a literalism and unduly accents certain distinctions found in the language of the various subsections of Rule 37. Indeed

160. *Id.* at 203.

161. Federal Rule of Civil Procedure 41(b) reads:

> If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.

FED. R. CIV. P. 41(b).

162. *Societe Internationale*, 357 U.S. at 213.

163. *Id.* at 207–08.

> subsection (b), as noted above, is itself entitled '*Failure* to Comply With Order.' (Italics added.) For purposes of subdivision (b)(2) of Rule 37, we think that a party 'refuses to obey' simply by failing to comply with an order. So construed the Rule allows a court all the flexibility it might need in framing an order appropriate to a particular situation. Whatever its reasons, the petitioner did not comply with the production order. Such reasons, and the willfulness or good faith of the petitioner, can hardly affect the fact of noncompliance and are relevant only to the path which the District Court might follow in dealing with petitioner's failure to comply.[164]

In *Societe Internationale*, the case was returned to the trial court on due process grounds to determine whether the circumstances have conspired or were of natural occurrence, and not the result of a diabolical plan.[165] Rule 37 is a suitable tool to employ when a trial court is faced with a question of improper or insufficient discovery.[166] The use of the rule is not limited to circumstances where the recalcitrant party refuses to obey (willfully disobeys) but any failure to comply, willful or not.[167] The important part of the *Societe Internationale* decision is that, in the federal court system, Rule 37 is applicable whether the recalcitrance was willful or innocuous.[168] One can see a divergence

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164. *Id.* at 207 (internal citations omitted). In BankAtlantic v. Blythe Eastman Paine Webber, Inc., 12 F.3d 1045, 1049 (11th Cir. 1994), the court refers to above quoted language as dicta. *See infra* pt. F.1 (detailing the *BankAtlantic* case). In footnote one, the Court discusses Rule 37's title, "Refusal to Make Discovery: Consequences," and imports no significance to the title, and its use of the word "Refusal." Refusal, the Court explained, must be taken, as applied "to noncompliance for any reason." The Court also seems to indicate willfulness is a criterion that may or may not be applicable as a standard. *Societe Internationale*, 357 U.S. at 207, n.1.

165. *Societe Internationale*, 357 U.S. at 212–13.

166. *Id.* at 207.

167. *Id.* at 208.

168. Since the decision in *Societe Internationale*, the Rule's wording has changed by the removal of the word "refusal." The 1990 Westlaw electronic version of the Rule in the Advisory Committee Notes, referencing the 1970 Amendments to the Rule, states the following on the rewording of the statute to remove the use of the word refusal:

> Rule 37 sometimes refers to a "failure" to afford discovery and at other times to a "refusal" to do so. Taking note of this dual terminology, courts have imported into "refusal" a requirement of "wilfullness." In Societe Internationale v. Rogers, 357 U.S. 197 (1958), the Supreme Court concluded that the rather random use of these two terms in Rule 37 showed no design to use them with consistently distinctive meanings, that "refused" in Rule 37(b)(2) meant simply a failure to comply, and that wilfullness was relevant only to the selection of sanctions, if any, to be imposed.

flowering between the Florida Supreme Court *Mercer* ruling of the need to find willful disdain for the court or its process before a discovery violation is claimed.[169] In *Societe Internationale*, simply failing to comply with an order, whether willful or not, amounts to a refusal to obey and a rule violation.[170] The secondary concept to be taken from *Societe Internationale* is the singularity of Rule 37 to resolve discovery recalcitrance.[171]

### *2.* Chambers v. NASCO, Inc*., 501 U.S. 32 (1991).*

*Chambers* is an inherent powers matter.[172] A radio station was sold, but before FCC and local property rules were completed, Chambers, the intended seller, changed his mind.[173] To force compliance with the contracted sale, the purchaser brought a proceeding to enforce specific enforcement and temporary restraining order (TRO) to curtail the alienation of the property.[174] *Chambers*, to thwart the power of the court and the then-evolving litigation, conveyed away the subject property hours before the TRO was heard.[175] The recalcitrance did not stop there.[176] During the litigation, the court was overwhelmed with baseless motions and discovery shenanigans.[177] During the proceedings, the plaintiff sought contempt for four separate and distinct undertakings by the defendant to move the business out of the trial court's jurisdiction.[178] It may be an understatement to say Chambers demonstrated a willful disdain for the court or its process.[179] The

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> Nevertheless, after the decision in *Societe*, the court in Hinson v. Michigan Mutual Liability Co., 275 F.2d 537 (5th Cir. 1960) once again ruled that "refusal" required wilfullness. Substitution of "failure" for "refusal" throughout Rule 37 should eliminate this confusion and bring the rule into harmony with the *Societe Internationale* decision.

FED. R. CIV. P. 37 (1970) (internal citations omitted).

169. *See supra* pt. C.1 (detailing the *Mercer* case and its "willful disdain" standard).
170. *Societe Internationale*, 357 U.S. at 208.
171. *Id.* at 207.
172. Chambers v. NASCO, Inc., 501 U.S. 32, 35 (1991).
173. *Id.* at 35–36.
174. *Id.* at 36.
175. *Id.* at 36–37.
176. *Id.* at 38.
177. *Id.*
178. *Id.* at 39.
179. On an earlier interlocutory appeal in the matter, the Court of Appeal found Chambers' appeal grounds to have been frivolous and imposed sanctions in the form of attorney's fees and double costs, pursuant to Federal Rule of Appellate Procedure 38, and remanded for further disposition. *See id.* at 40.

list of recalcitrance by defendants was so voluminous that one could wonder how a trial court could confront all the bad deeds against the multitude of statutory and rules sanction tools.[180] In answer, the majority instructed, whereas "each of the other mechanisms [including Rule 37,] reaches only certain individuals or conduct, the inherent power extends to a full range of litigation abuses."[181]

The Court's inquiry may be read to ask the question, why encumber the trial court with laying out all the minutia of each violation versus the violated rule as opposed to all the multitude of recalcitrance offending the singular power of inherent powers?[182] Its conclusion explains just cut to the chase and rely on the inherent power violation.[183] The dissent, though, was very able in laying out all the sanction rules applying to federal trial courts, listing their particular use, and professing each should have been applied singularly instead of relying on inherent powers to resolve the complexity of the *Chambers* defendant's obduracy, notwithstanding his agreement to sell and proper court process.[184] The Court, notwithstanding the dissent, provided a full explanation of its understanding of inherent powers,[185] and in its final analysis concluded:

> when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power.[186] But if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power.[187]

So, *Societe Internationale* remains intact unless there is a need, because of the complexity of applying every related rule, to rely on other rules.[188] Or rather, as the Supreme Court of the United States stated:

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180. *Id.* at 41–42.
181. *Id.* at 46.
182. *Id.* at 51.
183. *Id.* at 56.
184. *Id.* at 62 (Kennedy, J., dissenting).
185. *Id.* at 43–45 (majority opinion).
186. *Id.* at 50.
187. *Id.*
188. *Id.*

> The decision in *Societe Internationale*, is not to the contrary. There it was held that the Court of Appeal had erred in relying on the District Court's inherent power and Rule 41(b), rather than Federal Rule of Civil Procedure 37(b)(2)(iii), in dismissing a complaint for a plaintiff's failure to comply with a discovery order. Because Rule 37 dealt specifically with discovery sanctions, id., at 207, 78 S.Ct., at 1093, there was "no need" to resort to Rule 41(b), which pertains to trials, or to the court's inherent power. ibid. Moreover, because individual rules address specific problems, in many instances it might be improper to invoke one when another directly applies.[189]

The distinction of *Societe Internationale* versus *Chambers* is not assuredly distinct. The Court must decide when to apply the singular and denominated rules, versus a plethora of related rules, or generic powers unless the use of the inherent power is more appropriate.[190] One must take their best guess when it is appropriate. That dilemma will not be resolved in this Article.

The distinction proposed in this Article is in the Florida system, the act of coercive enforcement must demonstrate the recalcitrant deponent has not made an adequate response to a request but additionally prove that: (1) the recalcitrant litigant has not claimed a valid inability to produce; (2) there has been a demonstrated willful disdain for the court or its process; and (3) the proposed sanctions do not punish the recalcitrant too severely.[191] In the federal system, the (1) through (3) criteria will not necessarily act as a gatekeeper rule with the trial court obligated to use their case-specific judgment in applying, Rule 37 or other powers.[192]

### *3.* National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976).*

The trial court dismissed a litigation party's failure to timely answer written interrogatories.[193] Relying on the law as stated in *Societe Internationale* and its determination that sanctions are at the discretion of the trial court stating it "is not whether this Court, or whether the Court of Appeal, would as an original matter have

189. *Id.* at 50 n.14 (internal citations omitted).
190. *Id.* at 50.
191. Mercer v. Raine, 443 So. 2d 944, 946 (Fla. 1983).
192. *Chambers*, 501 U.S. at 50.
193. Nat'l Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639, 639–40 (1976).

dismissed the action; it is whether the District Court abused its discretion in so doing."[194] In its dismissal order, the trial court had found the filed discovery responses were repeatedly late and grossly inadequate.[195] Here, the Supreme Court of the United States found the dismissal was not an abuse of discretion because "the extreme sanction of dismissal was appropriate by reason of respondents' 'flagrant bad faith' and their counsel's 'callous disregard' of their responsibilities."[196] In Florida, the right to apply litigation-effecting or case-ending discovery orders is preconditional on a three-factor examination of the matter while in the federal system it is discretionary, based on the insight of the trial court.[197] That, at least, is the understanding of the matter in this Article.

The Eleventh Circuit Court of Appeals, however, may have found a halfway point between the Florida point of view and that of the federal criterion.[198]

### F. The Eleventh Circuit Court of Appeals

#### *1.* BankAtlantic v. Blythe Eastman Paine Webber, Inc.*, 12 F.3d 1045 (11th Cir. 1994).*

The recalcitrant litigant prevailed on the case but was then taxed for costs for prior discovery violations.[199] The issue on appeal was whether willfulness or bad faith was a precursor requirement for sanctions under Rule 37.[200] Here, the Court of Appeals explained, "[it] is clear that only in a case where the court imposes the most severe sanction—default or dismissal—is a finding of willfulness or bad faith failure to comply necessary."[201] The court then added, "[a] court may impose lesser sanctions without a

194. *Id.* at 642.
195. *Id.* at 640–41.
196. *Id.* at 643.
197. *Id.* at 642.
198. *See* BankAtlantic v. Blythe Eastman Paine Webber, Inc., 12 F.3d 1045, 1048 (11th Cir. 1994).
199. *Id.* at 1053.
200. *Id.* at 1049.
201. *Id.* (internal citations omitted).

showing of willfulness or bad faith on the part of the disobedient party."[202]

Whether the federal use of Rule 37 in the Florida federal court system will equate to Florida courts and Florida Rule of Civil Procedure 1.380 criteria cannot be affirmatively stated. The indication is that the Eleventh Circuit Court of Appeal, while obeying the Supreme Court of the United States direction to give breath to the trial court, is inclined to give breath to the Florida Rule perspective as well.[203]

## G. First District Court of Appeal Cases

### *1.* Owens-Illinois, Inc. v. Lewis*, 260 So. 2d 221 (Fla. 1st Dist. Ct. App. 1972).*

In *Owens*, the plaintiff requested interrogatories from the defendant seeking to learn of other similar injuries the plaintiff suffered.[204] The defendant resisted by contending they do not keep such records.[205] The trial court, not accepting the defendant's argument, ordered production that was belatedly produced.[206] The trial court had issued a warning that if the order was not obeyed, the court would strike the defendant's defenses and enter judgment.[207] Eventually, judgment was entered accordingly.[208] The trial court later held an ex parte hearing on sanctions with plaintiffs being the sole party at the inquiry.[209] The First District Court of Appeal reversed because, first, the trial court reached its sanction decision without providing adequate representation of the

202. *Id.* No citation supporting the assertion was provided. Yet, in the immediately succeeding paragraph, the court discussed the Supreme Court of the United States holding in *Societe Internationale*, and observed, "the Supreme Court, in *dicta*, discussed the relevance of 'willfulness' and 'good faith.' The Court obliterated the lower court's apparent distinction between 'failure' and 'refusal' to comply with its discovery order . . . ." *Id.*

*BankAtlantic* also stated, "[t]he district court's award of reasonable costs and attorney's fees pursuant to Rule 37 implicates the Due Process Clause of the Fifth Amendment." *Id.* at 1050 (citing Devaney v. Cont'l Am. Ins. Co., 989 F.2d 1154, 1159 (11th Cir. 1993)). I.e., did the discovery order put the recalcitrant litigation party on notice of possible sanctions?

203. *Id.* at 1049.

204. Owens-Illinois, Inc. v. Lewis, 260 So. 2d 221, 222–23 (Fla. 1st Dist. Ct. App. 1972).

205. *Id.* at 223.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

defendant's interests at the sanctions hearing, and, second, the sanctions were without a finding of willfulness or bad faith.[210]

The First District Court of Appeal, in its analysis reversing the trial court's discovery practices, quoted heavily from an earlier Second District Court of Appeal litigation concerning Florida Rule of Civil Procedure 1.380 and therein determined the trend in Florida was to require willful or bad faith in resisting discovery before issuing litigation-effecting or case-ending discovery orders.[211] In *Owens-Illinois*, the court relied heavily on the following Second District Court of Appeal statement:

> 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 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.[212]

In *Owens-Illinois*, the court may have had its deficiencies, but the appellate decision on the other hand provides a high level of understanding of Florida Rule of Civil Procedure 1.380 and its future status.[213]

### *2.* Anderson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 434 So. 2d 43 (Fla. 1st Dist. Ct. App. 1983).*

In *Anderson*, the court effectively provided no case facts, other than informing of a failure to comply with a discovery order.[214] On that subject, the First District Court of Appeal cogently stated:

> The striking of pleadings or the entering of a default judgment for noncompliance with an order compelling discovery is the

210. *Id.* at 225.

211. *Id.* (citing in its n. 4, to Hurley v. Werly, 203 So. 2d 530, 537 (Fla. 2d Dist. Ct. App. 1967)). *Hurley* briefed further at page 34, *infra*. *Mercer*, itself, would not be decided for another 11 years.

212. *Owens-Illinois*, 260 So. 2d at 225 (citing *Hurley*, 203 So. 2d at 537).

213. *Id.* at 225–26.

214. Anderson v. Merrill Lynch, 434 So. 2d 43 (Fla. 1st Dist. Ct. App. 1983).

> most severe of all sanctions and should be employed only in extreme circumstances such as where a party acts in deliberate and contumacious disregard of the court's authority or gross indifference to an order of court. Moreover, the visitation of such an ultimate sanction should not be imposed for failure to timely comply with the discovery order especially where failure to comply does not operate to prejudice the opposing party in any substantial manner.[215]

*Anderson* was decided and reported out twenty days before *Mercer*, and yet it reads as a review of Florida Supreme Court caselaw from forthcoming *Mercer* through *Ham* decisions.[216] *Anderson* highlighted the following inquiries to be undertaken in a sanction hearing: (1) was the deponent able to produce; (2) was there a demonstrated willful disdain for the court or its process; and (3) the proposed sanctions should not be too harsh.[217] The First District Court of Appeal decided dismissal for the listed infraction, a "failing to comply with orders of the trial court compelling discovery"[218] was "too severe and, therefore, constituted an abuse of discretion by the trial court."[219]

### *3.* Sizemore v. Ray Gunter Trucking, Inc.*, 524 So. 2d 717 (Fla. 1st Dist. Ct. App. 1988).*

In *Sizemore*, the plaintiffs sued for physical damages to business property.[220] The discovery issues were akin to the circumstance in *Owens-Illinois*, a litigant resisting what is common stock in trade discoverable information, but in *Sizemore*, the plaintiff resisted the production of tax returns.[221] A second discovery issue arose concerning the belated assessment of damages from the plaintiffs, whose calculation was allegedly pending.[222] The defendants made three discovery motions to take the matter off the trial calendar, arguing the discovery delays put the defendants at a disadvantage in formatting the presentation of

215. *Id.* at 43 (citing Santuoso v. McGrath & Assocs., Inc., 385 So. 2d 112 (Fla. 3d Dist. Ct. App. 1980)) (internal citations omitted).
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.*
220. Sizemore v. Ray Gunter Trucking, Inc., 524 So. 2d 717 (Fla. 1st Dist. Ct. App. 1988).
221. *Id.* at 718.
222. *Id.*

their case.[223] Contrary to the requested motions to the court to delay trial, without further notice, the trial court dismissed the litigation, i.e., instead of delaying the trial, the court dismissed the complaint and entered judgment for the defendant.[224]

The appellate court reversed the lower court's decisions because the trial court entered its dismissal without notice to appellants that the court would make a litigation-effecting or case-ending discovery order decision and therein provide an opportunity for the plaintiffs to explain the discovery failure as not willful or in bad faith.[225] On remand, the appellate court asked the trial court to review if defaulting the plaintiff was justified.[226] The *Sizemore* decision asked whether the coercive or sanctioning order was justified.[227] The term commonly used by most courts is that a sanction not be "too severe[]," as originally employed in *Mercer*.[228]

In the federal system, failure to perform is a violation, with or without an excuse.[229] In the Florida system, failure to perform only invites a court to consider the circumstances, determine whether it was a willful act, and quantify whether the coercion or sanction is proportional to the offense.[230]

### *4.* Mahmoud v. International Islamic Trading (IIT), Ltd.*, 572 So. 2d 979 (Fla. 1st Dist. Ct. App. 1990).*

In *Mahmoud*, a default judgment was entered against the defendants, with liquidated damages and assessed profits which in western business would have been more properly characterized as interest income on a loan.[231] Defendants had been obstructive in all phases of discovery.[232] The default was entered because "[t]he

223. *Id.*
224. *Id.*
225. *Id.* at 718–19 (citing Owens-Illinois, Inc. v. Lewis, 260 So. 2d 221, 225–26 (Fla. 1st Dist. Ct. App. 1972)).
226. *Id.* at 719.
227. *Id.*
228. *Id.* (first citing Sunstream Jet Center, Inc. v. Lisa Leasing Corp., 423 So. 2d 1005 (Fla. 4th Dist. Ct. App. 1982); then citing Austin v. Papol, 464 So. 2d 1338 (Fla. 2d Dist. Ct. App. 1985); and then citing Belflower v. Cushman & Wakefield of Fla., Inc., 510 So. 2d 1130 (Fla. 2d Dist. Ct. App. 1987)). *Belflower* and *Sizemore* are the only two cases that used the term to justify the sanction. *See* case briefs *infra* pts. II.H.3 and II.J.4.
229. *See* FED. R. CIV. P. 37.
230. *See* FLA. R. CIV. P. 1.380.
231. Mahmoud v. Int'l Islamic Trading (IIT), Ltd., 572 So. 2d 979, at 979–980 (Fla. 1st Dist. Ct. App. 1990).
232. *Id.* at 980.

court found no credible evidence was submitted justifying [defendants'] conduct or their failure to comply with the discovery rules or the orders of the court."[233] On appeal, the defendants alleged their discovery failures were the sole effect of counsel's wrongful guidance.[234] The First District Court of Appeal agreed with the assessment of the trial court that notwithstanding the allegations of attorney wrongful guidance, the volume of discovery infractions was too frequent and supported litigation-effecting or case-ending discovery orders.[235] The First District Court of Appeal, however, reversed the trial court's default order, because the alleged "profits" should have been treated as unliquidated and calculated from a full hearing.[236]

Then, the First District Court of Appeal commented on the issue of reliance on counsel, cited by the defendants:

> [I]nvolved trial counsels' singular failure to attend a pretrial conference and file a pretrial statement, and it was clear in those cases that the litigants were being punished for the transgressions of their lawyers. However, this case does not involve a single failure, but repeated and numerous failures to comply with discovery over a period of seven months.[237]

In past cases, when a case was not dismissed for counsel-induced discovery recalcitrance, the matter was resolved around a single or contextual failure on the part of counsel. However, the appellate court noted that this case does not involve a single failure, but repeated and numerous failures to comply with discovery over a period of seven months, impugning the complacency of the litigants.[238]

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233. *Id.* at 981.

234. At this point in the analysis, the First District Court of Appeal distinguished *Beasley* as a case concerning a limited failing by the litigant's counsel as opposed to this case, *Mahmoud*, where there was practically universal discovery recalcitrance. *See* Beasley v. Girten, 61 So. 2d 179, 180–81 (Fla. 1952).

235. *Mahmoud*, 572 So. 2d at 982.

236. It should be noted that in many circumstances effective interest would be a liquidated amount but the contract terms in the matter were not so simply calculatable. Because of arcane provisions, requiring the interest to be referenced as profits, the amount was denominated unliquidated.

237. *Mahmoud*, 572 So. 2d at 981.

238. *Id.*

### *5.* Horace Mann Insurance Co. v. Chase*, 51 So. 3d 640 (Fla. 1st Dist. Ct. App. 2011).*

The trial court had found the appellant participated in "'gross discovery misconduct' and acted with 'bad faith, willfulness or deliberate disregard.'"[239] The trial court then imposed sanctions pursuant to Florida Rule of Civil Procedure 1.380 and the court's inherent power for raising unsupported claims or defenses, service of motions, and damages for litigation delay.[240]

The First District Court of Appeal nullified the trial court's sanction order under Florida Rule of Civil Procedure 1.380 because the case disposition was not preceded by a motion to compel.[241] As to the trial court's use of its inherent powers, the review determined the sanctions were inappropriate because the written order did not fully satisfy the *Moakley* requirements, which the court did not restate or otherwise expound upon.[242] *Moakley* explained the inherent power protects the court from a litigation party's acts obstructing the administration of justice.[243] In *Moakley*, the Florida Supreme Court required a written finding that the counsel willfully abused the judicial processes, and the sanction was an action taken to excoriate the bad faith actions undertaken by the counsel.[244] The First District Court of Appeal explained the record amply supported such a conclusion, but the court's written order failed to satisfy those requirements outlined in *Moakley*.[245] The *Mann* court ruling protected the process before a trial court, instead of the usual focus on whether there existed a reason for the recalcitrance and the severity of the sanction.[246]

### *6. First District Court of Appeal Summary*

Well before *Mercer*, the First District Court of Appeal in *Owens-Illinois* voiced against severe or litigation-effecting or case-ending discovery orders, unless demonstrated willfulness or bad

239. Horace Mann Ins. Co. v. Chase, 51 So. 3d 640 (Fla. 1st Dist. Ct. App. 2011).
240. *Id.*
241. *Id.*
242. *Id.*
243. Moakley v. Smallwood, 826 So. 2d 221, 225 (Fla. 2002).
244. *Horace Mann Ins. Co.*, 51 So. 3d at 640. The author presumed reference would be to *Moakley*, 826 So. 2d at 226, and the need for specific findings.
245. *Moakley*, 826 So. 2d at 224.
246. *Horace Mann Ins. Co.*, 51 So. 3d at 64 (noting the trial court could have used Fla. Stat. § 57.105(3), Attorney's fee, if the appellees made a timely request).

faith in relation to the court or its process was determined and embodied in the trial court's order.[247] *Anderson* emphasized severe sanctions should be limited to "extreme circumstances."[248] *Sizemore* required the trial courts to consider any mitigating circumstances concerning a litigant's inadequate discovery responses.[249] In *Mahmoud*, the First District Court of Appeal did take note of the defendant's continued recalcitrance in providing customary discovery but reversed because of a need for more precise damage analysis.[250] *Mann* concerned itself with protecting the orders and process of the court.[251] The First District Court of Appeal has long honored the *Mercer* prerequisite particularly as it applies to thwarting willful disdain for the court or its process.[252]

## H. Second District Court of Appeal Cases

### *1.* Hurley v. Werly*, 203 So. 2d 530 (Fla. 2d Dist. Ct. App. 1967).*

*Hurley* tells an interesting story; the case introduces us to arcane English Middle Ages law, and confirms Florida's then-developing trend towards leniency in the process of coercing discovery.[253] The *Hurley* parties were embroiled in a real estate purchase transaction.[254] The plaintiff, the Bishop of St. Augustine Diocese in his representative capacity as a "corporation sole," the purchasing party, contended the provided title documents showed defects in merchantability and insurability of title.[255] During the contestations, the Bishop was noticed for deposition.[256] The Bishop questioned: (1) the need for his deposition; and (2) that as the corporation sole of the Bishopric, he was immune from the state law process.[257] Upon continued resistance to providing his

247. Owens-Illinois, Inc. v. Lewis, 260 So. 2d 221, 225 (Fla. 1st Dist. Ct. App. 1972).
248. Anderson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 434 So. 2d 43, 43 (Fla. 1st Dist. Ct. App. 1983).
249. Sizemore v. Ray Gunter Trucking, Inc., 524 So. 2d 717, 719 (Fla. 1st Dist. Ct. App. 1988).
250. Mahmoud v. Int'l Islamic Trading (IIT), Ltd., 572 So. 2d 979, 982 (Fla. 1st Dist. Ct. App. 1990).
251. *Horace Mann Ins. Co.*, 51 So. 3d at 641.
252. Mercer v. Raine, 443 So. 2d 944, 946–47 (Fla. 1983).
253. *See generally* Hurley v. Werly, 203 So. 2d 530 (Fla. 2d Dist. Ct. App. 1967).
254. *Id.* at 531.
255. *Id.*
256. *Id.*
257. *Id.* at 532.

testimony, the trial court ordered the performance of the contract terms and, when the order was not honored, amended its order to permit a loss of the deposit monies as liquidated damages.[258] The Second District Court of Appeal reversed.[259]

The court began its analysis by giving purchase to the concept of a corporation sole, in modern American law, as a defense against having to respond to discovery or other court processes.[260] The court could have chosen to avoid the issue of a corporation sole in reaching a final order but instead defined and sustained the concept.[261] First, the court explained its understanding of a "corporation sole" in law, and next determined such includes the Bishop, someone who holds property in their name for a line of continuity they represent, such as the Bishopric.[262]

The true crux of the matter in *Hurley*, however, was whether the opposing party, the defendant, the party proposing to sell the real property, should have looked to another source to provide the information the defendant sought to obtain from the Archdiocese.[263] The Bishop, according to the holding, was not a person having the relevant knowledge of the title and its potential imperfections.[264]

After its interesting discussion on the corporation sole, the Second District Court of Appeal assesses, in its 1967 view, when and to what extent coercive actions may be taken:

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258. *Id.*
259. *Id.* at 538.
260. *Id.* at 532–33.
261. *Id.* at 532–34.
262. *Id.* at 534. The *Hurley* opinion noted the concept of a "corporation sole" is usually associated with that of the king and queen, who had the power to resist civil process. In Black's Dictionary, the definition of Corporation is the following:

> corporation aggregate. (17c) 1. See CORPORATION. 2. Hist. A corporation made up of a number of individuals. — Also termed *aggregate corporation*. Cf. corporation sole (1).
>
> "The first division of corporations is into *aggregate and sole*. Corporations aggregate consist of many persons united together into one society, and are kept up by a perpetual succession of members, so as to continue forever: of which kind are the mayor and commonalty of a city, the head and fellows of a college, the dean and chapter of a cathedral church."

*Corporation*, BLACK'S LAW DICTIONARY (11th ed. 2019) (internal citation omitted). While there is no apparent direct definition of a corporation sole, it is used in comparison to corporation in the aggregate. *Id.*
263. *Hurley*, 203 So. 2d at 534.
264. *Id.* at 535–36.

> [S]anctions 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.[265]

The Panel then implied the Bishop's refusal was reasonable, given the assumption of his limited direct knowledge of the merchantability of title as the gravamen of the litigation.[266] The early guidance of *Hurley* foretells the history to come: a recalcitrant discovery litigant is not sanctionable without a finding of a willful disdain for the court or its process.[267] Does this mean it could be reasonable to ignore the Rule or not obey a court order if your position is reasonable? That is unlikely. The *raison d'etre* of any appeal is a claim the trial court was unreasonable. Here, it was not reasonable to conclude that Bishop had relevant knowledge on the issue of title merchantability.[268]

### *2.* Allstate Insurance Company v. Biddy*, 392 So. 2d 938 (Fla. 2d Dist. Ct. App. 1980).*

The complexity of the *Allstate* case focused on an employee failing to provide a posttrial report pursuant to the plaintiff's discovery request.[269] The report in question was allegedly unknown by Allstate management and written by a disgruntled former employee.[270] The plaintiff eventually learned of the questioned post-trial report from the disgruntled employee in deposition and sought and received trial court sanctions against Allstate and one of its officers, including judgment on one of the plaintiff's claims.[271] The existence of the posttrial report may or may not have been data subject to discovery, may or may not have been authorized to have been written, and may or may not have been known to any Allstate employee responsible for discovery to plaintiffs.[272] On appeal, Allstate sought to quash the sanction

265. *Id.* at 537.
266. *Id.*
267. *Id.* at 536–37.
268. *Id.* at 534–37.
269. Allstate Ins. Co. v. Biddy, 392 So. 2d 938, 939 (Fla. 2d Dist. Ct. App. 1980).
270. *Id.* at 940.
271. *Id.* at 939–41.
272. *Id.*

against its regional vice president in that he was without knowledge of the matter, and the disposition against Allstate for the inadvertently unproduced report.[273]

After reviewing a plethora of facts concerning the workings of Allstate's claims system, the Second District Court of Appeal took issue with the trial court's discovery findings against an individual employee of Allstate and the ultimate penalty awarded by the trial court.[274] In the end, the Second District Court of Appeal reversed the sanctions against the Allstate officer as lacking any willful intent.[275] It left the limited sanctions against Allstate because it should have had better command over its inner workings but did not explain what Allstate did wrong.[276] How that finding against Allstate became willful disdain for the court or its process was not directly explained by the appellate court.[277] Yet, the *Allstate* court looked directly to the *Hurley* case and restated language from *Hurley* that the Rule's objective is to obtain information, not litigation-effecting or case-ending rewards.[278] The *Allstate* case correctly stated the developing law, yet its application is unconvincing.

### *3.* Belflower v. Cushman & Wakefield of Florida, Inc.*, 510 So. 2d 1130 (Fla. 2d Dist. Ct. App. 1987).*

In *Belflower*, the Second District Court of Appeal held that before entering a default judgment against the defendant for failure to attend his third scheduled deposition, the trial court was required to conduct an evidentiary hearing to confirm the allegations supporting the motion.[279] The third deposition was ordered by the trial court, but there was an issue as to the trial court's signing of the order setting the third attempt at a deposition.[280] The appellate court restated, "[a] discovery sanction as severe as the entry of default, however, should only be imposed in extreme circumstances such as where the defaulted party's

273. *Id.* at 938, 941.
274. *Id.* at 941.
275. *Id.* at 943.
276. *Id.* at 942–43.
277. *Id.*
278. *Id.* at 942.
279. Belflower v. Cushman & Wakefield of Fla., Inc., 510 So. 2d 1130, 1131–32 (Fla. 2d Dist. Ct. App. 1987).
280. *Id.* at 1131.

conduct reflects bad faith, willful disregard, gross indifference, deliberate callousness, or a deliberate and contumacious disregard of the trial court's authority."[281] Here though, the return of the matter to the trial court was for that hearing on the defendant's failure to appear for the third order.[282] The Second District Court of Appeal was not opposed to the trial court's sanction and resolution, but only with due process—the need to hold a hearing before issuing.[283]

### *4.* Marr v. State, Department of Transportation*, 614 So. 2d 619 (Fla. 2d Dist. Ct. App. 1993).*

Plaintiffs challenged an order dismissing their complaint with prejudice for failure to comply with a court order compelling discovery and the failure of their counsel to attend the hearing.[284] The trial court in its order found the recalcitrant litigant's resistance to discovery to have been willful and to have evidenced a deliberate and contumacious disregard of the court's discovery order.[285] The Second District Court of Appeal affirmed the sanctions (dismissal of the pleadings), because the trial court found and documented that the litigant's actions were "egregious," [286] and then relied upon the *Tubero* ruling that there can be no finding of an abuse of discretion if reasonable persons could differ as to the propriety of the action taken. [287] The decision contained no discussion of delineating a distinction between the client litigant and their counsel.[288]

281. *Id.* (citing Mercer v. Raine, 443 So. 2d 944 (Fla. 1983)).
282. *Id.*
283. *Id.* at 1131–32.
284. Marr v. State, Dep't of Transp., 614 So. 2d 619 (Fla. 2d Dist. Ct. App. 1993).
285. *Id.* at 619–20.
286. *Id.* at 620–21 (first citing Allstate Ins. Co. v. Biddy, 392 So. 2d 938, 939 (Fla. 2dd Dist. Ct. App. 1980); and then citing Hart v. Weaver, 364 So. 2d 524 (Fla. 2d Dist. Ct. App. 1978)).
287. *Id.* at 620–21 (citing Commonwealth Fed. Sav. & Loan v. Tubero, 569 So. 2d 1271, 1273 (Fla. 1990) (internal citations omitted)).
288. *Id.* at 620.

### *5.* Elder v. Norton*, 711 So. 2d 586 (Fla. 2d Dist. Ct. App. 1998).*

*Elder* involves a case of an innocuous client with counsel showing willful disdain for the court or its process.[289] The trial court dismissed the allegations in the complaint after four years of counsel's improper discovery undertakings.[290] Nevertheless, the Second District Court of Appeal reversed.[291] The Second District Court of Appeal, citing *Kozel*, explained the evidence of discovery recalcitrance infractions came from the practices of the trial attorney, rather than from the client.[292] In Florida, punishing a litigant without evidence of the party litigant's knowledge or participation in the malfeasance of their counsel is not encouraged.[293]

### *6.* Channel Components, Inc. v. America II Electronics, Inc.*, 915 So. 2d 1278 (Fla. 2d Dist. Ct. App. 2005).*

In *Channel*, the plaintiffs sued alleging breach of a non-compete agreement.[294] The defendants did not comply with the trial court's discovery orders, and sanctions were issued.[295] The sanctions included a contempt finding, monetary punishment, and purge provision, which provided the plaintiffs with an opportunity to undo the contempt by delivering discovery before penalties would accrue.[296] The recalcitrant litigants alleged the sanctions were criminal and awarded without proper due process.[297] The Second District Court of Appeal found "[t]he trial court scrupulously complied with the procedural requirements for entering this form of sanction judgment."[298] The court found that the trial court did not abuse its discretion.[299] In addition to the

289. Elder v. Norton, 711 So. 2d 586, 587 (Fla. 2d Dist. Ct. App. 1998).
290. *Id.*
291. *Id.*
292. *Id.*
293. *See id.*
294. Channel Components, Inc. v. Am. II Elecs., 915 So. 2d 1278, 1279 (Fla. 2d Dist. Ct. App. 2005).
295. *Id.* at 1282.
296. *Id.* at 1283–84.
297. *Id.* at 1279.
298. *Id.* at 1280, 1283.
299. In explaining the distinctions between criminal and civil contempt, the *Channel* Panel, relied upon the Florida Supreme Court's decision in Parisi v. Broward County, 769

issued sanctions, the trial court warned further non-compliance would be treated as willful, and a sanction could include striking the defendant's pleadings.[300] When the recalcitrance continued, the court held the defendants in contempt but gave them an additional period to comply, with a map of how to comply and how to respond if the requested document did not exist, all before its sanctions would take effect.[301] During the discovery phase, the defendants claimed to not have the requested communication documents, which were later found to be false.[302] Discovery was litigated for more than three years and produced voluminous paperwork.[303]

The Second District Court of Appeal supported the trial court's practices and finding by stating:

> Notably, rule 1.380 does not specifically provide for the imposition of a monetary sanction or fine unconnected to the expenses (such as attorneys' fees) caused by the failure to provide discovery. Thus, the assessment of a fine in the

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So. 2d 359, 363–64, 365 (Fla. 2000) (with the *Channel* court omitting internal quotation marks, citations, and footnotes):

> Contempt sanctions are broadly categorized as criminal or civil contempt. Civil contempt sanctions are further classified as either compensatory or coercive sanctions. . . . We have previously explained that the purpose of criminal contempt is to punish. Criminal contempt proceedings are utilized to vindicate the authority of the court or to punish for an intentional violation of an order of the court. On the other hand, a contempt sanction is considered civil if it is remedial, and for the benefit of the complainant.
>
> [B]ecause civil contempt sanctions are viewed as nonpunitive and avoidable, fewer procedural protections for such sanctions have been required. Thus, civil contempt may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard. Neither a jury trial nor proof beyond a reasonable doubt is required. While civil contempt sanctions do not require the same procedural and constitutional protections as criminal contempt, the key safeguard in civil contempt proceedings is a finding by the trial court that the contemnor has the ability to purge the contempt.

*Channel*, 915 So. 2d at 1283. Note should be taken that the trial court used its determination of a properly issued contempt as a coercive force and provided the opportunity to the recalcitrant litigant to purge the contempt before its sanctions would begin to accrue.

As noted by the Second District Court of Appeal, "[i]n this case, the trial court scrupulously followed the procedure necessary to impose a coercive civil contempt sanction arising from the violation of the discovery." *Id.*

300. *Channel*, 915 So. 2d at 1280.

301. *Id.* at 1281.

302. *Id.* at 1282.

303. *Id.*

> discovery context must be predicated upon a finding of contempt.[304]

The Second District Court of Appeal allowed the coercive civil contempt sanction arising from the violation of the discovery orders.[305]

Further, the Second District Court of Appeal explained—in additional support of the trial court—that the precise penalties to be imposed were at the discretion of the trial court and summarized that point by reviewing some of the Florida Supreme Court holdings discussed in this Article:

> It is well settled that determining whether sanctions should be imposed for discovery violations and the amount or nature of those sanctions are matters committed to the discretion of the trial court, and the trial court's decision will not be disturbed upon appeal absent an abuse of that discretion. Courts have generally held that the severity of the sanction imposed must be commensurate with the offense.[306]

Additionally, the court determined "there is no requirement that the amount of a fine coincide with some strict element of proof of damages or losses caused by the noncompliance."[307] *Channel* is

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304. *Id.* at 1283 (first citing Stewart v. Jones, 728 So. 2d 1233 (Fla. 4th Dist. Ct. App. 1999); then citing Fla. Physicians Ins. Reciprocal v. Baliton, 436 So. 2d 1110 (Fla. 4th Dist. Ct. App. 1983); and then citing Allstate Ins. Co. v. Biddy, 392 So. 2d 938 (Fla. 2d Dist. Ct. App. 1980) (authorizing the imposition of a $2000 fine after affirming an adjudication of contempt for failure to comply with discovery orders)).

305. The Second District Court of Appeal restated the Florida Supreme Court's explanation of the distinction between civil and criminal contempt:

> Contempt sanctions are broadly categorized as criminal or civil contempt. Civil contempt sanctions are further classified as either compensatory or coercive sanctions. . . . We have previously explained that the purpose of criminal contempt is to punish. Criminal contempt proceedings are utilized to vindicate the authority of the court or to punish for an intentional violation of an order of the court. On the other hand, a contempt sanction is considered civil if it is remedial, and for the benefit of the complainant.
>
> [B]ecause civil contempt sanctions are viewed as nonpunitive and avoidable, fewer procedural protections for such sanctions have been required. Thus, civil contempt may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard. Neither a jury trial nor proof beyond a reasonable doubt is required. While civil contempt sanctions do not require the same procedural and constitutional protections as criminal contempt, the key safeguard in civil contempt proceedings is a finding by the trial court that the contemnor has the ability to purge the contempt.

*Id.* at 1283–84. (citing Parisi v. Broward County, 769 So. 2d 359, 363–64, 365 (Fla. 2000)).

306. *Id.* at 1284 (citing Ham v. Dunmire, 891 So. 2d 492, 495 (Fla. 2004)); Ferrante v. Waters, 383 So. 2d 749 (Fla. 4th Dist. Ct. App. 1980).

307. *Channel*, 915 So. 2d at 1284.

a roadmap for a trial court facing virulent, recalcitrant litigation discovery issues. Perhaps the *Channel* court's guidance is appropriate in all discovery confrontations and not just virulent discovery confrontations.[308]

### *7.* Chmura v. Sam Rodgers Properties, Inc.*, 2 So. 3d 984 (Fla. 2d Dist. Ct. App. 2008).*

The defendant in a mechanic's lien proceeding claimed inability to attend a deposition because of a stroke but refused to provide evidence of the medical condition.[309] The trial court sanctioned the litigant party, which was reversed as an abuse of discretion for failing to document willfulness or deliberate disregard.[310] By the time *Chmura* was decided in 2008, the 1990 *Tubero* case requiring a written finding had become an embedded element of any sanction under the Rule.[311]

The Second District's opinion stated generally that the striking of pleadings or entering default for noncompliance with an order compelling discovery is the most severe of all sanctions, which should be employed only in extreme circumstances.[312] Further, the opinion stated that severe sanctions issued by a trial court must contain explicit findings "that the conduct upon which the order is based was equivalent to willfulness or deliberate disregard"[313] to "ensure that the trial judge has consciously determined that the failure was more than a mistake, neglect, or inadvertence, and to assist the reviewing court to the extent the record is susceptible to more than one interpretation."[314] The willfulness or disdain for the court or its process had to be determined and documented before a rule sanction could be issued.[315]

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308. *Channel* imposed a very costly penalty. The *Channel* Panel gave serious discussion to the severity of the penalty, an issue not reviewed in this Article. *Id.* at 1284–85.

309. Chmura v. Sam Rodgers Prop., Inc., 2 So. 3d 984, 986 (Fla. 2d Dist. Ct. App. 2008).

310. *Id.*

311. *Id.*

312. *Id.* (citing Mercer v. Raine*,* 443 So. 2d 944, 946 (Fla. 1983)).

313. *Id.* (citing and quoting Commonwealth Fed. Sav. & Loan Ass'n v. Tubero, 569 So. 2d 1271, 1273 (Fla. 1990)).

314. *Id.* (citing and quoting Ham v. Dunmire, 891 So. 2d 492, 496 (Fla. 2004)).

315. *Id.* at 986–87.

### *8. Second Circuit Court of Appeal Summary*

In *Hurley*, the appellate court limited litigation-effecting or case-ending sanctions to willful disdain to the court or its process and where the discovery order provides the recalcitrant deponent an opportunity to conform.[316] *Allstate* explains Florida Rule of Civil Procedure 1.380 is not punitive; rather, it is a compliance tool.[317] In *Marr*, the court found the trial court properly documented the willful act of recalcitrance and thus supported the litigation-effecting or case-ending discovery order.[318] In *Elder*, however, the court reversed a litigation-effecting or case-ending discovery order because the trial court did not distinguish between the counsel's disdain for either the court or its process and whether the litigation party participated in the recalcitrance.[319] *Channel* introduced for our study that the Rule does not specifically provide for the imposition of a monetary sanction or fine, but the assessment of a fine in the discovery context can be predicated upon a finding of contempt.[320] *Channel* also provided that the penalty for discovery recalcitrance is at the discretion of the trial court and should be based upon the expenses (such as attorneys' fees) caused by the failure to provide discovery and that severe sanctions issued by a court must contain explicit findings "that the conduct upon which the order is based was equivalent to willfulness."[321] *Chmura* explained that failure to find and document willful disdain for the court or its process is a reversible error.[322] The Second District Court of Appeal cases are in direct line with the Florida Supreme Court rulings.[323]

316. Hurley v. Werly, 203 So. 2d 530 (Fla. 2d Dist. Ct. App. 1967).

317. Allstate v. Biddy, 392 So. 2d 938, 942 (Fla. 2d Dist. Ct. App. 1980); FLA. R. CIV. P. 1.380 advisory committee's note to 2005 amendment.

318. Marr v. State, Dep't of Transp., 614 So. 2d 619, 621 (Fla. 2d Dist. Ct. App. 1993).

319. Elder v. Norton, 711 So. 2d 586, 587 (Fla. 2d Dist. Ct. App. 1998).

320. Channel v. Am. II Elecs., 915 So. 2d 1278, 1284 (Fla. 2d Dist. Ct. App. 2005).

321. *Id.* at 1282; Commonwealth Fed. Sav. & Loan Ass'n v. Tubero, 569 So. 2d 1271, 1273 (Fla. 1990).

322. Chmura v. Sam Rodgers Props., 2 So. 3d 984, 987 (Fla. 2d Dist. Ct. App. 2008).

323. *See* Hurley v. Werly, 203 So. 2d 530 (Fla. 2d Dist. Ct. App. 1967); *Elder*, 711 So. 2d 586; *Marr*, 614 So. 2d 619; *Chmura*, 2 So. 3d 984, *Channel*, 915 So. 2d 1278; Allstate v. Biddy, 392 So. 2d 938, 942 (Fla. 2d Dist. Ct. App. 1980); *cf. Tubero*, 569 So. 2d 1271.

## I. Third District Court of Appeal Cases

### *1.* Rashard v. Cappiali*, 171 So. 2d 581 (Fla. 3d Dist. Ct. App. 1965).*

The appellate review involved procedural wrangling by the plaintiff to wrongfully avoid answering interrogatories.[324] Rather than properly answer propounded interrogatories, the plaintiff attempted to notice the matter for trial as a strategy to avoid her discovery obligation.[325] Notwithstanding the notices, the trial court eventually entered judgment, with prejudice, for the defendant.[326] In reviewing the appeal, the Third District Court of Appeal noted "where dismissal is to be with prejudice and thus act as an adjudication on the merits it must be for the violation of an *order* of the court and not for a mere failure to abide by a notice of a procedural step."[327] The appellate court noted that the then-prevailing but now former, Florida Rule of Civil Procedure 1.35(b), read in part: "(b) Involuntary Dismissal. For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him."[328]

The court then explained:

> It will be noted that this rule permits a dismissal upon motion of the defendant for three separate reasons: (1) failure to prosecute, (2) failure to comply with the rules, or (3) failure to comply with an order of court. There can be no doubt of the authority of a trial court to dismiss a complaint with prejudice where the plaintiff wilfully fails to obey an order of court.[329]

The Third District Court of Appeal, interpreting the rule considering then-existing law, found that a violation of a court order must occur for a dismissal to be with prejudice rather than "a mere failure to abide by a notice of a procedural step."[330] A violation of a discovery rule is subject to an adverse motion and

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324. Rashard v. Cappiali, 171 So. 2d 581 (Fla. 3d Dist. Ct. App. 1965).
325. *Id.*
326. *Id.* at 581–82.
327. *Id.* at 583 (emphasis added).
328. *Id.* at 582.
329. *Id.* (citing Local 415, Mia. Joint Council, etc. v. William Weitz, Inc., 141 So. 2d 18 (Fla. 3d Dist. Ct. App. 1962)).
330. *Id.* at 583.

discussable before the trial court, while a violation of a trial court order is subject to coercible or litigation-effecting or case-ending discovery order by the court.[331] The *Rashard* dismissal was reversed because the violation was not in derogation of a court order.[332]

### *2.* Watson v. Peskoe*, 407 So. 2d 954 (Fla. 3d Dist. Ct. App. 1981).*

Two years before the *Mercer* case would be decided by the Supreme Court of Florida, the court in *Watson* once again focused on the disobedience to the order rather than the rule violation; however, it did not cite *Rashard*.[333] Plaintiffs were required to produce documents ordered by the trial court which were first requested pursuant to a deposition but continued in their recalcitrance.[334] The trial court, after finding willful disobedience to its order, struck the plaintiff's pleadings and entered judgment for the defendant.[335] The Third District Court of Appeal, after a full recitation of then-existing law on the subject, affirmed the trial court's order striking the pleadings.[336] *Watson* is a demonstration of willful disdain for the court, but not necessarily for its process.

### *3.* Merrill Lynch Pierce Fenner & Smith Inc. v. Haydu*, 413 So. 2d 102 (Fla. 3d Dist. Ct. App. 1982).*

The defendant brokerage firm, for an unknown reason, refused to provide the requested documents and responses to interrogatories.[337] The appellate court noted the defendants failed to comply with both discovery rules and court enforcement orders.[338] The trial court struck Merrill's pleading and made a

331. The reader should take this sentence as the author's representation of the appellate court's meaning rather than a reiteration of its stated finding and ruling.
332. *Rashard*, 171 So. 2d at 583.
333. Watson v. Peskoe, 407 So. 2d 954, 955 (Fla. 3d Dist. Ct. App. 1981).
334. *Id.*
335. *Id.* at 955–56.
336. *Id.* at 956.
337. Merrill Lynch Pierce Fenner & Smith Inc. v. Haydu, 413 So. 2d 102, 102 (Fla. 3d Dist. Ct. App. 1982).
338. *Id.*

special point of noting that Merrill's actions prejudiced the plaintiff.[339] The sanction was affirmed.[340]

### *4.* Gomez v. Pujols*, 546 So. 2d 734 (Fla. 3d Dist. Ct. App. 1989).*

*Gomez* concerned a mortgagor who failed to comply with a trial court order compelling her to answer interrogatories.[341] She repeatedly refused to answer the interrogatories and provided no basis for her refusal.[342] Her counsel, citing his client's failure to cooperate, was permitted to withdraw, but soon thereafter returned as Gomez's counsel.[343] The Third District Court of Appeal stated a default for noncompliance with an order compelling discovery is "the most severe of all sanctions which should be employed only in extreme circumstances."[344] The court never provided further characterization as to what those extreme circumstances might be to support a default order.[345] In *Gomez,* the sanction was affirmed.[346] It is beneficial to take note that recalcitrance and lack of excuse were both factors for supporting litigation-effecting or case-ending discovery orders.[347]

### *5.* Ledo v. Seavie Resources, LLC*, 149 So. 3d 707 (Fla. 3d Dist. Ct. App. 2014).*

As in *Gomez*, *Ledo* involves a mortgagor refusing to answer interrogatories.[348] In the matter, the record was devoid of an explanation for Ledo's failure to comply with the discovery order, and the trial court found a demonstrated willful disdain for the court or its process.[349] As a result, the appellate court affirmed the sanction and warned:

> Failure to comply with the preceding paragraph [response to interrogatories], will create a presumption that Client no longer

339. *Id.*
340. *Id.*
341. Gomez v. Pujols, 546 So. 2d 734, 735 (Fla. 3d Dist. Ct. App. 1989).
342. *Id.*
343. *Id.*
344. *Id.* (citing Watson v. Peskoe, 407 So. 2d 954, 956 (Fla. 3d Dist. Ct. App. 2014)).
345. *Id.*
346. *Id.* at 736.
347. *Id.* at 735–36.
348. Ledo v. Seavie Res., LLC, 149 So. 3d 707, 711 (Fla. 3d Dist. Ct. App. 2014).
349. *Id.* at 708, 710.

> wishes to participate in this lawsuit and the Court may *sua sponte* or on motion of opposing party impose sanctions against Client. Sanctions may include the imposition of fees and costs, striking of pleadings, entry of default, and dismissal with prejudice.[350]

It appears that courts favor pre-announcement of the nature of sanctions the wayward discovery litigant may suffer for continued recalcitrance.[351] The appellate court also set the trial court's duty in making its findings written and explanatory: Express findings are required to ensure that the trial judge has consciously determined that the failure was more than a mistake, neglect, or inadvertence, and to assist the reviewing court to the extent the record is susceptible to more than one interpretation.[352]

*Ledo* can be cited for the proposition that litigation-effecting or case-ending discovery orders can be applied to litigation for a litigant's failure to comply with discovery orders if there is no rational explanation for non-compliance.[353] The case also recommends a forewarning is advisable before a sanction is applied.[354] The Third District Court of Appeal has directed Florida Rule of Civil Procedure 1.380 sanctions are limited to willfulness or deliberate violations of trial court orders.[355]

### *6. Third Circuit Court of Appeal Summary*

*Rashard* stated a violation of a discovery rule is subject to an adverse motion and discussable before the trial court, while a violation of a trial court order is subject to coercible orders to correct the recalcitrance.[356] Some fifteen years after *Rashard*, *Watson* affirmed a trial court striking of pleadings for the litigation party's failure to obey a trial court's discovery order.[357] *Rashard* and *Watson* seem to favor the right of a trial court to sanction for simple failure to obey the trial court's orders and may be in contradiction with the Author's use of the terminology "willful

350. *Id.* at 708 (emphasis omitted).
351. *See id.* at 711.
352. *Id.* at 710 (citing Commonwealth Fed. Sav. & Loan Ass'n v. Tubero, 569 So. 2d 1271, 1273 (Fla. 1990)).
353. *Id.*
354. *See id.* at 711.
355. *See id.* at 710–11.
356. Rashard v. Cappiali, 171 So. 2d 581, 583 (Fla. 3d Dist. Ct. App. 1965).
357. Watson v. Peskoe, 407 So. 2d 954, 956 (Fla. 3d Dist. Ct. App. 1981).

disdain for the court or its process."[358] *Merrill* demonstrated how the trial court converted discovery rule violations into violations of a trial court order by providing an opportunity to the recalcitrant to correct their disobedience but when not obeyed led to a default sanction.[359] *Gomez* demonstrated how "willful and intentional disregard of the trial court order" without any attempt to comply or explain why the litigant was unable to comply supports a litigation-effecting or case-ending discovery order.[360] Finally, *Ledo* stands for the proposition that the trial court orders and the discovery process are best served where the trial court provides an understanding to the recalcitrant as to what sanctions it will consider if the court order is not completed with proper discovery responses.[361] One may see the distinction between the Third District Court of Appeal's early cases against the latter decision, the latter being more in common with the other Districts.

### J. Fourth District Court of Appeal Cases

#### *1.* Swindle v. Reid*, 242 So. 2d 751 (Fla. 4th Dist. Ct. App. 1970).*

Before the Florida Supreme Court cases *Mercer* and *Kozel*, the Fourth District Court of Appeal examined whether the dismissal of a litigant's complaint for an "inability" to produce discovery documents were warranted.[362] The plaintiff did produce many of the required documents but had to also provide an affidavit explaining other documents were beyond her control.[363] The trial court, notwithstanding proof the missing documents were in the possession of a third party who refused to cooperate, entered a sanction order of dismissal.[364]

The appellate court confirmed that Florida Rule of Civil Procedure 1.380 granted authority to the trial court to issue litigation-effecting or case-ending discovery orders, but it returned the matter for reconsideration by the trial court because "the order

358. *See id.*; *Rashard*, 171 So. 2d at 582.
359. Anderson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 434 So. 2d 43, 43 (Fla. 3d Dist. Ct. App. 1983).
360. Gomez v. Pujols, 546 So. 2d 734, 735–36 (Fla. 3d Dist. Ct. App. 1989).
361. Ledo v. Seavie Res., LLC, 149 So. 3d 707, 711 (Fla. 3d Dist. Ct. App. 2014).
362. Swindle v. Reid, 242 So. 2d 751, 753 (Fla. 4th Dist. Ct. App. 1970).
363. *Id.* at 752.
364. *Id.* at 753.

of dismissal in this 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."[365] The appellate court noted dismissal is drastic "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."[366] The Fourth District Court of Appeal ruled a mere finding of willful disdain for the court or its process was not appropriate without the supporting finding that her failure to comply with the trial court's order was a refusal to comply.[367]

### *2.* Herold v. Computer Components International, Inc.*, 252 So. 2d 576 (Fla. 4th Dist. Ct. App. 1971).*

In *Herold*, the Fourth District Court of Appeal found the trial court exhibited patience in encouraging the plaintiff-appellant to provide complete discovery disclosure before striking the recalcitrant party's pleadings and dismissing their complaint.[368] Nevertheless, the Fourth District Court of Appeal concluded that such severe sanctions take exceptional cases, whereas, in the instant matter, the plaintiff's failure to furnish better answers did not justify dismissal of the complaint because the trial court did not identify what, if any, relevant case factors were withheld from discovery.[369] After consideration by the Florida appellate court of federal decisions,[370] the factor considered important was stated as: "the recalcitrant party has acted in willful 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."[371] The Fourth District Court of Appeal in *Herold* explained such sanctions are not yet ripe

365. *Id.*
366. *Id.* (citing State v. Fattorusso, 228 So. 2d 630, 633 (Fla. 3d Dist. Ct. App. 1969)).
367. *Id.*
368. Herold v. Comput. Components Int'l, Inc., 252 So. 2d 576, 578 (Fla. 4th Dist. Ct. App. 1971).
369. *Id.*
370. *Id.* at 579.
371. *Id.* The *Herold* court interpreted Florida Rule of Civil Procedure 1.380 by comparing it to the federal court's Rule 37. The federal system, as noted earlier, is more permissible to issuing strict sanctioning and to examine those cases alongside the Florida system would create discombobulation. The word "willful" is often used in this Article. The word is properly spelled "willful" but may also be spelled, "wilful" and one court herein will spell the word "wilfull." When restating the verbiage of the court, the spelling of that court is used.

for disposition in the matter at bar as the trial court did not give "consideration [that] ought to be given to the relevancy of the interrogatories propounded."[372] The court determined, in addition to examining the respect for the court, its orders, and its process, a sanction must also measure the penalty against the importance of the information being sought by the discovery.[373] There is wisdom in the ruling, but the relevancy of the discovery being sought is not an often-mentioned criterion in prior case law.

### *3.* Ferrante v. Waters*, 383 So. 2d 749 (Fla. 4th Dist. Ct. App. 1980).*

The litigant ignored opposing interrogatories, did not communicate with her attorney on the failure to answer the discovery, and became unreachable.[374] Relying on *Swindle* and *Herold*, the Fourth District Court of Appeal determined a deliberate and contumacious disregard for the court's authority will permit sanctions.[375] Here, the court did not know and did not consider as a factor, whether the recalcitrant litigant's refusal to obey the compelling order was intentional or not as her counsel lost contact with the litigant.[376] One would suppose that not keeping in contact with representing counsel is willful disdain for the court or its process.

### *4.* Sunstream Jet Center, Inc. v. Lisa Leasing Corp.*, 423 So. 2d 1005 (Fla. 4th Dist. Ct. App. 1982).*

Here, again, the court was confronted by a litigant's failure to make the discovery, and, in response, the trial court issues an order compelling a response.[377] When the order was ignored, the trial court entered a default without further hearings.[378] The Fourth District Court of Appeal reversed.[379] In *Ferrante*, the recalcitrant litigant ignored the notice, but there was no conclusion

372. *Id.* at 580.
373. *Id.*
374. Ferrante v. Waters, 383 So. 2d 749, 750 (Fla. 4th Dist. Ct. App. 1980).
375. *Id.* at 751.
376. *Id.*
377. Sunstream Jet Ctr., Inc. v. Lisa Leasing Corp., 423 So. 2d 1005, 1006 (Fla. 4th Dist. Ct. App. 1982).
378. *Id.*
379. *Id.* at 1007.

as to why the litigant did not participate in discovery.[380] In *Sunstream*, the appellate court thought it necessary for the trial court to determine whether the appellant's failure to comply with the trial court's order compelling discovery resulted from willfulness or bad faith or was otherwise occasioned.[381] The *Sunstream* appellate court remarked favorably on the trial court's notice of the sanctions that will befall a disobedient party for non-compliance.[382]

### *5.* Mittleman v. Rowe International, Inc.*, 511 So. 2d 766 (Fla. 4th Dist. Ct. App. 1987).*

In *Mittleman*, the Fourth District Court of Appeal again reversed a trial court sanction striking a pleading and entering default for failure to answer interrogatories.[383] The court of appeal found it an abuse of the court's discretion, for the trial court to not have given credence to the fact that the litigant filed the appropriate responsive pleadings alleging her inability to comply, explaining she was an unrelated party to the information sought in discovery.[384] The Fourth District Court of Appeal found her submissions did not demonstrate a calculated effort to conceal.[385] *Mittleman*, it may be concluded, required a "willful or deliberate noncompliance" by the recalcitrant litigant.[386] An inability to comply is not necessarily willful disdain for the authority or process of the court.[387]

### *6.* Schlitt v. Currier*, 763 So. 2d 491 (Fla. 4th Dist. Ct. App. 2000).*

Here, Currier filed a total of thirteen motions to compel against Schlitt's failure to respond to discovery requests, orders to compel discovery, orders setting deadlines for responsive pleadings, and more.[388] Several of the orders noticed the potential dismissal of claims, sounding much as though the trial court was

380. *Ferrante*, 383 So. 2d at 751.
381. *Sunstream*, 423 So. 2d at 1006–07.
382. *Id.* at 1007.
383. Mittleman v. Rowe Int'l, Inc., 511 So. 2d 766, 767 (Fla. 4th Dist. Ct. App. 1987).
384. *Id.* at 767–68.
385. *Id.* at 768.
386. *Id.*
387. *Id.*
388. Schlitt v. Currier, 773 So. 2d 491, 492 (Fla. 4th Dist. Ct. App. 2000).

following *Sunstream* and *Mittleman*.[389] The appellate court had a dilemma though. It did not know whether the fault was attributable to the plaintiff or their counsel.[390] The Fourth District Court of Appeal returned the matter to the trial court to resolve the "question of Schlitt's knowledge, a notice of, or willful blindness to, his attorney's contumacious conduct."[391]

*Schlitt* stands for the proposition that there is no utility in punishing a faultless plaintiff when their attorney is solely responsible.[392] Trial courts should not necessarily conjoin the attorney's malfeasance with their party litigant.[393]The *Schlitt* court laid the groundwork for the *Ham* consideration, a case then yet to be decided by the Florida Supreme Court, that would come more than three years later.[394]

### *7.* Carpenter v. McCarty*, 810 So. 2d 1053 (Fla. 4th Dist. Ct. App. 2002).*

*Carpenter* concerned a detailed set of findings by the trial court that included the phrase "appears to be a calculated attempt to block discovery."[395] Notwithstanding the completeness of the trial court's order, the appellate court did not like the conjectured nature of the "appears to be" appearing in the trial court's order.[396] If litigation-effecting or case-ending discovery orders are to be applied, only a determined order without supposition is proper.[397]

389. *Id.*; *see* Sunstream Jet Ctr., Inc. v. Lisa Leasing Corp., 432 So. 2d 1005, 1006–07 (Fla. 4th Dist. Ct. App. 1982); *see also Mittleman,* 511 So. 2d at 767–68.

390. *See Schlitt*, 773 So. 2d at 492–93.

391. *Id.* at 493.

392. *See id.*

393. Later in 2000, the Fourth District Court of Appeal, in Waters v. Am. Gen. Corp., 770 So. 2d 1275, 1276 (Fla. 4th Dist. Ct. App. 2000), again took up a similar discovery issue, a motion to compel discovery of medical records, and reversed the ruling because of insufficient (or no) evidence of notice of the hearing to the litigant distinct from that of their counsel.

394. *Compare Schlitt*, 773 So. 2d at 492–93, *with* Ham v. Dunmire, 891 So. 2d 492, 494–502 (Fla. 2004) (acknowledging that even without a party litigants involvement circumstances are conceivable where a counsel's misbehavior, alone, would support a dismissal).

395. Carpenter v. McCarty, 810 So. 2d 1053, 1054 (Fla. 4th Dist. Ct. App. 2002).

396. *Id.*

397. *See id.*

### *8.* Thomas v. Chase Manhattan Bank*, 875 So. 2d 758 (Fla. 4th Dist. Ct. App. 2004).*

A mortgagor failed to answer requests for admissions in a timely manner.[398] Responses finally came in six months late.[399] No trial court order to compel was issued as the bank never moved for sanctions or struck the recalcitrant litigant's pleadings.[400] Instead, the order striking the defendant's pleadings was made *sua sponte*.[401] The Fourth District Court of Appeal reversed and returned to the trial court, citing *Tubero*, for the requirement to provide an express written finding of a party's willful or deliberate refusal to obey a court order and find and document the nexus between the discovery issue and the litigation-ending sanction.[402] Without a showing of willful disdain for the court or its process, litigation-effecting or case-ending discovery orders may be inappropriate.[403]

### *9.* Tianvan v. AVCO Corp.*, 898 So. 2d 1208 (Fla. 4th Dist. Ct. App. 2005).*

*Tianvan* provided no case allegations but rather spoke only of the civil procedures with which it was confronted.[404] In reversing the dismissal of the complaint, the Fourth District Court of Appeal stated that the trial court failed to make express written findings of facts describing the failure to obey the court and a written finding the litigant had demonstrated willful disdain for the court or its process as required by *Tubero* and *Ham*.[405] However, the appellate court's direction was perplexing when it came to the remand to consider the Kozel factors.[406] The case did not indicate any particular failure by counsel.[407]

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398. Thomas v. Chase Manhattan Bank, 875 So. 2d 758, 759 (Fla. 4th Dist. Ct. App. 2004).
399. *Id.*
400. *Id.*
401. *Id.*
402. *Id.* at 760.
403. *Id.*
404. Tianvan v. AVCO Corp., 898 So. 2d 1208, 1209 (Fla. 4th Dist. Ct. App. 2005).
405. *Id.*
406. *Id.*
407. *Id.*

### *10.* Bennett ex rel. Bennett v. Tenet St. Mary's, Inc.*, 67 So. 3d 422 (Fla. 4th Dist. Ct. App. 2011).*

Here, the appellate court's ruling did concern an attorney's representation.[408] The recalcitrant litigant's counsel repeatedly failed to comply with discovery orders, even after a clear warning that continued disobedience would result in the dismissal of pleadings.[409] The trial court, however, in its order dismissing the case, failed to lay out a *Kozel* analysis.[410] So, the matter was returned to the trial court for written findings.[411] The appellant court reminded the trial court, "[i]f the malfeasance can be addressed adequately through the use of a contempt citation or a lesser degree of punishment on counsel, the action should not be dismissed." [412]

### *11.* Garvin v. Tidwell*, 126 So. 3d 1224 (Fla. 4th Dist. Ct. App. 2012).*

*Garvin* sought to nullify a settlement agreement for a unilateral mistake.[413] It has two notable rulings on discovery—conditions that must be met before sanctions may be issued.[414] First, evasive or incomplete answers in discovery may warrant case sanctions.[415] Next, such sanctions must be preceded by a litigant's motion to compel.[416] The process of motion, order, and incomplete or non-responsive replies are tantamount to supporting Florida Rule of Civil Procedure 1.380 sanctions.

408. Bennett *ex rel.* Bennett v. Tenet Saint Mary's, Inc., 67 So. 3d 422, 424 (Fla. 4th Dist. Ct. App. 2011).
409. *Id.* at 424–25.
410. *Id.* at 427.
411. *Id.*
412. *Id.* (citing Ham v. Dunmire, 891 So. 2d 492, 498 (Fla. 2004)).
413. Garvin v. Tidwell, 126 So. 3d 1224, 1227 (Fla. 4th Dist. Ct. App. 2012).
414. *Id.*
415. *Id.*
416. *Id.* at 1230.

### *12.* Heritage Circle Condominium Association, Inc. v. Florida Department of Business & Professional Regulation, Division of Condominiums, Timeshares & Mobile Homes*, 121 So. 3d 1141 (Fla. 4th Dist. Ct. App. 2013).*

The trial court granted a default judgment against the appellant condominium as a sanction for discovery violations without holding a hearing[417] and without considering the *Kozel* factors.[418] It should be noted that the case indicated the *Heritage* litigant, and not counsel, demonstrated the willful disdain for the court or its process. However, that was merely indicated in the language of the case, not an outright statement made by the court.[419] Nevertheless, the case presents somewhat of a quandary. *Heritage* relies heavily on *Ham*'s ruling that a dismissal of an action based on the violation of a discovery order will require a hearing. Further, the hearing needs to engender a *Kozel* analysis and determine whether the litigation party or their counsel demonstrated willful disdain for either the court or its process.[420] *Heritage* held a hearing is required and from such hearing, facts are to be ascertained by the trial court to determine the propriety of *Heritage*'s discovery contention.[421] The dilemma arises because of how the *Ham* case was written. *Ham* may be interpreted to require an "evidentiary" hearing when examining the *Kozel* factors and making distinctions between a party's counsel and the party litigant's unacceptable acts.[422] *Ham*, though, likely does not necessitate the need for such an evidentiary hearing, although, in appropriate circumstances, the trial court may be so direct.[423] *Heritage*, unlike *Ham*, does not make these fine distinctions (where necessary to assist the court) but rather supports the concept that when requested by the recalcitrant litigant a hearing is necessary.[424] These may be subtle but important distinctions not

417. Heritage Circle Condo. Ass'n, Inc. v. Fla. Dep't of Bus. & Pro. Regul., Div. of Condos., Timeshares & Mobile Homes, 121 So. 3d 1141, 1142 (Fla. 4th Dist. Ct. App. 2013).
418. *Id.*
419. *Id.*
420. *Id.* at 1143–44.
421. *Id.* at 1144.
422. Ham v. Dunmire, 891 So. 2d 492, 496–97 (Fla. 2004).
423. *Id.* at 500.
424. *Heritage*, 121 So. 3d at 1144.

obviated by *Heritage*.[425] Of course, *Ham*, the Florida Supreme Court case, not *Heritage*, has the final say on the matter.[426]

*13.* Vista St. Lucie Association, Inc. v. Dellatore*, 165 So. 3d 731 (Fla. 4th Dist. Ct. App. 2015).*

The condominium association was delayed in responding to the discovery.[427] The belated (and by then compelled) response was forwarded to its counsel, who failed to forward the response to the requesting litigation party.[428] Without a hearing or a *Kozel* analysis, the trial court entered an order of dismissal with prejudice and attorney fees.[429] The case was reversed and remanded to the trial court with instructions to hold a hearing and apply the *Kozel* analysis to the facts therein discerned.[430]

*14.* Chappelle v. South Florida Guardianship Program, Inc.*, 169 So. 3d 291 (Fla. 4th Dist. Ct. App. 2015).*

The defendants, through counsel, argued that the trial court erred by entering a judicial default against them without considering the *Kozel* factors and without an opportunity for an evidentiary hearing.[431] The *Chappelle* appellate court confirmed the requirement of the trial court reviewing the *Kozel* factors but did not resolve whether there existed a need for an evidentiary hearing.[432]

*15.* Bank of America, N.A. v. Ribaudo*, 199 So. 3d 407 (Fla. 4th Dist. Ct. App. 2016).*

A bank resisted discovery orders, and as a result, the trial court dismissed the case against the mortgagor but did not provide

425. *Ham*, 891 So. 2d at 496–97.
426. *Id.* at 501–02.
427. Vista Saint Lucie Ass'n, Inc. v. Dellatore, 165 So. 3d 731, 733 (Fla. 4th Dist. Ct. App. 2015).
428. *Id.*
429. *Id.*
430. *Id.* at 735.
431. Chappelle v. S. Fla. Guardianship Program, Inc., 169 So. 3d 291, 293–94 (Fla. 4th Dist. Ct. App. 2015).
432. *Id.* at 295.

written *Kozel* findings.[433] The court announced its frustration with the process of the trial court and stated:

> We have held time and time again (and apparently must do so once more) that before a case can be dismissed as a sanction for a discovery violation, the trial court must consider the six factors established in *Kozel* to determine if dismissal is appropriate, and set forth explicit findings of fact in the order that imposes the sanction of dismissal.[434]

The *Bank of America* case may be considered the culmination point in discerning the substance and procedures required by Florida Rule of Civil Procedure 1.380, including various caselaw interpretations of that rule. Although Florida Rule of Civil Procedure 1.380 does not denote a documented statement of willful disdain for either the court or its process, the Supreme Court of Florida has on multiple occasions required such a specific determination on litigation-effecting or case-ending discovery orders.[435] Further, representing counsels should take the signal that winning a sanction motion will require the trial court consideration of the *Kozel* factors when the recalcitrance may be caused by the counsel's alleged, or even suspected malfeasance.[436]

*16.* EMM Enterprises Two, LLC v. Fromberg, Perlow & Kornik, P.A.*, 202 So. 3d 932 (Fla. 4th Dist. Ct. App. 2016).*

A litigation party failed to produce discovery, and, at a hearing on attorney's fees, the recalcitrant litigation party's counsel failed to appear.[437] That counsel later stated that the attorney fee hearing was mistakenly set in its firm calendar.[438] The trial court dismissed the litigation and the Fourth District Court of Appeal reversed, explaining the dismissal was unwarranted.[439] The appellate court said, "[w]hile we recognize there are cases where repeated negligence or refusal to comply with court orders may arise to willful, deliberate or contumacious behavior, no such

433. Bank of Am., N.A. v. Ribaudo, 199 So. 3d 407, 408 (Fla. 4th Dist. Ct. App. 2016).
434. *Id.* at 407 (internal citations omitted).
435. *See* Mercer v. Raine, 443 So. 2d 944, 944 (Fla. 1983).
436. *See* Kozel v. Ostendorf, 629 So. 2d 817, 818 (Fla. 1993).
437. EMM Enters. Two, LLC v. Fromberg, Perlow & Kornik, P.A., 202 So. 3d 932, 933 (Fla. 4th Dist. Ct. App. 2016).
438. *Id.*
439. *Id.* at 934.

circumstances exist in this record meriting dismissal."[440] One could assume the courts mean it when they say trial courts should apply a less severe sanction when such is a viable alternative.[441]

### *17.* Williams v. Prepared Insurance Co.*, 274 So. 3d 398 (Fla. 4th Dist. Ct. App. 2019).*

In *Williams*, the insurer moved to strike homeowners' pleadings and to impose sanctions after the homeowners' public adjuster repeatedly failed to appear for a deposition.[442] The insurance company, and ultimately the trial court, placed fault on the plaintiffs and their law firm for the adjuster's refusal to appear for a deposition.[443] The Fourth District Court of Appeal agreed with the plaintiffs and their law firm that they should not be held accountable for the failure of a non-party to appear for a deposition.[444] Additionally, the trial court failed to identify any rule or court order that the plaintiffs and their attorneys failed to obey.[445] The court reminded the Bar, "[w]hile sanctions are within a trial court's discretion, it is also well established that dismissing an action for failure to comply with orders compelling discovery is 'the most severe of all sanctions which should be employed only in extreme circumstances.'"[446]

### *18. Fourth District Court of Appeal Summary*

*Swindle* acknowledged that although Florida Rule of Civil Procedure 1.380 provided the trial court with the authority to dismiss a proceeding for failing to make discovery, such action required a finding of "refusal to obey the order" of the court.[447] Inability is not obduracy.[448] *Herold* pulls together many of the

440. *Id.* at 934 (citing *Mercer*, 443 So. 2d at 946).
441. Ham v. Dunmire, 891 So. 2d 492, 497 (Fla. 2004).
442. Williams v. Prepared Ins. Co., 274 So. 3d 398, 401–03 (Fla. 4th Dist. Ct. App. 2019).
443. *Id.* at 403.
444. *Id.* at 405–406.
445. *Id.* at 405.
446. *Id.* at 404 (citing *Ham*, 891 So. 2d at 495).
447. Swindle v. Reid, 242 So. 2d 751, 753 (Fla. 4th Dist. Ct. App. 1970) (citing Rashard v. Cappiali, 171 So. 2d 581 (Fla. 3d Dist. Ct. App. 1965)).
448. *See id.*, finding that:

> We deem it important to note that the order of dismissal in this 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. Instead, the court merely found that the

concepts previously determined by the various courts, including examining respect for court orders, its process, and that any sanction must measure the penalty against the importance of the information being sought by the discovery.[449] *Ferrante* stands for the proposition that merely ignoring your duties in discovery will make you sanctionable.[450] One must participate in litigation if made subject to it.[451] *Sunstream* emphasized the need for notice and a hearing when issuing sanctions.[452] *Mittleman* presented the argument that an inability to comply with a discovery order is not necessarily willful disdain for the court or its process.[453] *Schlitt* stands for the proposition that there is no utility in punishing a faultless plaintiff when their attorney is solely responsible.[454] *Carpenter* required certainty in findings, leading to litigation-effecting or case-ending discovery orders.[455] *Thomas* required the predicate of a court order, a coercive order, preceding a sanctioning order by the trial court.[456] *Tianvan* reversed the trial court sanctions because it failed to provide findings demonstrating willful or deliberate disregard for the trial court.[457] *Bennett* reminded the trial courts that when the conduct to be sanctioned involves actions by counsel, a *Kozel* analysis is required before sanctions may be set.[458] *Garvin* laid out the requirement that a motion for sanctions must be preceded by an order to compel discovery and then followed by a written explanation of the need for the sanctions.[459] Additionally, *Garvin* equated evasive or incomplete answers in discovery with failure to provide any

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plaintiff had shown an insufficient excuse for her failure to comply, a distinction which we feel to be significant.

449. *See* Herold v. Comput. Components Int'l, Inc., 252 So. 2d 576, 579–80 (Fla. 4th Dist. Ct. App. 1971).

450. *See* Ferrante v. Waters, 383 So. 2d 749, 751 (Fla. 4th Dist. Ct. App. 1980).

451. *Id.* (first citing E.Z.E., Inc. v. Little River Bank & Trust Co., 300 So. 2d 43 (Fla. 4th Dist. Ct. App. 1974); and then citing *Herold*, 252 So. 2d at 576).

452. Sunstream Jet Ctr. v. Lisa Leasing Corp., 423 So. 2d 1005, 1007 (Fla. 4th Dist. Ct. App. 1982).

453. *See* Mittleman v. Rowe Intern, Inc., 511 So. 2d 766, 767–68 (Fla. 4th Dist. Ct. App. 1987).

454. Schlitt v. Currier, 763 So. 2d 491, 483 (Fla. 4th Dist. Ct. App. 2000).

455. Carpenter v. McCarty, 810 So. 2d 1053, 1054 (Fla. 4th Dist. Ct. App. 2002).

456. Thomas v. Chase Manhattan Bank, 875 So. 2d 758, 760 (Fla. 4th Dist. Ct. App. 2004).

457. Tianvan v. AVCO Corp., 898 So. 2d 1208, 1209 (Fla. 4th Dist. Ct. App. 2005).

458. Bennett *ex rel.* Bennett v. Tenet St. Mary's, Inc., 67 So. 3d 422, 437 (Fla. 4th Dist. Ct. App. 2011).

459. Garvin v. Tidwell, 126 So. 3d 1224, 1230 (Fla. 4th Dist. Ct. App. 2012).

response.[460] *Heritage*, as in *Garvin*, was a sanction case where the trial court failed to hold a hearing and failed to consider the *Kozel* factors.[461] When requested, a formal hearing must be held, at which time the trial court likely will need to consider the *Kozel* factors.[462] *Vista* confirmed *Heritage*.[463] *Chappelle* was in support of undertaking a *Kozel* analysis, especially when the acts of counsel are brought into question, but left the issue of the nature of the hearing unresolved.[464] The *Bank of America* litigation shows us that the Florida trial court system is not doing well in adhering to the Rule and its caselaw.[465] This is shown when the *Bank of America* court states, "[w]e have held time and time again (and apparently must do so once more) that before a case can be dismissed as a sanction for a discovery violation, the trial court must consider the six factors established in *Kozel* to determine if dismissal is appropriate."[466] The *EMM Enterprises* appellate court alerted all to understand where no willful, deliberate, or contumacious behavior exists, there is no basis for case dismissal.[467] Finally, in *Williams,* the trial court had to resolve the issue that the other party's witness, a third-party independent appraiser, who repeatedly failed to show up for their deposition was not the obligation of the litigant, who should not be held accountable for the failure of a non-party, even though it was a party's independent appraiser.[468] In *Williams*, we find the genesis of a distinction emblematic of the Florida Rule of Civil Procedure 1.380 as developed since *Mercer*, *Wallraff*, *Tubero*, *Kozel*, and *Ham*: litigants should not be held sanctionable for the acts of third

460. *Id.* at 1227.

461. Heritage Circle Condo. Ass'n, Inc. v. Fla. Dep't of Bus. & Pro. Regul., Div. of Condos., Timeshares & Mobile Homes, 121 So. 3d 1141, 1143 (Fla. 4th Dist. Ct. App. 2013); *Garvin*, 126 So. 3d at 1229; Kozel v. Ostendorf, 629 So. 2d 817, 818 (Fla. 1993).

462. Vista St. Lucie Ass'n, Inc. v. Dellatore, 165 So. 3d 731, 734–35 (Fla. 4th Dist. Ct. App. 2015).

463. *Id.* at 735.

464. Chappelle v. S. Fla. Guardianship Program, Inc., 169 So. 3d 291, 295 (Fla. 4th Dist. Ct. App. 2015).

465. *See, e.g.*, Bank of Am., N.A. v. Ribaudo, 199 So. 3d 407, 408–09 (Fla. 4th Dist. Ct. App. 2016) (failing to reverse a sanction for a discovery violation where the trial court did not consider the *Kozel* factors).

466. *Id.* at 407.

467. EMM Enters. Two, LLC v. Fromberg, Perlow & Kornik, P.A., 202 So. 3d 932, 934 (Fla. 4th Dist. Ct. App. 2016).

468. Williams v. Prepared Ins. Co., 274 So. 3d 398, 401, 404 (Fla. 4th Dist. Ct. App. 2019).

parties, even those third parties scheduled to provide testimony and documentation on behalf of a litigant.[469]

Florida discovery enforcement rules will not be employed as weapons in litigation.[470] The discovery rules are to ensure the sharing of information, and that objective is singular and will be maintained.[471] This may indeed cause litigations to progress slower and may be more costly.[472] The discovery rules are for revealing facts, not a tactic to thwart the opponent's efforts.[473]

## K. Fifth District Court of Appeal Cases

### *1.* Johnson v. Allstate Insurance Co.*, 410 So. 2d 978 (Fla. 5th Dist. Ct. App. 1982).*

Plaintiff sued her insurance carrier for extended attributes in her policy.[474] In an interrogatory, she was asked to report her calculation process.[475] Her explanation was reported to be incomplete and evasive.[476] Plaintiff failed to expand her explanation in any response to a follow-up and third order for more detail.[477] The Fifth District Court of Appeal explained it affirmed the trial court's dismissal of the complaint because the plaintiff failed to comply with the trial court's repeated orders.[478] The

469. *Id.* at 401; FLA. R. CIV. P. 1.380 authors' comment 1967; Mercer v. Raine, 443 So. 2d 944, 945–46 (Fla. 1983); Wallraff v. T.G.I. Friday's, Inc., 490 So. 2d 50, 52 (Fla. 1986); Commonwealth Fed. Sav. & Loan Ass'n v. Tubero, 569 So. 2d 1271, 1273 (Fla. 1990); Ham v. Dunmire, 891 So. 2d 492, 499 (Fla. 2004).

470. Elkins v. Syken, 672 So. 2d 517, 522 (Fla. 1996).

471. *Id.*

472. The more costly concept would put the Rule's civil caselaw requirements in this Article in direct conflict with Florida Rule of Civil Procedure 1.010's "[t]hese rules shall be construed to secure the just, speedy, and inexpensive determination of every action."

This conundrum between more costs because of discovery malaise versus "inexpensive determination of every action" is one of the working purposes of the recommendations laid out in note 12, the objective of the Workgroup on Improved Resolution of Civil Cases, *to wit.,* to find and reveal recommendations that have "improved the management and resolution of civil cases in the federal court system and that, if adopted in Florida, would improve the resolution of civil cases." JMC, Workgroup, Imp. Reso. Civ. Cases, *supra* note 12, at 5.

473. HON. ANGELA J. COWDEN ET AL., FLORIDA HANDBOOK ON CIVIL DISCOVERY PRACTICE (2019).

474. Johnson v. Allstate Ins. Co., 410 So. 2d 978, 979 (Fla. 5th Dist. Ct. App. 1982).

475. *Id.*

476. *Id.*

477. *Id.*

478. *Id.* at 980.

appellate court saw the failure to respond to the second and third orders as being "willful and intentional."[479]

### *2.* Sanders v. Gussin*, 30 So. 3d 699 (Fla. 5th Dist. Ct. App. 2010).*

*Sanders* faced the issue of client versus attorney discovery recalcitrance head-on.[480] Two elderly women were in contention for ownership of a property in The Villages, Florida.[481] Discovery failures were initially accepted without sanctions because of a question of senility.[482] After further discovery failures, which may have been attributed to representing counsel, the complaint was dismissed.[483] In the end, however, the Fifth District Court of Appeal did not have the requisite information to determine whether the discovery failures were that of an ailing plaintiff or the functioning of her counsel.[484] Thus, the trial court's sanction of dismissal was quashed.[485] The appellate court took exception with the trial court for not undertaking a *Kozel* determination before entering its order of dismissal.[486]

### *3.* Wells Fargo Bank, N.A. v. Stahler*, 115 So. 3d 1105 (Fla. 5th Dist. Ct. App. 2013).*

Wells Fargo brought an action to reestablish a lost note and mortgage and to foreclose on real property.[487] The trial court agreed with the mortgagor and ordered the plaintiff bank to provide more responsive answers.[488] After the second set of responses proved equally deficient, the trial court dismissed the complaint with prejudice.[489] The Fifth District Court of Appeal stated in support of its reversal, "[t]he trial court erred in failing to include in its order a written finding of willful or intentional

479. *Id.* at 978.
480. Sanders v. Gussin, 30 So. 3d 699, 700 (Fla. 5th Dist. Ct. App. 2010).
481. *Id.* at 701.
482. *Id.* at 702.
483. *Id.* at 703.
484. *Id.*
485. *Id.* at 704.
486. *Id.*
487. Wells Fargo Bank, N.A. v. Stahler, 115 So. 3d 1105, 1106 (Fla. 5th Dist. Ct. App. 2013).
488. *Id.*
489. *Id.*

defiance of court authority."[490] The appellate court explained it did not necessarily equate "comply" with "willful or deliberate disregard."[491] The Fifth District Court of Appeal wrote, "a protracted history of discovery abuses, numerous motions to compel, prior sanctions by the trial court, patent prejudice to the opposing party, or other circumstances may support a finding of willful or deliberate disregard, but written findings are ultimately needed."[492]

### *4. Fifth District Court of Appeal Summary*

*Johnson* spoke right to the heart of all discovery orders.[493] In *Johnson,* the trial court ordered the production of better responses, and the deponent ignored the court order.[494] That amounted to willful disdain for the court or its process, or as stated in *Johnson*, was "willful and intentional."[495] *Sanders* determined that without a *Kozel* determination of liability, the appellate court could not assure it was not punishing the plaintiff for the improprieties of her counsel, i.e., the appellate court could not determine the plaintiff's willfulness from counsel malfeasance as displayed in the record.[496] *Wells Fargo Bank* stands for the proposition that willful or deliberate disregard of a court discovery order will be reversed on appeal if it is not accompanied by a written finding, delineating the discovery recalcitrance.[497]

The Fifth District Court of Appeal's cases require final sanctioning orders to be sufficiently presented so if brought up on appeal, the appellate court, will have sufficient insight into the litigation to make the proper determinations under *Mercer* and *Kozel*.[498]

490. *Id.* (citing Commonwealth Fed. Sav. & Loans Ass'n v. Tubero, 569 So. 2d 1271, 1273 (Fla. 1990)).
491. *Id.* at 1107.
492. *Id.* (citing Ham v. Dunmire, 891 So. 2d 492, 499 (Fla. 2004)).
493. *See* Johnson v. Allstate Ins. Co., 410 So. 2d 978 (Fla. 5th Dist. Ct. App. 1982).
494. *Id.* at 979.
495. *Id.* at 980.
496. Sanders v. Gussin, 30 So. 3d 699, 703–04 (Fla. 5th Dist. Ct. App. 2010).
497. *Wells Fargo Bank, N.A.*, 115 So. 3d at 1106–07.
498. *See id.*; *Sanders*, 30 So. 3d at 704–05; *Johnson*, 410 So. 2d at 979–80.

## *V. CONCLUSION*

Discovery may only claim what the deponent can provide from the deponent's assets or holdings. Florida Rule of Civil Procedure 1.010's instruction "to secure the just, speedy, and inexpensive determination of every action" is without importance to a trial court's decision in coercing resisted discovery. The caselaw explaining Florida Rule of Civil Procedure 1.380 is not focused on whether the lawsuit gives you a right to discovery, but on whether the court finds the information relevant and whether the relevant data supports a discovery order. Then, at least in Florida, it is not the failure to produce the document or other information, but the failure to follow a court order that will engender coercion to produce. Sometimes that disdain can be demonstrated outright, but it often can be displayed by several orders of the court not being provided for by the litigation adversary, demonstrating a lack of concern for litigation costs. Accordingly, the litigant seeking discovery enforcement must not only establish the recalcitrant deponent has not made a proper response to a relevant production request but must also show the extrinsic factors: (1) the recalcitrant litigant has not claimed a valid inability to produce; (2) there has been a demonstrated willful disdain for either the court or its process (by not obeying a discovery order); and (3) the proposed sanctions do not proportionally punish the recalcitrant too severely. So, per the third element, even if you prevail and obtain discovery, one may still need to defend an appeal that the adverse party was abused in the coerced production. Happy litigation.