

IN THE SUPREME COURT  
STATE OF FLORIDA

MANUEL ANTONIO GOVAYRA,

Defendant, Petitioner,

v.

DONALD S. STRAUBEL,

Plaintiff, Respondent. /

PETITION TO INVOKE DISCRETIONARY  
JURISDICTION TO REVIEW A DECISION  
OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT

BRIEF OF PETITIONER ON JURISDICTION

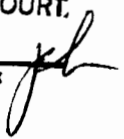
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**FILED**

SID J. WHITE

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CASE NO. 64,988

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CITATION OF AUTHORITIES

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STATEMENT OF THE CASE AND FACTS

Defendant, Petitioner, MANUEL ANTONIO GOVAYRA, (hereafter referred to as Petitioner or GOVAYRA), seeks to have reviewed a decision of the District Court of Appeal, Third District, dated and filed January 17, 1984. Petition for rehearing was denied on February 24, 1984.

The Petitioner was the original Defendant below and the Appellee before the District Court of Appeal. The Respondent, DONALD S. STRAUBEL, (hereafter Respondent or STRAUBEL) was the original Plaintiff in the trial forum and was the Appellant before the District Court of Appeal. This was an appeal by the Respondent from an Order of Dismissal for Want of Prosecution entered by the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida. The District Court of Appeal, Third District, reversed and remanded.

Respondent DONALD S. STRAUBEL initiated this action against Petitioner MANUEL ANTONIO GOVAYRA, seeking to recover damages as a result of an automobile accident between the parties. (Record at 1-2, hereafter referred to as "R, 1-2"). STRAUBEL subsequently noticed the case for trial. (Appendix p. 7). In June, 1980, the trial court entered its Order setting the cause for jury trial during the three week period beginning September 29, 1980 (R, 8).

On September 18, 1980, the parties filed a Stipulation for Continuance to alleviate the Respondent's lack of readiness for trial. (R, 9). On September 29, 1980, the trial court entered an Order which removed the cause from

the trial calendar commencing September 29, 1980 and further reciting:

"This cause shall be reset for trial upon further proper notice therefor."

(R, 12). [Emphasis supplied].

The cause was not noticed for trial and based upon the lack of record activity for a period far in excess of one year the trial court filed a Notice Preceding Order of Dismissal for Lack of Prosecution on February 16, 1983, (R, 16). The trial court dismissed the cause for lack of prosecution pursuant to Rule 1.420 F.R.C.P. when Respondent failed to show good cause why the cause should not be dismissed, (R, 18). The Order of Dismissal reflected that Respondent did not file a responsive pleading to the Notice Preceding Order of Dismissal, (R, 18). Respondent appealed the Order of Dismissal to the District Court of Appeal, Third District.

(R, 17).

QUESTION PRESENTED

WHETHER THE DECISION IN THE INSTANT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF THE DISTRICT COURT OF APPEAL, SECOND DISTRICT, HOLDING THAT A PLAINTIFF WHO FILES A NOTICE OF TRIAL AND INDUCES THE COURT TO SET THE CASE FOR TRIAL AND THEN OBTAINS A CONTINUANCE, CANNOT THEN RELY ON THE COURT'S ORDER CONTINUING THE CAUSE UNTIL A DATE TO BE ESTABLISHED BY THE COURT, TO SHOW GOOD CAUSE WHY THE CASE SHOULD NOT BE DISMISSED FOR LACK OF PROSECUTION AFTER A TWELVE-MONTH LAPSE IN RECORD ACTIVITY WHEN THE CAUSE WAS CONTINUED DUE TO THE PLAINTIFF'S LACK OF READINESS FOR TRIAL AND THE PLAINTIFF FAILS TO INDICATE TO THE COURT THAT THE CAUSE IS READY BY FILING A NEW NOTICE OF TRIAL.

## ARGUMENT

THE DECISION IN THE INSTANT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF THE DISTRICT COURT OF APPEAL, SECOND DISTRICT, HOLDING THAT A PLAINTIFF WHO FILES A NOTICE OF TRIAL AND INDUCES THE COURT TO SET THE CASE FOR TRIAL AND THEN OBTAINS A CONTINUANCE, CANNOT THEN RELY ON THE COURT'S ORDER CONTINUING THE CAUSE UNTIL A DATE TO BE ESTABLISHED BY THE COURT, TO SHOW GOOD CAUSE WHY THE CASE SHOULD NOT BE DISMISSED FOR LACK OF PROSECUTION AFTER A TWELVE-MONTH LAPSE IN RECORD ACTIVITY WHEN THE CAUSE WAS CONTINUED DUE TO THE PLAINTIFF'S LACK OF READINESS FOR TRIAL AND THE PLAINTIFF FAILS TO INDICATE TO THE COURT THAT THE CAUSE IS READY BY FILING A NEW NOTICE OF TRIAL.

The decision in the instant case is in express and direct conflict with the decision of the District Court of Appeal, Second District in Bogart v. F.B. Condominiums, decided on August 31, 1983 and reported in 438 So. 2d 856 (Fla 2d DCA, 1983). This Court has jurisdiction pursuant to Article V, Section 3(b) (3) of the Florida Constitution. The decision of the instant case on its face so collides with the decision in Bogart, supra, that it creates conflict among precedents. Kincaid v. World Insurance Co. 157 So. 2d 517 (Fla. 1963). In Bogart, the District Court of Appeal, Second District affirmed the trial court's dismissal for lack of prosecution under facts which were nearly identical to the facts of the instant case. Id.

In Bogart, a proper notice of trial was filed and the case was set for trial. Appellants' attorney then moved to continue the case because he was not adequately prepared for trial. Pursuant to appellants' motion, the Court entered an Order continuing the trial:

"until a date during the fourth quarter of 1978 or thereafter to be established by this Court."

Id. at 857. The case was never reset for trial. After a twelve-month lapse in record activity, the Court dismissed the case for lack of prosecution. Id.

In affirming the trial court's order, the Bogart court noted that after a proper notice of trial is filed, a party has no duty to take any affirmative action to prevent dismissal of the cause for failure to prosecute. Id. However, the Court reasoned that since the case was not tried on the appointed date because the appellants were not ready, it was incumbent upon the appellants to notify the court when the case was ready by filing a new notice of trial. Further the Court reasoned that any ambiguities created by the language of the trial court's Order continuing the case should have been dispelled when the trial was not set at the designated time pursuant to the court's Order. Id.

Finally, the Court in Bogart applied some common sense policy reasons for upholding the trial court's Order of Dismissal by stating:

While we adhere to our view that the filing of a proper notice of trial is sufficient to avoid a dismissal for lack of prosecution when an Order of trial is not forthcoming, we do not believe that a notice of trial once filed carries over beyond the setting of a trial date and subsequent Order of continuance. The caseload of our Courts is such that the parties must bear their share of the burden of seeing to a prompt disposition of the trial docket.

Id. at 857.



Bogart conflicts expressly and directly with the instant case because the decision in the instant case turns on the respondent's contention that he was misled into his post-continuance inaction by the language of the Order continuing the case, to-wit:

"this cause shall be reset for trial upon further proper notice therefor"

[R, 12] [Emphasis supplied] The District Court reasoned that the respondent was justified in believing that the Court had undertaken the responsibility of renoticing the case for trial by virtue of Florida Rule of Civil Procedure 1.440 (c) which authorizes a trial court to set an action for trial on its own motion. (Appendix p. 5). Consequently, the Court reasoned that the respondent had shown good cause why the action should remain pending and reversed the Order of Dismissal for failure to prosecute. Id.

The language of the Order continuing the cause in Bogart was susceptible to the interpretation that the trial court would undertake to reset the action for trial at a later date. However, the Bogart court dismissed the appellants' contentions that they were misled into inaction by the language of the Order of Continuance by reasoning that such a motion should have been dispelled when the trial was not set during the fourth quarter of 1978. Bogart, supra, at 857. Furthermore, the Bogart court recognized that the courts are very congested and a litigant should not rely on Florida Rule of Civil Procedure 1.440 (c) which authorizes a trial

court to set an action for trial on its own motion, by giving proper notice. Id. The Bogart court shifted the burden of monitoring the prompt disposition of the trial docket to the parties.

In contrast, the language of the Order Continuing the cause in the instant case is not susceptible to the interpretation that the trial court would undertake to reset the cause for trial. Nowhere in the Order does it state that the court below would take any action to reset the cause for trial.

Moreover, the Order continuing the case below was entered on September 25, 1980. [R,12]. The Order of Dismissal was entered on March 3, 1983. [R, 16]. Assuming, arguendo, that the Order of continuance below was susceptible to the interpretation that the trial court had assumed a share of the responsibility for noticing the case for trial, it was unreasonable for the respondent to believe that he was relieved of the duty of renoticing the cause for trial. Such a belief and consequent reliance by the respondent was unreasonable because the trial court had not renoticed the cause for trial for a period in excess of thirty (30) months and because the cause had been continued due to the respondent's lack of readiness for trial. The respondent was the only one who knew whether or not he was prepared for trial and it is only reasonable that the burden of noticing the case for trial should fall on the party who obtained a continuance because

he was unprepared. To hold otherwise is to impose an unreasonable burden on our already congested and overburdened trial courts. The dismissal of the case below should be affirmed based upon the principles espoused in Bogart, supra.

The decision in the instant case is cloaked with a suggestion of error and directly and expressly conflicts with Bogart, supra. Consequently, this Court should extend its discretionary jurisdiction to this cause to correct the error of this decision and to approve Bogart as the controlling law of this state.

CONCLUSION

The decision of the District Court of Appeal, Third District, that the Petitioner, MANUEL ANTONIO GOVAYRA, seeks to have reviewed is in direct and express conflict with the decision of the District Court of Appeal, Second District in the case of Bogart v. F.B. Condominiums, 438 So. 2d 856 (Fla 2d DCA, 1983).

Because of the reasons and authorities set forth in this brief, it is submitted that the decision in the present case is erroneous and that the conflicting decision of the District Court of Appeal for the Second District is correct and should be approved by this Court as the controlling law of this state.

The Petitioner, therefore, requests this Court to extend its discretionary jurisdiction to this cause, and to enter its Order quashing the decision and Order hereby sought to be reviewed, approving the decision of the District Court of Appeal of Florida, Second District, as the correct decision, and granting such other and further relief as shall seem right and proper to this Court.

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By   
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Victor E. Rocha

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 30th day of March, 1984, to RICHARD F. O'BRIEN, III, ESQ., Hall and O'Brien, P.A., Attorneys for Plaintiff, Respondent, Suite 200, Brickell Concourse, 1401 Brickell Avenue, Miami, Florida 33131.

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