THE SUPREME COURT OF FLORIDA

FLORIDA PATIENT'S COMPENSATION FUND,

Petitioner,

v.

CASE NO. 69,062

BARBARA JEAN GANT, et vir.,

Respondents.

* DCA Case no. BI-182

TALLAHASSEE MEMORIAL REGIONAL MEDICAL CENTER, ET AL.,

Petitioners,

v.

CASE NO. 69,063

BARBARA JEAN GANT, et vir.,

Respondents.

_____/

PETITIONER, FLORIDA PATIENT'S COMPENSATION FUND'S, INITIAL BRIEF

August 18, 1986

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PRELIMINARY STATEMENT

This case involves a trial court order dismissing the plaintiffs' cause of action by granting the motion to dismiss for lack of prosecution jointly filed by two of the defendants. The same order denied the other defendant's motion to dismiss for lack of prosecution as being one day prematurely filed. The plaintiffs appealed the dismissal and the First District Court of Appeal reversed, holding that the early filed motion constituted record activity sufficient to preclude a dismissal under Fla. R. Civ. P. 1.420(e).

The basis claimed for the Court's jurisdiction is a conflict of the First District's opinion with prior decisions of the Second and Third District Courts of Appeal.

The petitioner/defendant, Florida Patient's Compensation Fund, will be referred to as the "Fund." The petitioner/defendants, Tallahassee Memorial Regional Medical Center and A. D. Brickler, M.D., will be referred to as "TMRMC" and "Brickler," respectively. The respondent/plaintiffs will be referred to as the "Gants." A certified copy of the First District Court of Appeal's decision is contained in Appendix A. and will be referred to as (App. A).

STATEMENT OF THE CASE AND OF THE FACTS

In February, 1984, the Gants filed a medical malpractice complaint against TMRMC, Brickler and The Fund in Leon County Circuit Court (case no. 84-432). It is undisputed that the last record activity in the case prior to the motions to dismiss herein involved was a notice of deposition filed on May 18, 1984. On May 20, 1985, the Fund filed a motion to dismiss for lack of prosecution pursuant to Rule 1.420(e), Fla. R. Civ. P. On May 21, 1985, TMRMC and Brickler jointly filed a similar motion, and the Gants filed an Amended Complaint.

On May 24, 1985, the Gants responded to the motions alleging, inter alia, that good cause existed for their failure to prosecute because Brickler's insurance carrier had been in receivership during most of the one-year period of inactivity and was unable to defend or act on any cases. The Gants also alleged that the Fund's motion was filed on the last day of the one year period, and was thus premature. The Gants further alleged that since their Amended Complaint was filed on the same day as the TMRMC/Brickler motion, there was sufficient record activity to preclude dismissal.

After a hearing on the motions, the trial court entered an order denying the Fund's May 20, 1985, motion as being untimely filed, and granting the May 21, 1985, TMRMC/Brickler motion, thereby dismissing the case. The Gants appealed the order of dismissal, and the First

District Court of Appeal reversed. The Court held that the trial court did not abuse its discretion in finding that the status of Dr. Brickler's insurance carrier was not good cause for their failure to prosecute.

However, the Court held that the Fund's prematurely filed motion constituted record activity sufficient to toll the one year period provided in the rule, thus rendering the granting of the later filed TMRMC/Brickler motion erroneous as a matter of law.

The First District did not address whether the Plaintiffs' Amended Complaint filed the same day as the TMRMC/Brickler motion was sufficient activity to toll the one year period.

Citing to Rule 9.030(a)(2)(A)(iv), Fla. R. App. P., the First District certified that its decision expressly and directly conflicts with a decision of another district court of appeal on the same question of law. See (App. A).

SUMMARY OF ARGUMENT

The Court should accept jurisdiction of this case because of the significant procedural problems that will result if the conflicting district court decisions are left to stand.

In 1976, Rule 1.420(e) was amended to provide that only activity of record may be used to defeat a motion to dismiss for lack of prosecution. Not only must the activity be of record, but case law interpreting the rule has also required that the actions be in furtherance of the prosecution of the case, and designed to hasten the suit to judgment. This necessarily implies that such actions must be in pursuit of a decision on the merits of the case.

Because a motion to dismiss for lack of prosecution hinders rather than furthers the prosecution of a case, it cannot be construed as activity of record for purposes of defeating a Rule 1.420(e) dismissal. Such a motion does not lead to a decision on the merits of the case and, therefore, an early filed motion in no way advances the case toward resolution.

Rule 1.420(e) creates a unique situation in that it prescribes no time limits within which a motion to dismiss for lack of prosecution may be filed. Hence, there is no such thing as a "prematurely" filed motion. The trial court erred in denying the Fund's motion on the basis that it was filed early. The motion was not heard until after one year had elapsed without any activity of record.

ARGUMENT

I. THE FIRST DISTRICT'S OPINION EXPRESSLY AND DIRECTLY CONFLICTS WITH PREVIOUS DECISIONS OF TWO OTHER DISTRICT COURTS OF APPEAL ON THE SAME QUESTION OF LAW.

In its opinion, the First District Court of Appeal certified that its decision expressly and directly conflicts with a decision of the Second District Court of Appeal on the same question of law. However, the First District neglected to mention that its decision also expressly and directly conflicts with a decision from the Third District Court of Appeal, which cites with full approval the Second District decision on the same question of law.

In the en banc decision of Fleming v. Barnett Bank of East Polk County, 490 So.2d 126 (Fla. 2nd DCA 1986), the Second District held that a prematurely filed motion to dismiss for lack of prosecution is not record activity sufficient to toll the one year period provided in Rule 1.420(e), Fla. R. Civ. P.

In Fleming, the defendant filed a motion to dismiss for lack of prosecution three months before the expiration of the one year period provided in the rule. After the expiration of the one year period, a hearing was held on the defendant's early motion and the trial court dismissed the action.

On appeal, the Second District reversed the dismissal, holding that for purposes of Rule 1.420(e), the defendant's prematurely filed motion to dismiss was a nullity. Therefore, since no other pleading had been filed,

the trial court improperly dismissed the cause. The Second District seemingly requires the Defendant to file a new motion to dismiss at the expriation of the one year period.

Moreover, the Second District specifically addressed the question of whether the prematurely filed motion to dismiss constitutes record activity sufficient to toll the one year period. The Fleming Court stated:

> The concern which prompted our en banc hearing is the principal that record activity sufficient to preclude dismissal must be an affirmative act that is reasonably calculated to hasten the suit to judgment. Harris v. Winn Dixie Stores, Inc., 378 So.2d 90 (Fla. 1st DCA 1979). A motion to dismiss for failure to prosecute which is premature does not fall within this category, it does not achieve the termination of the litigation and, for purposes of the rule, the premature motion is a nullity. We, therefore, recede from the statement in Johnson v. Mortgage Investors of Washington, supra, [410 So.2d 541 (Fla. 2d DCA 1982)], that a prematurely filed motion to dismiss for lack of prosecution constitutes record activity.

In Johnson, id., a case almost factually identical to the case sub judice, one of the defendants filed a motion to dismiss for lack of prosecution on the last day of the one year period provided in the rule. The Second District reversed the dismissal, holding that the one day premature motion constituted record activity sufficient to preclude dismissal.

However, the Second District "receded" from its holding in Johnson, id. and therefore, Fleming is now controlling law in the Second District.

In the instant case, the First District held that a motion to dismiss for lack of prosecution filed one day

before the one year period of inactivity has passed constitutes record activity sufficient to preclude dismissal. Suffice it to say that the First District expressly certified that its decision expressly and directly conflicts with Fleming. These two opinions are obvious conflicts on the same question of law in this important area of procedure.

It is important to note that the Third District reached a similar conclusion in the recently decided case of Inman, Inc. v. Miami Dade Water and Sewer Authority, 489 So.2d 218 (Fla. 3rd DCA 1986).

In Inman, the relevant dates are as follows: On April 26, 1984, a settlement stipulation was filed with the court; in November, 1984, the defendant filed a premature motion to dismiss for lack of prosecution; in January, 1985, the trial court entered an order denying the November, 1984, motion; on May 7, 1985, the defendant filed another motion to dismiss for lack of prosecution, which was granted.

On appeal from the dismissal, the Third District held that neither the early filed motion to dismiss for lack of prosecution nor the order denying that motion constitutes record activity sufficient to preclude the entry of an order dismissing the cause for lack of prosecution pursuant to a second, timely filed motion to dismiss. Moreover, the Third District cites with full approval the Second District's conclusion in Fleming. The Inman Court did not address the

holding in Fleming that a premature motion, being a nullity, could not be acted upon by the court after one year of activity. This was because in Inman, the defendant filed a second motion to dismiss after the one year period expired, which was granted. The Inman Court elaborated on the effect of a premature motion by stating:

> A motion to dismiss for lack of prosecution is undeniably record activity. However, because the goal of the motion is to terminate the cause, the motion is the antithesis of activity reasonably calculated, as it must be, "to advance the cause to resolution." (citation omitted). And, just as a court order designed to spur activity is held not to constitute affirmative record activity advancing the cause, (citations omitted), a court order, as here, which rejects the defendant's request to terminate the prosecution, although concededly not impeding the cause, does absolutely nothing to advance it. 489 So.2d at 219

Accordingly, the First District's decision in the instant case expressly and directly conflicts with the Third District's decision in Inman.

II. THIS COURT SHOULD ACCEPT JURISDICTION IN THIS CASE TO RESOLVE THE CONFLICT BETWEEN THE DISTRICTS IN THIS IMPORTANT FIELD OF PROCEDURE.

The purpose of this Court's conflict jurisdiction is to resolve inconsistent judicial opinions which cause uncertainty about a particular question of law. As this court noted in Sroczyk v. Fritz, 220 So.2d 908, 911 (Fla. 1969), the rationale for the court's conflict jurisdiction is to resolve such inconsistencies, and when these inconsistencies present themselves for review it is this court's duty to resolve them.

The Sroczyk Court stated:

> If we leave Adams, Little and the District Court opinion in this case on the books, together with other decisions (footnote omitted) on the same subject, there will be irreconcilable statements of law in this important field of procedure which will inevitably cause uncertainty and confusion to the bar, the trial courts and the district courts of appeal.
>
> It is just such areas of uncertainty in the law developed by inconsistent judicial opinions that makes necessary the conflict jurisdiction of this court. When the conflict is of such degree and in an area of such importance in the conduct of litigation as is here presented, this court should take jurisdiction and attempt to express the law in such clear language as to discourage further litigation. 220 So.2d at 911

The constitutional test for this court accepting jurisdiction is whether the decision of the district court on its face collides with a prior decision of another district court on the same point of law so as to create an inconsistency or conflict among the precedents. Kincaid v.

World Insurance Co., 157 So.2d 517, 518 (Fla. 1963) (citing Ansin v. Thurston, 101 So.2d 808 (Fla. 1958), Nielsen v. City of Sarasota, 117 So.2d 731 (Fla. 1960).

It is clear that there is substantial conflict between the district, which, if left on the books, will cause uncertainty and confusion among the bar, the trial courts and the district courts of appeal alike.

Therefore, based on the foregoing arguments, the petitioner respectfully requests that this court accept jurisdiction in this case.

III. THE EARLY FILING OF A MOTION TO DISMISS FOR LACK OF PROSECUTION DOES NOT CONSTITUTE ACTIVITY OF RECORD.

A. For Activity to be Record, It Must Advance the Case Toward a Conclusion on its Merits.

Prior to 1976, Rule 1.420(e) provided that a case could be dismissed for lack of prosecution only where there had been no activity for a year or more. At that time, "activity" could be either record or non-record actions as long as they were ostensibly designed to move the case toward a resolution. Rapport v. Weisberg, 316 So.2d 73 (Fla. 3rd DCA 1975). However, the Supreme Court, even under the old Rule 1.420(e), appeared to require that the actions be designed to assist in moving the case forward toward a decision on the merits, not simply a dilatory action. This Court held, in Musselman Steel Fabricators, Inc. v. Radziwon, 263 So.2d 221 (Fla. 1972), that the "act of sending photographic copies of exhibits by defense counsel to plaintiff's counsel here is similar action which moves the case without resort to the courtroom, and correspondingly hastens the suit toward judgment." 263 So.2d at 223.

The Musselman Steel decision speaks in terms of moving the case to the courtroom, which necessarily implies toward a decision on the merits. Thus, under the old Rule 1.420(e), even non-record activity had to move a cause toward a decision on the merits in order to prevent dismissal for neglect.

In 1976, Rule 1.420(e) was amended to provide that a motion to dismiss for lack of prosecution could be granted only if there had been no activity of record for a period of one year. Record activity which has been held sufficient to preclude dismissal varies from one appellate decision to the next, but generally the decisions focus on whether the action taken is designed to move the case forward toward a conclusion on the merits. See Nelson v. Stonewall Insurance Co., 440 So.2d 664, 665 n. 2 (Fla. 1st DCA 1983) (listing cases which define record activity that has been held sufficient and insufficient to preclude dismissal pursuant to Rule 1.420(e)).

The trial court below determined that the motion to dismiss for lack of prosecution was not activity of record sufficient to preclude dismissal. This decision was in keeping with the general theme of cases construing Rule 1.420(e) that the activity must be one which is designed to hasten the suit to judgment. Harris v. Winn Dixie Stores, Inc., 378 So.2d 90 (Fla. 1st DCA 1979). Since a motion to dismiss would terminate the action, it can hardly be said to hasten the suit to judgment on the merits.

It is noteworthy that the primary decision that Respondents relied on in the District Court in support of their position that a motion to dismiss for lack of prosecution is activity of record has been overturned. In Fleming v. Barnett Bank of East Polk County, 490 So.2d 126 (Fla. 2nd DCA 1986), the Second District receded from its

position in an earlier decision, Johnson v. Mortgage Investors of Washington, 410 So.2d 541 (Fla. 2nd DCA 1982), which held a motion to dismiss for lack of prosecution filed before the expiration of the one year period of inactivity precluded dismissal. In Fleming, the Court determined in an en banc proceeding that a motion to dismiss for lack of prosecution is not an activity which is designed to hasten a suit to judgment and therefore is not activity of record sufficient to preclude dismissal pursuant to Rule 1.420(e). Implicit in the court's opinion was the finding that in order for an activity to be of record sufficient to preclude dismissal pursuant to Rule 1.420 (e), such activity must be designed to advance the cause on its merits. Because a motion to dismiss for lack of prosecution concludes rather than advances the cause, the Court's determination that it is not activity of record is proper.

The reasoning of the Second District in Fleming was adopted and clarified by the Third District in Inman, Inc. v. Miami Dade Water and Sewer Authority, 489 So.2d 218 (Fla. 3rd DCA 1986). In Inman, the Court did not go so far as to call the motion to dismiss filed before the expiration of the one year period a nullity, but simply found that the motion did not advance the cause to judgment and was therefore not sufficient to preclude dismissal. The Inman decision reflects the same underlying consideration regarding advancing a cause on its merits, i.e., an activity must move the matter toward resolution on its merits, otherwise it cannot preclude dismissal.

The holdings in Fleming and Inman are consistent with many other decisions on the types and character of filings that are considered record activity for purposes of a Rule 1.420(e) motion. Courts have not been willing to allow a case to languish for long periods of time and then kept alive by some activity whose sole purpose is to prevent a dismissal pursuant to Rule 1.420(e). For example, in Overseas Development, Inc. v. AmeriFirst Federal Savings and Loan Association, 433 So.2d 587 (Fla. 3rd DCA 1983), pet. for rev. dismissed, 438 So.2d 833 (Fla. 1983), the Court held that the filing of a motion for corporate name change, and an order granting same, was not activity of record sufficient to preclude dismissal pursuant to Rule 1.420(e). The Court stated that in order to defeat a Rule 1.420(e) motion, there must be action taken which was "reasonably calculated to advance the case toward resolution." 433 So.2d at 589.

Obviously, the Courts have been concerned that cases are not being moved quickly enough, and to permit a case to be kept alive without any significant movement toward resolution is not consistent with the meaning and purpose of Rule 1.420(e). The Courts have also taken into consideration the level of activity occurring in the file when trying to determine whether certain actions are consistent with a lack of file activity.

In Karcher v. F.W. Schinz and Associates, 487 So.2d 389 (Fla. 1st DCA 1986), the Court held that a single interrogatory, the only file activity for more than a year,

was not sufficient to preclude dismissal pursuant to Rule 1.420(e). In evaluating the case, the Court looked at the minimal prosecution which had occurred prior to the motion to dismiss, and determined that the action by the plaintiff was simply a feeble attempt to keep the case active. The Court clearly intended that an action must be designed to advance the case on its merits, which a motion to dismiss for lack of prosecution does not accomplish.

One major fallacy in the First District Court's reasoning in Gant relates to the character of the so-called "conclusion" that results from a dismissal by way of a motion to dismiss for lack of prosecution. A dismissal pursuant to Rule 1.420(e) does not conclude the case at all. Such a dismissal is without prejudice, thereby permitting the plaintiff to immediately refile his claim (assuming the statute of limitations has not run). This begins the entire legal process over again, from service of the summons and complaint, to the filing of motions directed to the complaint, discovery, and so forth.

Thus, the holding below that an early filed motion to dismiss for lack of prosecution is activity of record because it hastens the suit to a "conclusion" is somewhat misleading when viewed in terms of the options available to a claimant. If the granting of a Rule 1.420(e) motion to dismiss was always with prejudice, then unquestionably such an outcome would conclude the case. However, no such conclusion automatically results, and it is not appropriate

to find an early filed motion to dismiss for lack of prosecution activity of record on this basis.

When a case has been left to collect dust in the clerk's file cabinet for a year, Courts should be unwilling to create legal fictions that permit the matter to languish even longer. This would frustrate the laudable purpose of Rule 1.420(e) which is :

(1) To require prompt and efficient prosecution of the case up to the point of submission for disposition or determination by the judge or judges.

(2) To prevent the clogging of dockets of the trial courts with litigation that has been essentially abandoned for the stated period. Harris v. Winn Dixie Stores, Inc., 378 So.2d 90 (Fla. 1st DCA 1979).

B. A Rule 1.420(e) Motion to Dismiss Does Not Advance a Cause.

Only those activities that are designed to move the case forward on its merits are appropriately considered activity of record. This has always been implicit in the appellate decisions interpreting Rule 1.420(e), including the decisions of the First District. For example, in Nelson v. Stonewall Insurance Company, 440 So.2d 664 (Fla. 1st DCA 1983), the First District held that a sua sponte order of the Court to show cause why an action should not be dismissed for lack of prosecution did not constitute activity of record sufficient to defeat a motion to dismiss. As was noted in the Court's opinion:

> The purpose of the rule is to expedite litigation and keep the Court dockets as current as possible, and it is Plaintiff's responsibliity to expedite his litigation. 440 So.2d at 665.

The Nelson opinion clearly states that for activity in a case to be considered sufficient to preclude a Rule 1.420(e) dismissal, the action must further the prosecution of the case. This is clearly in keeping with the obvious purpose of the rule which is to prevent claims from sitting untouched for an extended period of time.

The reasoning of the First District in Nelson should apply with equal force to a similar motion filed by a party, since the purpose and effect is no different. There is no basis upon which to distinguish a motion to dismiss for lack of prosecution filed by the Court versus the same motion filed by a party. Both accomplish the same purpose, i.e., to remove cases from the Court docket that have been abandoned. Contrary to the position taken in Gant, a Rule 1.420(e) motion does not advance a cause but hinders it, regardless of whether the motion is filed by the court or a party. As the Inman Court stated,

> [B]ecause the goal of the motion is to terminate the cause, the motion is the antithesis of activity reasonably calculated, as it must be, 'to advance the cause to resolution.' 489 So.2d at 219

The Gant decision creates a double standard with regard to an early filed motion to dismiss for lack of prosecution. If the motion is filed by the Court, the action is not activity of record, but if the motion is filed by the party, it is activity of record. Such a dual standard creates needless confusion in the law and leads to absurd results by

elevating form over substance. The most logical decision is to apply the same standard in every case involving an early filed motion to dismiss for lack of prosecution, whether filed by the court or a party. That standard, as announced in Inman and Fleming, is that an early filed motion to dismiss for lack of prosecution is not activity of record sufficient to preclude dismissal pursuant to Rule 1.420(e) for the reasons cited above.

Ironically, the First District, in a footnote in the Nelson decision, suggested it had "doubts" about whether the Johnson decision (which held an early filed motion to dismiss for lack of prosecution was record activity), was based on sound reasoning. 440 So.2d at 665(n. 3). The Nelson Court was not required to reach the issue of whether a motion to dismiss for lack of prosecution was record activity, but clearly from the footnote, left the impression that it would agree with the position ultimately taken by the Second District in Fleming. Surprisingly, the impression given in Nelson was not correct.

In addition to the requirement that an activity be for the purpose of resolving the case on its merits, this Court, in Gulf Appliance Distributors, Inc. v. Long, 53 So.2d 706 (Fla. 1951), adopted the position that "activity of record" means actions taken by the plaintiff which are designed to bring a case to a conclusion. Quoting from a Louisiana Supreme Court decision, this Court stated that activity of record means:

> An active measure taken by plaintiff, intended and calculated to hasten the suit to judgment. 53 So.2d at 707. (citing Augusta Sugar Company Limited v. Haley, 112 So. 731, 732 (La. 1927.)

The Gulf Appliance Distributors decision affirmed the responsibility of the court to rid itself of stale claims that are not being actively prosecuted by a plaintiff.

Taken to its logical conclusion, the First District's decision in Gant would recognize virtually any activity which appears in the record as sufficient to preclude a Rule 1.420(e) dismissal. Not only is this position improper, but it goes against the work this and other Courts have done to encourage lawyers and judges to move cases through the judicial system expeditiously and without unnecessary delay. This Court should resist any attempts to broaden the time frames and requirements for moving a case to a conclusion on its merits.

IV. DENIAL OF THE FUND'S MOTION TO DISMISS FOR LACK OF PROSECUTION WAS IMPROPER.

The trial court determined that the Fund's motion to dismiss for lack of prosecution was filed before the expiration of the one year period of inactivity, and, therefore denied it as prematurely filed. It is undisputed, however, that the hearing on the early filed motion was not held until after one year had lapsed without any record activity. In the absence of any intervening record activity between the date of filing of the motion to dismiss for lack of prosecution and the running of the one year period, the Court improperly denied the Fund's motion.

The Courts decision to deny the Fund's motion on the basis of its prematurity is not compelled by statute, rule or case law. Unlike, for example, Rule 1.510 Fla. R. Civ. P., which does not permit a claimant to move for summary judgment until after the expiration of twenty days from the commencement of the action, or, after service of a motion for summary judgment by the adverse party, no such restrictions exist under Rule 1.420(e). The Rule provides as follows:

> All actions in which it appears on the face of the record that no activity by filing of pleadings, order of court or otherwise has occurred for a period of one year shall be dismissed by the court on its own motion or on the motion of any interested person, whether a party to the action or not . . .

There are no limitations on when the motion to dismiss for lack of prosecution can be filed. Clearly, if the motion were filed and called up for hearing before the expiration of one year of inactivity, the court would be

required to deny it. Zentmeyer v. Ford Motor Company, Inc., 464 So.2d 673 (Fla. 5th DCA 1985). However, to deny the motion to dismiss for lack of prosecution solely on the basis that it was filed before the expiration of the one year period of inactivity, notwithstanding that the motion was not heard until after the one year period had lapsed, is not compelled by rule or statute, and is unsupported by case law. Fleming v. Barnett Bank of East Polk County, 490 So.2d 126 (Fla. 2nd DCA 1986), (Lehan, Judge, Concurring in Part and Dissenting in Part).

It is a waste of judicial time to require a party who files a motion to dismiss for lack of prosecution before the expiration of the one year period of inactivity to refile the same motion after the one year is complete. Because the motion was not called up for hearing until the conclusion of the one year period, and, there was no intervening record activity, the trial court should have dismissed the action on the Fund's motion.

Obviously, by filing a motion to dismiss for lack of prosecution before the expiration of the one year period without record activity, the movant is risking the possibility that there may be intervening record activity which would preclude the granting of the motion. However, in the absence of such record activity, once the one year period expired, the motion was timely and should have been granted.

Judge Lehan, in his partial dissent in the Fleming decision, points out the variety of instances where the law

gives effect to a prematurely filed document or pleading after the happening of a subsequent event. To hold that a early filed motion to dismiss for lack of prosecution is a nullity is not consistent with this court's recent efforts to streamline the judicial process and expedite the clearing of crowded court dockets.

Additionally, a careful reading of Rule 1.420 (e) seems to place a motion to dismiss for lack of prosecution in a unique, legal category. Such a motion asks the court to look at a file and make a determination that no activity of record has occurred for a period of one year. Because a motion to dismiss for lack of prosecution simply invokes the application of Rule 1.420(e), it cannot be considered as proof of the existence of activity that would preclude dismissal. Such a conclusion is consistent with other decisions of this Court that have rejected circular reasoning that leads to absurd and illogical results.

For example, this Court has consistently rejected the opinions of experts in medical malpractice cases when the basis for the opinion is the opinion itself. As this Court stated in Arkin Construction Company v. Simpkins, 99 So.2d 557, 561 (Fla. 1957), "the basis for a conclusion cannot be deduced or inferred from the conclusion itself. The opinion of the expert cannot constitute proof of the existence of the facts necessary to the support of the opinion." This circular reasoning which has been rejected in medical malpractice cases requires, in a similar manner, rejection of the theory that an early filed motion to dismiss for lack

of prosecution pursuant to Rule 1.420(e) constitutes proof of the existence of the essential fact necessary to compel denial of the motion. There must be facts, i.e., pleadings, independent of the motion itself that form the requisite activity of record that requires denial of the Rule 1.420(e) motion.

CONCLUSION

Based on the foregoing argument, the Fund respectfully submits that the Supreme Court should accept jurisdiction of this matter, and reverse the decision of the First District Court of Appeal. The Court should find that an early filed Motion to Dismiss for Lack of Prosecution that invokes a Rule 1.420(e) review is not activity of record and cannot be used to defeat the very relief that it seeks. The Fund's Motion was not heard until after the expiration of one year without record activity, and therefore should be granted.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) bound copies of the foregoing Initial Brief of Petitioner, Florida Patient's Compensation Fund, have been HAND DELIVERED to the Clerk of the Supreme Court, Tallahassee, Florida, and that a true and correct copy of same was delivered by U.S. Mail to John D. Buchanan, Esq., 118 South Monroe Street, Tallahassee, Florida, and to Harold Regan, 308 East College Avenue, Tallahassee, Florida 32301 this 18th day of August, 1986.

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