

THE SUPREME COURT OF FLORIDA

FLORIDA PATIENT'S COMPENSATION
FUND,

Petitioner,

CASE NO. 69,062

v.

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,
REPLY BRIEF**

September 19, 1986

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ARGUMENT

A Motion to Dismiss for Lack of Prosecution Is Not
Activity of Record Sufficient To Preclude a Rule
1.420(e) Dismissal.

Respondents urge this Court to adopt the position that the filing of a Motion to Dismiss for Lack of Prosecution on or before the expiration of one year, without intervening record activity, mandates dismissal of the Motion. Respondent's argument in support of their position seems to be that a Motion to Dismiss for Lack of Prosecution is record activity because such a motion is (1) a document that is (2) filed in a case and which (3) causes activity to occur in response to the Motion.

The essence of Respondents' argument is that a Motion to Dismiss for Lack of Prosecution "advances" a cause toward resolution because if the motion is granted, the case is terminated. The absurdity of this reasoning is self evident and compels rejection of the Gant's position.

Respondents cite Inman, Inc. v. Miami Dade Water and Sewer Authority, 489 So.2d 218 (Fla. 3rd DCA 1986) for the proposition that a Motion to Dismiss for Lack of Prosecution constitutes activity of record. While the Inman decision does in fact contain a statement that a Motion to Dismiss for Lack of Prosecution is an

"activity of record", the conclusion of the Court was that this is not the type of record activity which precludes a Rule 1.420(e) dismissal. In concluding that a Motion to Dismiss for Lack of Prosecution filed before the expiration of one year from the last record activity was not activity preventing subsequent dismissal, the Inman Court adopted the position taken by the Second District Court of Appeal in Fleming v. Barnett Bank of East Polk County, 490 So.2d 126 (Fla. 2d DCA 1986).

While Respondent's brief does not specifically address the issue, it is apparent that their position is that the appellate cases that speak of activities designed to advance a case toward a conclusion, resolution or disposition, do not refer to a conclusion, resolution or disposition on the merits. The Fund urges this Court to reject this ill-reasoned argument. A careful reading of the cases and the application of common sense lead to the inescapable conclusion that any action, to be considered activity sufficient to defeat a Rule 1.420(e) Motion, must advance a case toward a decision on the merits. Even adopting Gant's definition of what is meant to "advance" a cause leads to rejection of their argument. It cannot be argued that a Motion to Dismiss for Lack of Prosecution moves the case "forward in position time or place." (Respondent's Brief at 5) The case is moved back rather than forward if the Motion is granted, and, if the Motion is denied, the case goes nowhere.

Respondents also suggest that if an early filed Motion to Dismiss for Lack of Prosecution is not construed as activity sufficient to defeat a Rule 1.420(e) Motion, a shrewd defendant could trick an unwary plaintiff into inaction by filing such a motion at or near the expiration of one year of inactivity. This argument is totally devoid of merit. If a Motion to Dismiss for Lack of Prosecution is held to be activity of record, then the early filing of the Motion is self-defeating. If the Motion is held not activity of record, then the plaintiff would be alerted by the filing of the Motion that some activity designed to move the case toward a resolution on the merits must occur before the expiration of one year, or the case will be dismissed. In either instance, the conniving defense lawyer would provide the unsuspecting plaintiff's lawyer with the ammunition necessary to defeat the motion. This is a non-issue raised by Respondents, and fails to support their argument.

CONCLUSION

This Court should adopt the position taken by the Second and Third Districts that an early filed Motion to Dismiss for Lack of Prosecution does not constitute proof of the existence of activity that precludes dismissal for lack of prosecution pursuant to Rule 1.420(e). This would frustrate the purpose and intent of Rule 1.420(e) and would do nothing to expedite litigation.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) bound copies of the foregoing Reply 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 19th day of September, 1986.



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