SUPREME COURT OF FLORIDA

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By

TALLAHASSEE MEMORIAL REGIONAL
MEDICAL CENTER, INC.; A.D. BRICKLER, M.D.;
AND FLORIDA PATIENT'S COMPENSATION FUND,

Defendants/Petitioners.

vs.

DCA CASE NO. BI-182
SUPREME COURT CASE NO.: 69,063

BARBARA JEAN GANT and
LEON GANT, JR.,
her husband,

Plaintiffs/Respondents.

_____/

INITAL BRIEF OF PETITIONERS TALLAHASSEE MEMORIAL REGIONAL MEDICAL CENTER, INC. AND A.D. BRICKLER, M.D. ON APPEAL FROM THE CIRCUIT COURT, SECOND JUDICIAL CIRCUIT, LEON COUNTY, AND THE FIRST DISTRICT COURT OF APPEAL

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PRELIMINARY STATEMENT

Plaintiffs/Respondents will hereinafter be referred to as Gant. Defendants/Petitioners will hereinafter be referred to as TMRMC, Brickler, and The Fund.

STATEMENT OF THE CASE

Gant filed a Complaint on February 13, 1984, alleging negligent supervision of an intern, negligent monitoring of gestational diabetes, negligent control of a diagnosed condition and negligent monitoring of the size and condition of the fetus after diagnosing gestational diabetes.

The Fund filed its Answer and Affirmative Defenses and Motion to Strike. TMRMC and Brickler filed their Motion to Dismiss.

On May 18, 1984, TMRMC filed a Notice of Filing Deposition. On May 20, 1985, The Fund filed a Motion to Dismiss for Failure to Prosecute. On May 21, 1985, TMRMC and Brickler filed their Motion to Dismiss for Failure to Prosecute and Gant filed an Amended Complaint. On May 24, 1985, Gant filed a Response to Motion to Dismiss for Lack of Prosecution.

On July 30, 1985, the Honorable Donald O. Hartwell entered the Court's Order granting the Motion to Dismiss for Lack of Prosecution filed by TMRMC and Brickler but denying the Motion to Dismiss for Lack of Prosecution filed by The Fund on the basis that the granted Motion was timely filed but the Motion that was denied was untimely filed. The Court further denied Gant's Motion for Leave to File Amended Complaint.

From this Order, Gant filed a Notice of Appeal and urged the Court to rule that the untimely filing of a Motion to Dismiss for Failure to Prosecute by a Defendant constitutes record activity contemplated in Rule 1.420(e), Florida Rules of Civil Procedure, and that the Court should reverse the decision of the trial court dismissing the action as against defendants TMRMC and Brickler.

On June 20, 1986 the Court filed the opinion in this case holding that the Motion to Dismiss filed prematurely by the Fund was "record activity" sufficient to toll the one year period provided in the rule thereby reversing the trial court and reinstating Gant's case against TMRMC and Brickler.

Upon issuing this opinion, the Court certified conflict with a decision of another Court of Appeal on the same question of law and this appeal was taken to this Court by TMRMC and Brickler.

STATEMENT OF THE FACTS

BARBARA JEAN GANT was treated by TMRMC and Brickler for a pregnancy which was diagnosed about June 2, 1980. At said time, GANT was further diagnosed as having gestational diabetes, Class B. GANT'S baby was delivered dead on September 13, 1980.

JURISDICTIONAL STATEMENT

The decision rendered by the First District Court of Appeal in this case, Gant vs. Tallahassee Memorial Regional Medical Center, Inc., A.D. Brickler, and Florida Patients Compensation Fund, 11 F.L.W. 1391 (Fla. 1st DCA June 20, 1986) has been certified as expressly and directly conflicting with the decision of another district court of appeal on the same issue of law, i.e., Fleming v. Barnett Bank of East Polk County, 11 F.L.W. 1110 (Fla. 2nd DCA May 9, 1986).

By virtue of the direct conflict which has been certified, this Court may and should assume jurisdiction pursuant to either Rule 9.030(a)(2)(A)(iv) or Rule 9.030(a)(2)(A)(vi) Florida Rules of Appellate Procedure.

The narrow issue of law presented by this appeal has been construed contradictorily by different Courts. The issue of law which is directly addressed in the aforementioned decisions is whether a Motion to Dismiss for Failure to Prosecute pursuant to Rule 1.420(e) Fla. R. Civ. P. constitutes record activity so as to toll the running of the one year period of time specified therein and preclude the dismissal of an action pursuant to that rule for another 366 days.

Not only is it proper under the Appellate Rules that this court assume jurisdiction and decide the matters presented herein, but it is appropriate that this point of law be clearly decided and thus provide a consistent guide for all courts of this state. As shown elsewhere in this brief, there appear to be relative inconsistancies, reversals, or splits of opinion within the same districts and between districts.

Resolution of the issue presented in this appeal would make consistent the standards and rights to be applied and recognized in the courts of this State. A uniform and well defined rule provided by this Court establishing the rights and responsibilities of litigants and their attorneys will have the long term effect of reducing both judicial and litigant labor and put the bar and judiciary on clear notice of the proper application of this rule.

SUMMARY OF ARGUMENT

TMRMC and Brickler urged the Court to reverse the determination of the First District Court of Appeal that a defendant's Motion for Failure to Prosecute constitutes record activity contemplated in Rule 1.420(e) Florida Rules of Civil Procedure. In reversing the trial court, the Appellate Court largely ignored the underlying purpose and the rationale of judicial decisions construing the rule.

Examination of the language of the rule and judicial interperations thereof lead to the inescapable conclusion that the rule is designed to require the Plaintiff to pursue and prosecute the cause of action in an effort to prepare it for judicial resolution and that failure to do so should result in dismissal unless good cause can be shown. In addition to requiring the timely resolution of causes before the Court, this rule is desgined to reduce overcrowding of court dockets.

ARGUMENT

ISSUE:

DOES THE UNTIMELY FILING OF A MOTION TO DISMISS FOR FAILURE TO PROSECUTE CONSTITUTE RECORD ACTIVITY AS CONTEMPLATED BY RULE 1.420(e), FLORIDA RULES OF CIVIL PROCEDURE

The ruling of the First District Court of Appeal which affects TMRMC and Brickler and for which review in this Court is sought is the ruling that a Motion to Dismiss for Failure to Prosecute constitutes "record activity" referred to in Rule 1.420(e) Florida Rules of Civil Procedure and thereby recommences the running of the one year period specified in the Rule.

Gant, in her brief filed with the District Court of Appeal, urged that the Johnson v. Mortgage Investors of Washington, 410 So.2d 541, (Fla. 2nd DCA 1982) decision should control. In Johnson, it was ruled that a Motion to Dismiss for Failure to Prosecute constituted record activity. However, during the pendency of this appeal, the Second District Court of Appeal, proceeding en banc, reversed itself and held that such a motion does not constitute record activity. Fleming v. Barnett Bank of

East Polk County , 11 F.L.W. 1110 (Fla. 2nd DCA May 9, 1986)

The Court further held that such a motion is not an "affirmative act reasonably calculated to hasten the suit to judgment," and that such activity is required to preclude dismissal. Id. Ironically, the Second District cites Harris v. Winn-Dixie Stores, Inc., 378 So.2d 90 (Fla. 1st DCA 1979) in support of its ruling.

As stated by the First District Court of Appeal in the Gant opinion, the operative question determining the propriety of the trial court's dismissal of the action against TMRMC and Brickler is "whether the Fund's (pre-mature Motion to Dismiss for Failure to Prosecute) constituted 'record activity' so that granting the TMRMC/Brickler motion, filed on May 21, was improper." The Appellate Court then acknowleged that not all types of record activity will defeat such a motion and cited as support for this proposition Overseas Development, Inc vs. Amerifirst Federal Savings and Loan, 433 So.2nd 587,589 (Fla. 3rd DCA 1983).

In the Gant decision, the Court does not actually define "record activity", nor does it define "record activity" which is sufficient or insufficient to defeat a Motion to Dimiss for Failure to Prosecute. Rather, the Court cites a number of cases which provide judicial definitions of "record activity" as under

Rule 1.420(e) and concludes that those definitions do not indicate that "such activity must further a decision on the merits of a case, only that it further the conclusion thereof." The Court then cites their own decision, Nelson vs. Stonewall Insurance Company Co., 440 So.2d 664,665 (Fla. 1st DCA 1983), stating that "the purpose of the Rule is to expedite litigation and keep the Court's docket as current as possible." This case, however, seems worthy of more attention than merely extracting a single quote. Therein the Court also found that:

> the purpose of the rule is to expedite and keep the court dockets as current as possible, and it is plaintiff's responsibility to expedite his litigation...
>
> (W)e have reviewed a number of Appellate decisions which approve and disapprove dismissal for failure to prosecute. Our reading of these decisions indicates that the record action held necessary to prevent a Rule 1.420(e) dismissal not only substantially further the prosecution of the case but, also, was initiated either by a party to the action or by a Court Order entered in response to a party's notice or motion that advanced the cause. Id. at 665 (emphasis added)

In Nelson, the Court ruled that a sua sponte order to show good cause why an action should not be dismissed for lack of prosecution was not "record acitivity" sufficient to preclude dismissal. In this case the parties had stipulated to use December 18, 1981 as the date of last record activity prior to the Court's sua sponte order of December 14, 1982. On January

11, 1983 the Defendants moved to dismiss the action pursuant to Rule 1.420(e), Florida Rules of Civil Procedure. The Plaintiff's position was that the sua sponte order of December 14, 1982 constituted record action that prevented dismissal and recommenced the running of the one year period under the Rule.

A Motion to Dismiss for Failure to Prosecute may be taken "by the Court on its own motion or on the motion any interested person". Rule 1.420(e) Fla. R.Civ.P. Thus, the sua sponte motion and order in Nelson and the motion by the interested parties, TMRMC/Brickler and the Fund, have their genesis in the same rule, the same sentence, and the same language. It would seem patently inconsistant and illogical to find that the motion when made by the Court did not constitute "record activity" and the motion when made by an interested party did constitute "record activity". See also Chemical Bank of New York v. Polakov, 448 So.2d 1148 (Fla. 4th DCA, 1984).

In a footnote in the Nelson decision the Court indicated that it felt this matter was distinguishable from Johnson, supra, relied upon by Gant and the Appellate Court. The Court stated that it had "doubts about the validity" of treating a Motion To Dismiss For Failure To Prosecute as "record activity". Nelson, supra, at 665

Deeper examination of the cases cited by the Appellate Court in support of its determination that a Motion to Dismiss for Failure to Prosecute constitutes record activity indicates that the courts which rendered the respective rulings cited would not agree.

In Harris, supra, the Court concluded that a Notice of Deposition, although the deposition was later cancelled, and the filing of an Answer to the Third Amended Complaint constituted record activity. The Court also cited the two-fold purpose of this rule as specified in Strader v. Morrill, 360 So.2d 1137 (Fla. 1st DCA 1978)

> (1) To require prompt and efficient prosecution of the case up to the point of submission for disposition or determination by the judge or jury.
>
> (2) To prevent the clogging of dockets of the trial courts with litigation that has been, essentially, abandoned for the statutory period. Harris, at 92.

The instant situation is not analagous to the Harris, supra situation, and the dicta in Harris supports the notion that a Defendant's Motion to Dismiss For Failure to Prosecute does not constitute record activity:

> ...the court does have the power to

> examine the activity of record to determine if such are, in fact, calculated to move the case toward trial and disposition ... Id. at 94.

In the cited case of Grooms v. Garcia, 482 So.2d 407 (Fla. 2nd DCA 1985), the parties agreed that the one year period under Rule 1.420(e), Fla. R. Civ.P. expired on August 1, 1984, one year after filing motions for summary judgment. On July 25, 1984, a Notice of Hearing was filed by the Defendant scheduling a hearing on all pending motions for Sepember 18, 1984. The Court held that the Plaintiff's Notice of Hearing satisfied the requirement of record activity and was calculated to move the case toward conclusion. This Notice of Hearing is reflective of underlying activity to resolve the legal and factual issues presented in the cause of action. This is not akin to a motion seeking to remove an abandoned or neglected case from an overcrowded docket.

Overseas Development, supra, which has already been addressed, held that a motion filed by the Plaintiff reflecting a previously accomplished name change of the Defendant did not constitute affirmative record activity and that not all types of record activity will defeat a Motion to Dismiss for Failure to Prosecute. The Court went on to state:

> (I)t has long been held that a mere passive effort to keep an action on the docket of a court by the filing of motions or orders which are not

> reasonably calculated to hasten the suit to judgment does not constitute affirmative record activity sufficient to defeat an otherwise proper motion to dismiss for lack of prosecution under Fla.R.Civ.P. 1.420(e). Id. at 588. (emphasis added)

In Gulf Appliance Distributors, Inc. v. Long, 53 So.2nd 706, 707 (Fla. 1951) the Court held, as cited by the First District Court of Appeal, that record activity sufficient to defeat a later such motion to dimiss "means some active measure taken by plaintiff, intended and calculated to hasten the suit to judgment." (emphasis added)

It is a tenuous suggestion indeed that it be concluded based upon the cited cases that a Motion to Dismiss for Failure to Prosecute constitutes record activity. In fact and law, the opposite conclusion is appropriate.

Moving beyond the preceeding case authorities, the Rule should be given its intended and logical effect. The pertinent part of Rule 1.420 (e) Fla. R. Civ.P. reads 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, ...

The question now posed is does such a motion even constitute a pleading. According to Blacks Law Dictionary (5th Ed., 1979), probably not:

> Pleadings. The formal allegations by the parties of their respective claims and defenses.
>
> Rules or Codes of Civil Procedure. Unlike the rigid technical system of common law pleading, pleadings under federal and state rules or codes of civil procedure have a far more limited function, with determination and narrowing of facts and issues being left to discovery devices and pre-trial conferences. In addition, the rules and codes permit liberal amendment and supplementation of pleadings.
>
> Under rules of civil procedure the pleadings consist of a complaint, an answer, a reply to a counterclaim, an answer to a cross-calim, a third party complaint, and a third party answer. Fed.R.Civil P. 7(a) ...

A Motion to Dismiss for Failure to Prosecute is not a formal allegation of a claim or defense, nor does it frame facts and issues for trial; rather, it asserts that the Plaintiff has abandoned or neglected his claim to the point that it should be dismissed. Rule 1.100(a) Fla. R. Civ. P. also provides a definition of pleadings:

> (a) Pleadings: There shall be a complaint or, when so designated by

> a statute or rule, a petition, and an answer to it; an answer to a counterclaim denominated as such; an answer to a cross-claim if the answer contains a cross-claim; a third party complaint if a person who was not an original party is summoned as a third party defendant and a third party answer if a third party comlaint is served. If an answer or third party answer contains an affirmative defense and the opposing party seeks to avoid it, he shall file a reply containing the avoidance. No other pleadings shall be allowed.

The drafters of Rule 1.420(e) may not have intended such a literal construction but it is clear that a Defendant's motion of this nature is not the type of action which will toll the time for the purposes of this Rule.

The Committee Note following Rule 1.420(e) Fla. R.Civ. P. reads as follows:

> 1976 Amendment. Subdivision (e) has been amended to prevent the dismissal of an action for inactivity alone unless one year has elapsed since the occurrence of activity <u>of record</u>. Non-record activity will not toll the one year time period. (emphasis contained in note)

The note states, as the Rules strongly suggests, that activity is required and that activity must be of record. Thus, neither activity which is not of record nor the mere filing of documents constitute requisite activity.

The documents entered into the record must be reflective of underlying activity and do not per se constitute the activity. A Motion to Dismiss for Failure to Prosecute is not reflective of any underlying activity but rather reflects an absence of underlying activity. The claim that such a motion constitutes record activity is inconsistant logically and with the Rule.

Final issue must be taken with the ruling in Gant that the subject motion is record activity because it furthers the conclusion of the case. This would be true only in actions where refiling is precluded by the running of the statute of limitations. A dimissal pursuant to Rule 1.420(e) is not with predjudice nor is it on the merits. Harrison v. Griffin, 443 So.2d 499 (Fla. 1st DCA 1984). Further analysis shows The Fund's motion in this case incapable of furthering the conclusion of this case because it is premature and as such, can not be granted; in fact, such an untimely motion has been characterized as a nullity having no effect whatsoever. Fleming, supra, at 1110.

CONCLUSION

Although the subject rule may be described many different ways, the underlying principle is apparent. In instances where a Plain ff abandons or neglects his case as demonstrated by failure to actively pursue the action for a period of one year, that action should be dismissed upon motion by the Court or an interested party. The rationale for this rule is presented in detail in the cited cases and the preceding arguments.

The petitioners, TMRMC and Brickler, seek the reversal of the decision by the First District Court of Appeal that a Motion to Dismiss for Failure to Prosecute constitutes record activity as contemplated by Rule 1.420(e) Florida Rules of Civil Procedure and the reinstatement of the decision of the trial court dismissing Gant's action against the Defendants TMRMC and Brickler.

Respectfully submitted this 18 day of August, 1986.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Inital Brief of Petitioners Tallahassee Memorial Regional Medical Center, Inc. and A.D. Brickler, M.D. on Appeal from the Circuit Court, Second Judicial Circuit, Leon County, and the First District Court of Appeal has been furnished to Harold E. Regan, 308 E. College Avenue, Tallahassee, Florida 32302 and Craig A. Dennis, Collins, Dennis & Williams, Post Office Box 550, Tallahassee, Florida 32302, this 18 day of August, 1986.

JOHN D. BUCHANAN, JR.

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