THE SUPREME COURT OF FLORIDA

FLORIDA PATIENT'S COMPENSATION FUND,
Petitioner,

vs.

BARBARA JEAN GANT, ET VIR.,
Respondents.
* * * * * * * * * * * * * * * * * * *

CASE NO. 69,062

FILED
SEP [illegible] 1986
CLERK, SUPREME COURT
By _____
DCA CASE NO. BI-182

TALLAHASSEE MEMORIAL REGIONAL
MEDICAL CENTER, INC., ET.AL.,
Petitioners,

vs.

BARBARA JEAN GANT, ET VIR.,
Respondents.

CASE NO.: 69,063

_____/

PETITIONER, TALLAHASSEE MEMORIAL REGIONAL MEDICAL CENTER
REPLY BRIEF

JOHN D. BUCHANAN, JR.
EDWIN R. HUDSON

Henry, Buchanan, Mick
& English, P.A.
Post Office Drawer 1049
Tallahassee, Florida 32302
September 29, 1986

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT

THE PREMATURE FILING OF A MOTION TO DISMISS FOR FAILURE TO PROSECUTE DOES NOT CONSTITUTE ACTIVITY OF RECORD AS CONTEMPLATED BY RULE 1.420(e), FLORIDA RULES OF CIVIL PROCEDURE

The respondents have argued that a Rule 1.420(e) Fla. R. Civ. P. Motion to Dismiss for Failure to Prosecute constitutes record activity sufficient to preclude dismissal but have provided little rationale for this position other than the assertion that such a motion by a Defendant "advances or furthers a cause to conclusion, resolution or disposition."

As indicated in the Petitioners' intitial briefs, the activity to which the rule speaks is activity which goes to the merits of the case. The burden of prosecution of the cause is upon the plaintiff and only the plaintiff may prosecute its cause; thus, it is absolutely untenable that a defendants Motion to Dismiss for Failure to Prosecute should toll the running of time of the plaintiffs inaction.

The respondents go on to suggest that their interpretation is needed to protect "unsuspecting plaintiffs." This argument conveniently meets the need of the respondents but has no basis in law. The courts have made it clear:

> ... mere inadvertence or misimpressions and erroneous assumptions of plaintiff's counsel in not prosecuting a cause for a period of one year does not constitute good cause why the action should remain pending. Industrial Trucks of Florida vs. Gonzalez, 351 So 2d 744 (Fla. 3 DCA 1977)

In Industrial Trucks, the Court held that the filing of a Notice of Substitution of Counsel did not constitute affirmative case activity sufficient to preclude dismissal.

CONCLUSION

This court should adopt the clear and logical interpretation of Rule 1.420(e) set forth by the Second and Third Districts, an interpretation clearly supported by dicta in many First District decisions. To adopt the position advanced by the respondents would frustrate the clear purpose and intent of the rule to expedite litigation and preclude the clogging of court dockets.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ha been furnished by U.S. Mail to Craig A. Dennis, Collins, Dennis & Williams, Post Office Box 550, Tallahassee, Florida 32302, and Harold Regan, 309 East College Avenue, Tallahassee, Florida 32301, this 29th day of September, 1986.

JOHN D. BUCHANAN, JR.
EDWIN R. HUDSON

Henry, Buchanan, Mick
and English, P.A.
Post Office Drawer 1049
Tallahassee, Florida 32302
(904) 222-2920
Attorneys for Petitioners
Tallahassee Memorial Regional
Medical Center, Inc., and
A. D. Brickler, M.D.