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IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,299

THE PUBLIC HEALTH TRUST OF DADE COUNTY, FLORIDA, d/b/a JACKSON MEMORIAL HOSPITAL, THE UNIVERSITY OF FLORIDA, a non-profit corporation; THE UNIVERSITY OF MIAMI, d/b/a UNIVERSITY OF MIAMI DIAGNOSTIC CLINIC, MADLEENE M. SAWYER, M.D.; TILO GERHARDT, M.D.; GEORGE BIKAJZI, M.D.; STEVEN GOLDMAN, M.D.; CEDARS OF LEBANON HOSPITAL; ANTONIO LOPEZ-VEGA, M.D.; M. JO D'SULLIVAN, M.D., and R.N. GOLDBERG, M.D.,

Petitioners,

vs.

MANUEL C. DIAZ, Individually and as the Father of DIANA MARGARITA DIAZ, a Minor; MANUEL C. DIAZ and EMILIA BEATRIZ DIAZ-FOX, as Trustees and or Legal Guardians for DIANA MARGARITA DIAZ; BARBARA DIAZ, Individually and as the Mother of DIANA MARGARITA DIAZ,

Respondents.

ON PETITION FOR REVIEW
FROM THE DISTRICT COURT OF
APPEAL FOR THE THIRD DISTRICT

ANSWER BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF CITATIONS

Other authorities:

INTRODUCTION

This is a petition for review from the decision of the Third District Court of Appeals, which reversed the trial court's dismissal of this cause for lack of prosecution. The decision of the Third District is reported at Diaz v. Public Health Trust, 492 So.2d 1082 (Fla. 3d DCA 1986).

The original cause of action herein is a medical malpractice complaint which was filed based upon the brain damage sustained by the Appellant/Plaintiff, Diana Margarita Diaz, at or about the time of her birth. Diana is the niece of the undersigned. The Plaintiffs will, therefore, be referred to collectively or by the single appellation, the "Plaintiffs." The present suit was filed against ten (10) defendants who will be referred to collectively as the "Defendants." The principal defendants, Jackson Memorial Hospital, the University of Miami and Cedars of Lebanon Hospital in their various capacities will be referred to individually as "Jackson," "University," and "Cedars" respectively. The remaining defendants are specific physicians and will be referred to by their last names.

The following symbol will be used throughout this brief:

(R) for the District Court Record-on-Appeal consisting of Pages R1-R298.

I

STATEMENT OF THE CASE

Both of the Defendants' Statements of the Case and Facts are inaccurate, incomplete, fail to make proper record citations and are constantly embellished with argumentative characterizations and non-record references. The Plaintiffs would therefore properly restate the facts and proceedings herein in their entirety.

On April 11, 1983, the Plaintiffs filed a lengthy complaint alleging that as a direct and proximate result and solely because of the negligence of the Defendants, Diana Margarita Diaz suffered severe and permanent brain damage prior to, during, and subsequent to her birth on April 11, 1981. See, R1-R9. The Plaintiffs, however, were not even aware that Diana Margarita Diaz had any brain damage until a year later in about April of 1982 after clinical tests at Children's Variety Hospital in Miami. See, R218-R219 (Answer 19C). It was not until almost another year later in April of 1983 after conferences with the Miami medical malpractice firm of Colson and Hicks that the Plaintiffs were aware that Diana's brain damage could have been caused by the malpractice of the Defendants. See, R10. Said firm was therefore retained to represent the Plaintiffs. See, id. However, on or subsequent to April 16, 1984, Colson and Hicks declined to pursue Diana's Complaint. See, Id.

On April 11, 1984, the trial court signed a standard order threatening to dismiss the present cause for lack of prosecution but did not file it. See, R13. This document was not filed until May 15, 1984. See, Id. Prior to May 15th, the undersigned filed a pleading entitled, "Showing of Good Cause Why Complaint Should not be Dismissed," expressing the Plaintiff's efforts and desire to proceed with this matter. See, R10-R11. The trial court met with Emilia Diaz Fox and discussed extensively the status of the present cause, including the severe disability she had experienced with her first pregnancy at the age of thirty-three. This proceeding was not recorded. Then, on May 15, 1984 the trial court referring to, "the Plaintiffs' showing of good cause filed on May 8, 1984" (Emphasis added), declined to dismiss this cause and issued an order giving the Plaintiffs thirty (30) days to serve the Defendants. See, R12. This period of time was extended for an additional seventy-five (75) days in subsequent orders entered by the present trial judge, R16, and Judge Joseph Farina, R19. The first order granting an extension was filed simultaneously on May 15th with the order which suggested dismissal for lack of prosecution. See, R12, R13.

Subsequently, except for the Defendant, Lopez-Vega, all of the Defendants were served with the Plaintiff's Complaint. See, R20-R40. Goldman, Goldberg, Sullivan and Sawyer each filed a Motion to Quash. See, R84; R93; R96; R99. Cedars and Jackson each filed Motions to Dismiss. R48-R49; R55. Cedars' Motion

to Dismiss was specifically predicated upon an allegation that the alleged "two year" statute of limitations had expired before the Complaint was filed. See, R48-R49. Cedars' Motion was denied on November 5, 1984. See, R109. Cedars also filed a Motion for Judgment on the Pleadings raising the same grounds. See, R105-R106. This was also denied by a written order filed on December 19, 1984. See, R122-R123. The University, Bikhazi and Gerhardt each filed Answers to the Complaint. See, R42-R43; R50-R54; R87-R92.

Relevant to this proceeding on December 17, 1984, the University through the appearance of attorney Henry Burnett[1/] filed a pleading entitled, "Motion for Summary Judgment." See, R113. In said motion the University complained like Cedars, that the two year statute of limitations had run and that the action should be dismissed for lack of prosecution. See, Id. However, University's real complaint was that it was not served with the present Complaint until September 24, 1984. See, R120-R121 (affidavits). On January 14, 1985, the Defendants, Bikhazi and Gerhardt also filed identical motions through Jackson's attorney, Laura Pearson. See, R131-R135. Cedars also filed a Motion for Summary Judgment on other grounds, which have never been heard. See, R192-R209; R283-R284; R277.

On April 15, 1985, after a brief hearing with only Burnett and the undersigned present, the trial court announced that

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1. Burnett is a former law partner of the present trial judge, Phillip Knight. See, Martindale-Hubbel (1980).

it would deny University's Motion for Summary Judgment, but that it would grant University's request to dismiss for lack of prosecution. See, R210; R279; R280; R282; R288. In Judge Phillip Knight's written order, which was submitted by Burnett over the objections of the undersigned and filed on April 25, 1985, the Court dismissed the present cause as to all defendants. See, Id.; R296-R298. The written order recites that the cause is dismissed for lack of prosecution, nunc pro tunc to the year-old order and Notice of Dismissal, discussed above:

> "That the Order of this Court entered May 14, 1984, be, and the same is hereby vacated, and this cause be, and the same is hereby dismissed, nunc pro tunc, for lack of prosecution pursuant to Rule 1.420(e) of the Florida Rules of Civil Procedure."
>
> R298

The alleged basis in said order for rehearing this matter a year later upon the grounds for lack of prosecution, was an alleged error in the law. See, R297 (paragraph beginning: "It is the further considered opinion . . . ")

On May 6, 1985, the Plaintiffs filed a Motion for Rehearing. See, R285. Attorney Burnett then apparently without difficulty scheduled a hearing for May 15, 1985 with Judge Knight's approval, but, subsequently cancelled it. See, R286; Supplemental Record (letter of May 15, 1985). On the other hand, when the undersigned attempted to reschedule said motion, Judge Knight beligerently refused to reset it, and initially wrote, "pet rehng denied" on the face of the letter from the undersigned, but then marked it out. See, Id. Attorney

Burnett without apparent difficulty then reset the cause for May 29, 1985. See, R289. On said date, Judge Knight summarily denied the Plaintiffs' Motion for Rehearing in a written order without a hearing and then tried to hold the undersigned in contempt of court when she objected. No other relevant matters were then heard in this cause. See, R283-R284 ("Status Report"). The trial court has never taken any evidence or testimony in any proceeding to date. As noted above, Cedar's claim that a two year statute of limitations had expired herein as to all defendants prior to service of process, was litigated and rejected by both the trial court and the parties on November 28, 1984, five (5) months prior to the present bizarre turnabout. See, R104-R105 (Motion for judgment on the pleadings); R122 (letter to the Court conceding that the limitation period had not run); R123 (order denying judgment on the pleadings). No rehearing nor appeal was taken from said order. Thus, the trial Court spun like a top not once herein, but twice from two prior orders denying dismissal, with the only "new" fact being the party and attorney raising the issue.

On appeal to the Third District Court of Appeal, the Court reversed the foregoing dismissal, finding that it was an abuse of discretion. See, Diaz v. Public Health Trust, 492 So.2d 1082 (Fla. 3d DCA 1986). The Court first decided that the trial court did have the inherent authority to consider vacating its prior interlocutory order. Id, at 1084. As a preliminary matter to the issue of good cause, the Court observed that dismissals for lack of prosecution are not favored and judicial

restraint should be exercised in favor of adjudication of a case on its merits. See, id. As to the issue of good cause the Court observed that an attorney's claim of protracted disability has been held to be good cause to avoid a dismissal for lack of prosecution. The Court also noted that the uncontradicted testimony herein demonstrated that counsel was pregnant and unable to practice law on a full-time basis for at least six (6) months because of difficulty with her condition. The Court then, however, also noted that the mere fact of pregnancy alone would not have been sufficient as cause to avoid dismissal. The Court concluded that, in any event, the trial court had abused its discretion in reversing its original order in the present circumstance:

> "Our disposition of the case turns on another point. We hold that the trial court abused its discretion in waiting eleven months before vacating its order staying the dismissal and dismissing the action, based on no new supportive evidence. During that eleven-month hiatus plaintiffs' counsel relied on the original ruling and furthered the cause by serving the defendants. After the defendants were served, and responded with motions and discovery, plaintiffs became exposed to liability for attorney's fees and costs pursuant to section 768.56, Florida Statutes (1983). The trial court's dismissal of the action, following an eleven-month postponement of a decision on the motion to dismiss, during which periods the plaintiffs, with the court's permission, served the defendants, prosecuted the action and thereby became exposed to additional costs, constituted an unfair exercise of discretion."
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> Id, at 1085.

The Court also rejected University's cross-appeal which claimed that the delay in service of process somehow caused the statute of limitations to expire anyway:

> "By cross-appeal from the denial of the motion for summary judgment on statute of limitations grounds, defendant the University contends that plaintiffs could not stay the running of the statute by merely filing a complaint on the last day before the period for filing would expire, where service on the defendants was delayed for an unreasonable length of time. Szabo v. Essex Chemical Corp., 461 So.2d 128 (Fla. 3d DCA 1984), which defendant suggests should be revisited, is controlling. There we held that an action was commenced with the filing of a complaint, Fla. R. Civ. P. 1.050, which tolled the statute of limitations notwithstanding that there was no service of process on the defendants until some twenty months later. Delayed service of process raises a legal question of due diligence in prosecuting the claim or may raise equitable issues. However, Szabo, by which we are bound, holds that a protracted delay in service of process, where a complaint is otherwise timely filed, does not raise a statute of limitations question."
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> Id.

Judge Baskin, concurred with the Court's judgment that there was an abuse of discretion. See, id. However, Judge Baskin disagreed with the Court's finding of "good cause" based upon the disabilities arising from counsel's pregnancy. Judge Baskin contended that the record was silent as to what degree of disability was demonstrated aside from the normal pregnancy. See, id. As noted above, however, the lengthy discussion of the pregnancy and the special disability herein was made between Judge Knight and the undersigned at the original hearing in May

of 1984. It was also undisputed that the child in question was born five (5) months into the period of alleged inactivity herein.

On August 4, 1986, the District Court denied rehearing and rehearing en banc. Id, at 1082. The present proceeding follows. This Court has not set oral argument herein. However, this cause is not so simple as the Defendants contend. There may be an extra ordinary conflict in policies herein and a great complexity of issues, including the life of a maimed child at stake. This Court should not therefore decide the rights and liability of the parties on less than a full presentation to the Court. The undersigned has therefore requested oral argument and would urge this Court to permit the same.

II.

QUESTIONS PRESENTED

FIRST ISSUE

WHETHER THIS COURT HAS JURISDICTION IN THIS CAUSE

SECOND ISSUE

WHETHER THE DEFENDANTS HAVE SHOWN ANY ERROR IN THE PRESENT DECISION TO REVERSE THE TRIAL COURT'S DISMISSAL

III.

SUMMARY OF ARGUMENT

1. The Defendants in their jurisdictional briefs flooded this Court with endless speculative hyperbole about the present decision of the district court. However, the decision is based only upon a very ordinary finding that the trial judge abused his discretion. Furthermore, the decision does not present the required conflict with any other district court decision or this Court's decisions. Jurisdiction herein was therefore improvidently granted.

2. The Defendants' virulent personal attacks upon the undersigned and upon the judgment of the district court are based upon a contention that a two (2) year statute of limitations expired. This allegation is utterly misleading and specious. The Plaintiff/Parents, MANUEL and BARBARA DIAZ, who are rural farmers, did not discover that a malpractice had been committed against their child, Diana, until shortly before her second birthday on April 11, 1983. Therefore, the statute of repose of four (4) years, up to and including April 11, 1985, was the applicable limitation upon the present cause of action. Any argument of error or wrongdoing based upon a two year limitation is therefore frivolous.

Moreover, the District Court's finding of an abuse of discretion was eminently correct, where, first of all, having been fully apprised of the law and facts, the trial court induced

the Plaintiffs to proceed with delayed service of process and caused the Plaintiffs to expose themselves and to incur what now amounts to massive fees and costs. Secondly, and more importantly, the trial court's subsequent dismissal herein more than four (4) years after Diana's birth, absolutely barred the present action, whereas if the trial court had dismissed this cause in May of 1984, the Plaintiffs could have refiled it.

Additionally, the Plaintiffs seek to avoid their massive liability herein through the harsh procedural escape hatch of a dismissal for lack of prosecution. However, actually a reading of the rule in a technical manner, reflects that the Plaintiffs' pleading indicating efforts to advance the cause was filed before the motion and order suggesting dismissal for lack of prosecution. Furthermore, the order advancing the cause permitting service of process was also filed simultaneously with the order concerning the effective denial of dismissal. Under these circumstances, and the modern policy of this Court favoring adjudication of a case on the merits, the original refusal to dismiss was technically and morally correct. The dismissal almost a year later was not.

Finally, the Plaintiffs complain that they should be able to appeal from a final judgment and contest any refusal to dismiss a cause months or even years after dismissal was denied and that the present analysis by the district court precludes that. Under the modern policy of this Court, favoring adjudication on the merits, and the present appellate rules, the trial Court's discretion in denying a motion to dismiss for lack of prosecution

is not reviewable from a final judgment taken years after the fact and after a case has gone the full route of discovery, pleadings and trial. Under such a circumstance, it is unconscionable and contrary to this Court's modern philosophy to permit liable Defendants to escape through the administrative escape hatch of a dismissal for lack of prosecution irrespective of costs, a trial on the merits. In the same manner, that certain rulings and opinions of the district courts are not reviewable, so too are certain interlocutory orders of the trial courts not reviewable. There is nothing incorrect with such a conclusion as a matter of policy by this Court. A dismissal for lack of prosecution should not as a matter of policy be an escape hatch for defendants to avoid their liability after trial. Any potential abuses of this policy are readily remedied under this Court's new administrative reporting requirements in, The Florida Bar Re: Rules of Judicial Administration, 493 So.2d 423 (1986).

IV.

ARGUMENT

FIRST ISSUE

THIS COURT HAS NO LAWFUL JURISDICTION IN THIS CAUSE

The present case involves an ordinary decision of a district court of appeal that a trial court has abused its discretion. There is no basis to find from the faces of said decision that any square conflict has been created with any other district court opinion or with this Court's decisions.

Article V Section 3(b)(3) of the Constitution of the State of Florida provides, to-wit:

> "May review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law."

The conflict jurisdiction of this Court is therefore limited to cases where there is a real and embarrassing conflict of opinion and authority between decisions. Ansin v. Thurston, 101 So.2d 808 (Fla. 1958). The basic guidelines for "conflict" jurisdiction encompass two situations: (1) the announcement of conflicting rules of law or (2) the application of the same rule of law, producing different results in cases involving substantial-

ly the same controlling facts. Nielson v. City of Sarasota, 117 So.2d 731, 734, (Fla. 1960); Mancini v. State, 312 So.2d 732 (Fla. 1975). Arguments directed to the merits of the ruling below are improper and form no basis to establish "conflicts jurisdiction." Hastings v. Osius, 104 So.2d 21 (Fla. 1958); See, Commerce National Bank v. Safeco Ins. Co., 284 So.2d 205, 207 at n.2 (Fla. 1973); Foley v. Weaver Drugs, Inc., 177 So.2d 221, 223, 225 (Fla. 1965) (defining "record proper"). Cf. Register v. Gladding Corp., 322 So. 2d 911 (Fla. 1975); Ansin v. Thurston.

In its jurisdictional brief, University claimed that the present decision was in conflict with McArthur v. St. Louis-San Francisco Railway, 306 So.2d 575 (Fla. 1st DCA 1975); Szabo v. Essex Chemical Corp., 461 So.2d 128 (Fla. 3d DCA 1984) and The Florida Bar Re: Amendment to Rule 2.050, 493 So.2d 423 (Fla. 1986). The other Plaintiffs filed a brief claiming conflict with Paedae v. Voltaggio, 472 So.2d 768 (Fla. 1st DCA 1985) and 107 Group, Inc., v. Gulf Coast Paving, 459 So.2d 466 (Fla. 1st DCA 1984). All the Plaintiffs then proceeded to flood their briefs with extensive matters as to the merits and matters

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2. For example, University attempted to inflame this Court in its jurisdictional brief from the trial Court's order and its motion for rehearing in the district Court.

not present on the face of the present opinion.[2].

None of the foregoing matters present the plain "conflict" on the face of said decisions, which is required for this Court's jurisdiction. In McArthur v. St. Louis-San Francisco Railway, the Court held consistant with all decisions in this jurisdiction, that the commencement of a cause of action by filing a complaint tolls any statute of limitation irrespective as to when the complaint is served. Szabo v. Essex Chemical, holds precisely the same as McArthur and, indeed was cited as authority in the present decision. Similarly, this Court's acceptance of modifications to the Rules of Judicial Administration regarding internal reports on the status of cases provides no constitutional basis for this Court to interfere with the rights of private litigants in a district Court decision already concluded. This Court's modifications are prospective only. Finally, neither of the decisions in Paedae v. Voltaggio and 107 Group involve any conflict with the issues on the face of the present decision. To the contrary, 107 Group and Paedae addressed only the issue as in the present case of whether the trial court had erred or abused its discretion in finding "good cause" to deny a dismissal for lack of prosecution.

It is wholly apparent from the foregoing that the decisions relied upon the Defendants do not present conflict or a lawful basis for jurisdiction at all. Indeed, in University's brief on the merits at page 8 it states;

> "This case involves an issue not previously addressed by this Court or directly addressed by any of the district courts."

There is, therefore, no lawful basis for this Court's jurisdiction and this cause should be discharged as improvidently granted.

SECOND ISSUE

THE DEFENDANTS HAVE FAILED TO SHOW ANY ERROR IN THE PRESENT OPINION REVERSING THE TRIAL COURT

A. STATUTE OF LIMITATIONS

University in its brief on the merits first of all baldly asserts that it had an absolute "right to notice" of a cause of action within two (2) years that a cause of action accrued. The brain damaged child, Diana, was born on April 11, 1981. University then transports this reasoning into a summary conclusion that the "two year" Statute of Limitation herein must have expired on April 11, 1983, the day the present complaint was filed. University contends therefore that it was denied its alleged absolute right to notice. University then launches into a diatribe of generalities and speculation as to the possible effects of late service of process, without being able to point to a single matter of actual prejudice to these high powered, well represented Defendants except its allegation that somehow, late service of process caused the Statute of limitations to run.[3].

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3. Counsel generalizes at one point that medical records are "often destroyed." Brief, p.13. With all the publicity about medical malpractice and their high priced counsel, this general allegation is preposterous in this case. The Plaintiffs submit that in these days and times, when medical records are destroyed, it is likely because they contain incriminating, not favorable information.

University then attempts to bootstrap its argument by also contending that a delay in service of process "violates" this Court's administrative reporting requirements as provided for in The Florida Bar Re: Amendment to Rules of Judicial Administration, 493 So.2d 423 (Fla. 1986). Finally, in desperation University asks this Court to adopt new rules of procedure to govern the present circumstance. The enactment of new rules is not necessary. The Defendants' claims may be properly rejected upon the face of the present record.

Section 95.11(4)(b) Fla. Stat. (Supp. 1980), the applicable statute of limitations hrein provides that:

> "An action for medical malpractice shall be commenced within 2 years from the time the incident giving rise to the action occurred or within 2 years from the time the incident is discovered, or should have been discovered through the exercise of due diligence; however, in no event shall the action be commenced later than 4 years from the date of the incident or occurrence out of which the cause of action accrued."
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> [Emphasis added] .

In the present cause the "incident(s)" of "medical malpractice" obviously occurred in or around the birth of the child, Diana on April 11, 1983. The Plaintiff/Parents, Manuel and Barbara Diaz are rural farming people. It was not until one year after Diana's birth that they were even aware that she was injured. See, R. 219 (ans. 19c). It was not until a few days before Diana's second birthday and in discussions with the undersigned and Calvin L. Fox, Esquire, that the parents Manuel and Barbara Diaz came to understand that the extent of Diana's problems may have been a result of the medical malpractice of the Defendants. Cf., R10.

In Moore v. Morris,475 So.2d 666 (Fla. 1985), the trial Court had granted a motion for summary judgement as to a two year statute of limitations upon facts arising from a baby damaged at birth and disputed evidence as to when the parents should have known of the child's injury. The trial court found that the child's injury was apparent at birth because of a surgical procedure. However, this Court reversed citing the fact that the injuries to the child were not so apparent and the conflict in the evidence as to when the parents knew of the child's injury. This Court ordered that the issue of the statute of limitations was sufficiently contraverted that it should be submitted to the jury. 475 So.2d 668-670. Similarly in Almengor v. Dade County, 359 So.2d 892 (Fla. 3d D.C.A. 1978), which is cited with approval in Moore v. Morris, the Court also reversed a summary judgment on statute of limitations grounds where although something was apparently wrong with the child, the fact that it was caused by malpractice was not apparent;

> "There is some evidence in the record that during this time the plaintiff was aware or should have been aware that the baby was born mentally retarded and thereafter showed signs of mental retardation and abnormal development. We do not believe, however, that this evidence put the plaintiff on notice as a matter of law that the baby was injured during birth because such evidence just as reasonably could have meant that the baby had been born with a congenital defect without any birth trauma."
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> 359 So.2d at 894.

In the present case, as in Moore v. Morris, the only evidence herein is that brain injury to the child, Diana, was not at all apparent. Also, like Almengor v. Dade County, even when it was determined that Diana was injured, it was not immediately apparent to the Plaintiffs that it was caused by anyone's malpractice.[4] Therefore, under Moore v. Morris, and the language of Section 95.11 (4) (b) the statute of limitations herein did not expire at any time prior to four (4) years from Diana's birth -- April 11, 1985.

Upon the foregoing the unceasing and virulent attacks upon the intent of the undersigned and allegations that she was trying to avoid a two (2) year statute of limitations, which expired on April 11, 1983, are frivolous and unprofessional. Upon the face of the record and the settled law, the statute of limitations did not expire herein until April 11, 1985, at the earliest. There was, therefore, utterly no prejudice or error in not serving a complaint until 1984 which did not have to be filed until 1985.

Furthermore, there is no error in the conclusion that filing is the basis for commencement of a cause of action for purposes of avoiding the running of a statute of limitations.

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4. The firm of Colson & Hicks withdrew from this cause after sitting on it for more than a year, because, unknown to the Plaintiffs, Bill Colson was on the Board of Directors for the University of Miami. Also, the wife of Mike Eidson who was enthusiastic about the case, works at Jackson Memorial, one of the defendants herein. They did not withdraw because there was no case as the Plaintiffs contended in their brief.

See, Klosenski v. Flaherty, 116 So.2d 767 (Fla. 1959); Szabo v. Essex Chemical Corp., 461 So. 2d 128 (Fla. 3d DCA 1984). No fixed time is set or required thereafter for service of process by this Court's rules and the period is apparently limited only by a court's power to dismiss for lack of prosecution. See, Szabo v. Essex Chemical Corp., 461 So.2d at 129; Pratt v. Durkop, 356 So.2d 1278 (Fla. 2d DCA 1978). Rule 1.070 (a) Florida Rules of Civil Procedure directs the clerk not the parties to prepare and serve summons. Id. Thus, the practices of this Court's clerks and not counsel for private parties must be faulted if there, indeed, is any fault to bear. In any event there was utterly no prejudice nor requirement that process be served herein prior to April 11, 1985. Therefore, the Defendants' complaints are frivolous.

Finally it should be noted that there is no evidence herein of University's contention that the undersigned "intentionally interfered with the issuance of any summons or service thereof." This flagrant contention is solely based upon the trial court's order (which Burnett prepared for the court) which provides only that:

> "With respect to the Statute of Limitations argument presented by this Defendant, it appears unto the Court that the Plaintiffs, acting through counsel, have intentionally circumvented the express purpose of the Statute of LImitations by timely filing their Complaint on the final day of the two year Statute of Limitations period but intentionally deferring notice thereof . . . "

Nothing in said order states that counsel "intentionally interfered"

the clerk or service summons.

University's latter claim that this Court's subsequent enactment of rules of administration regarding time standards for disposition of cases and reports thereon, somehow rendered the proceedings herein improper is equally without substance. As reflected on the face of said opinion the time frames therein are merely preliminary and widely open to modification and study on a case by case basis. 493 So.2d at 424. Furthermore, it is truly only an undisputed medical malpractice case with limited facts and parties, which this one is not, which would ever conclude to disposition in eighteen (18) months as suggested by the guidelines. The Plaintiff's shrill chorus of a parade of horribles (none of which apply herein), does not change the result that the new proposed general time frames have any material bearing upon the present cause.

B. Dismissal for Lack of Prosecution.

With regard to the issue of the dismissal for lack of prosecution, the Defendants contend that the district Court has created a conflict with the right of a trial judge to modify interlocutory orders. This is just not so. The District Court in its opinion specifically reaffirmed the right of a trial court to modify interlocutory orders. See, 492 So.2d at 1084. The Defendants also assume that the "good cause" presented to the trial court was not sufficient; that there was no "record activity" prior to the suggestion of dismissal and contend that the "reliance" and prejudice to the Plaintiffs was not grounds for reversing the trial court.

The District Court's finding of an abuse of discretion by the trial Court was eminently correct. First of all, having been fully apprised of the law and facts, the trial court induced the Plaintiffs to proceed with delayed service of process and caused the Plaintiffs to expose themselves and to incur to what now amounts to massive fees and costs. Secondly,and more importantly, the trial court's subsequent dismissal herein more than four (4) years after Diana's birth, absolutely barred the present action, whereas if the trial court had dismissed this cause in May of 1984, the Plaintiffs could have refiled it.

Thirdly, although this analysis was not accepted by the district court, this Court should consider the nature of the order, which the trial court sought to revisit. The only disability in a lack of prosecution situation is the lack of record activity. This type of circumstance is not one that is carried throughout a case. It is completely cured by subsequent record activity. In order to again give it effect the trial court must return literally nunc pro tunc, to the status of the case before the record activity cured the alleged defect. That is why the "nunc pro tunc" language in the present trial court order was not mere surplus. That is also why the nunc pro tunc cases clearly demonstrate the abuse of discretion, which is patent herein.

It is settled beyond any question that the only lawful function of a nun pro tunc order, is to factually relfect a ruling previously actually made but defectively entered. See, Freemen v. Blackburn, 92 So.2d 262 (Fla. 1957); Ellis v. State, 100 Fla.

27, 129 So. 106 (1930); Jaris v. Tucker, 414 So.2d 1164 (Fla. 3DCA 1982) (en banc); Luhrs v. State, 394 So.2d 137 (Fla. 5th DCA 1981); DeBaun v. Michael, 333 So.2d 106 (Fla. 2d DCA 1976); Becher v. King, 307 So.2d 855 (Fla. 4thDCA 1975) In Jaris v. Tucker, the Court stated the controlling and settled rule of law herein thus:

> "A nunc pro tunc judgment must, of course, related back to a decision actually made and cannot be a judgment that had not therefore been pronounced. Ellis v. State, 100 Fla. 27, 129 So. 106 (1930); Becker v. King, 307 So.2d 855 (Fla. 4thDCA 1975)" (Emphasis added). 414 So.2d at 1166, n. 2.

A nunc pro tunc order is therefore not a devise to get a different ruling on the law than was previously entered. See, id. In the present cause, the trial judge permitted the device of a nunc pro tunc order to be used in order to facilitate a judgment, which, "had not therefore been pronounced." This total disregard for settled jurisprudence was therefore properly summarily reversed. See, Jaris; Freeman v. Blackburn.

Additionally, the Plaintiffs seek to avoid their massive liability herein through the harsh procedural escape hatch of a dismissal for lack of prosecution. HOwever, a literal review of the Rule and the record actually reveals that there was lawful record activiy which precluded dismissal fo this case in 1984. Under Rule 1.420 (e) Florida Rules of Civil Procedure, virtually, any record activity including a court order directing service of process, is sufficient to require the denial of a dismissal for lack of prosecution. See, Barnes v. Ross, 386 So.2d 812 (Fla. 3DCA 1980); Marshall v. Water Boggan

International, 401 So.2d 1157 (Fla. 3DCA 1981) (order requiring service of process). The operative event in determining the time limits under the Rule is when any record item was filed. See, Fund Insurance v. Preskitt, 231 So.2d 866 (Fla. 4thDCA 1970) (distinguishing between service and filing) Equity Capital v. 601 West 26, 223 So.2d 762 (Fla. 3DCA 1969) Pollock v. Pollock, 110 So.2d 474 (Fla. 1st DCA 1959), approved, 116 So.2d 761 (Fla. 1959). Thus, in Pollock, the defendants were not entitled to dismissal, where although two years had elapsed since any record activity, there was record activity prior to the filing of the defendant's Motion to Dismiss for Lack of Prosecution. Similarly, in Equity Capital, the Court reversed a dismissal for lack of prosecution, where after fourteen months of inactivity, but before any motion to dismiss was filed, the Plaintiff began record acitivity. Accord, Knowles v. Gilbert, 208 So. 2d 660 (Fla. 3d DCA 1960) (provision of rule is not self activating and record activity prior to motion to dismiss precludes dismissal).

In the present cause, the trial judge served Diana with notice of its intent to seek dismissal, but did not file anything. Before anything was filed, Diana began record activity by filing a document professing both a desire and efforts to advance this cause. In particular, Diana had been virtually abandoned without notice by the firm, Colson and Hicks, which had been retained and relied upon to prosecute this cause. Meanwhile, the undersigned was incapacitated with her first pregancncy. These circumstances alone, were originally found by the trial court to be good cause under the Court's views in Barnes v. Ross, supra. Additionally,

however, simultaneous with the subsequent filing of the Court's Notice of Dismissal, the Court also presented Diana with an order requiring service of process. See, R12; R13. Certainly, in a dead-heat between these two orders, the order requiring the cause to advance by service of process and overruling the order of dismissal must be given precedent as record acitivy designed to advance the cause. See, Marshall v. Water-Boggan; Fund Insurance v. Preskitt. Under these circumstances, and the modern policy of this Court favoring adjudication of a cause on the merits, the refusal to dismiss was technically and morally correct. The dismissal almost a year later was not.

Finally, the Plaintiffs complain that they should be able to appeal from a final judgment and contest any refusal to dismiss a cause months or even years after dismissal was denied and that the present analysis by the district Court precludes that. Under the modern policy of this Court favoring adjudication on the merits, the trial Court's discretion in denying a motion to dismiss for lack of prosecution should not be reviewable from a final judgment taken years after the fact and after a case has gone the full route of discovery,pleading and trial. See, Puga v. Suave Shoe, 417 So.2d 678 (Fla. 3d DCA 1982) (en banc). In Puga v. Suave Shoe the Court explained the applicable policy herein thus:

> "In accordance with the welcome policy that appellate like other judicial proceedings should be determined on their merits, instead upon irrelevant technicalities, our Supreme Court has determined -- by both its decisions and its enactment of the governing rules of appellate procedure--that non-jurisdctional and non prejudicial defects . . . are not grounds for dismissal." (Emphasis added.)

Id. at 679

It is therefore submitted that it is unconscionable and contrary to this Court's modern philosophy to permit those, who may be flagrantly liable, to escape through the administrative escape hatch and fiction of a dismissal for lack of prosecution after a case has proceeded through pleadings, costs discovery and trial.

In the same manner that certain rulings and opinions of the district courts are not reviewable, so too are certain interlocutory orders of the trial courts. There is nothing wrong with such a conclusion herein as a matter of policy by this Court and it is consistent with the elimination in the modern rules of a provision permitting appeals from orders denying dismissal in former appellate Rule 4.2 See, Fla. R. App. P. 9.130 (comments).

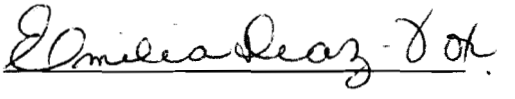
Finally, the Plaintiffs submit that any abuses of such inherent authority in the trial judges could be monitored and corrected through this Court's new time standard and reporting guidelines. See, Florida Bar Re: Amendment of Rule of Judicial Administration.

V.

CONCLUSION

Pursuant to the above facts, arguments and authorities, the Respondents submit that the trial court manifestly erred in granting the Petitioner's motion to dismiss and therefore the District Court's reversal was correct and should be affirmed.

RESPECTFULLY SUBMITTED,



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VI.
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing answer brief of the Respondents was served by mail upon the following attorneys: Christopher Lynch, Esquire, 66 West Flagler Street, Miami, Florida 33130, T. Michael Kennedy, Esquire, 501 City National Bank Bldg, 25 West Flagler Street, Miami, Florida 33130, and Kathleen M. O'Connor, Esquire, 2950 S.W. 27th Avenue, Suite 100, Miami, Florida 33133 on the 1st day of May, 1987.

Respectfully Submitted,

Emilia Diaz-Fox

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