IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,299

THE PUBLIC HEALTH TRUST OF DADE COUNTY, d/b/a JACKSON MEMORIAL HOSPITAL; TILO GERHARDT, M.D.; GEORGE BIKAJZI, M.D.; CEDARS OF LEBANON HEALTH CARE CENTER d/b/a CEDARS OF LEBANON HOSPITAL and THE UNIVERSITY OF MIAMI, 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, THIRD DISTRICT**

BRIEF OF PETITIONERS ON JURISDICTION
(With Appendix)

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BRIEF OF PETITIONERS ON JURISDICTION

STATEMENT OF THE CASE AND FACTS

The respondents, plaintiffs below, Manuel C. Diaz, Emilia Beatriz Diaz-Fox and Barbara Diaz (hereinafter "Diaz"), commenced a medical malpractice action on behalf of the minor plaintiff, Diana Margarita Diaz, in the Circuit Court of Dade County, Florida. The complaint, which was filed by attorney Emilia Diaz-Fox on April 11, 1983, alleged various acts of negligence in connection with the birth of the minor plaintiff on April 11, 1981. The plaintiffs sued The Public Health Trust of Dade County, Florida, d/b/a Jackson Memorial Hospital (Public Health Trust); The University of Miami (University) and Cedars of Lebanon Health Care Center d/b/a Cedars of Lebanon Hospital (Cedars); and several individually named physicians. (App. 2) [1]

After the filing of the Complaint, no summonses were issued or served on any of the defendants and no other record activity took place for a one year period. On April 11, 1984, the trial judge served notice that the action would be dismissed unless plaintiff showed good cause in writing why it should remain pending. (App. 2) In response, plaintiffs' attorney, Emilia Diaz-Fox, filed an unsworn "Showing of Good Cause Why Complaint Should Not be Dismissed", asserting that non-record activity had occurred during the prior year. (App. 11-12) In particular, plaintiffs' attorney alleged that she had met with attorneys in an attempt to refer the case to another law firm for handling. Plaintiff also alleged that the case had been referred to experts

[1] In this brief "App." refers to Petitioners' appendix.

in order to determine whether the action should be pursued. According to plaintiffs' attorney, the law firms which she contacted had declined to handle the case and the she was conducting further investigation of the matter. Plaintiffs' attorney also alleged that, "In the herein case, counsel for plaintiff was pregnant during 50% of the period of nonrecord activity."[2] (App. 11-12)

Plaintiffs' attorney then attended an ex parte hearing on the question of dismissal for lack of prosecution, after which the trial judge entered an order staying dismissal for thirty days and requiring plaintiffs' attorney to serve the defendants within that time. Plaintiffs' attorney requested and obtained two additional extensions of time in June and August of 1984. In September, 1984, approximately seventeen months after the complaint was filed, service was attempted on various defendants. (App. 2)

Answers were subsequently filed on behalf of the defendants, University of Miami, George Bikhazi, M.D., Tilo Gerhardt, M.D. and Cedars of Lebanon. The Public Health Trust Moved to dismiss based on insufficiency of process, insufficiency of service of process lack of jurisdiction over the subject matter. (App. 2)

On December 17, 1984, the University filed a motion for summary judgment based on the statute of limitations, or in the alternative, based on plaintiffs' failure to prosecute the action for a one year period. The defendants, Bikhazi and Gerhardt,

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[2]Contrary to the statement made in the majority opinion of the Third District, plaintiffs' attorney never alleged that she was disabled during the relevant period. (App. 11-12) See also concurring opinion of Judge Baskin. (App. 7).

filed identical motions. (App. 3)

The trial judge denied the motion for summary judgment on statute of limitation grounds. The court did, however, grant the motion based on lack of prosecution. After reviewing applicable case law providing that contacting expert witnesses and attempting to associate co-counsel did not constitute good cause for failure to prosecute, the trial judge concluded that he erred in failing to dismiss the case for lack of prosecution in May of 1984. The court specifically ruled that:

> It is the further considered opinion of this Court that the Plaintiffs failed to show good cause by their response of May 8, 1984, to the Court's April 11, 1984, Notice of Hearing on Motion for Order of Dismissal...and the dismissal of this action was mandatory pursuant to Rule 1.420(e), Florida Rules of Civil Procedure....[citations omitted.]

(App. 8-9) The court, therefore, entered an order dismissing the action on April 24, 1985. (App. 8-10)

The Third District Court of Appeal reversed. (App. 1-7) The court did not decide the issue of whether plaintiffs below demonstrated "good cause" for failure to prosecute the action for a one year period. In fact, the court specifically found that, "If the trial court had dismissed the action in the first instance, there is little probability that plaintiff, on the record before us, could have demonstrated that the court clearly abused its discretion." (App. 4) The district court concluded, however, that the trial court did abuse its discretion by waiting eleven months before vacating the order staying dismissal, where plaintiffs' counsel "relied" on the original ruling and furthered

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the cause by serving the defendants, thereby becoming exposed to liability for additional costs and fees. (App. 5)

SUMMARY OF ARGUMENT

The decision of the District Court of Appeal conflicts with decisions of this Court establishing the rule that a trial court has the power to reverse its own non-final orders at any time prior to final judgment. The district court's ruling that a court could not reverse a non-final order if a party relied upon it also conflicts with the well established rule that non-final orders are subject to review, and reversal, on appeal from a final judgment.

ARGUMENT

THE DISTRICT COURT'S CONCLUSION THAT A TRIAL COURT WAS POWERLESS TO VACATE A NON-FINAL ORDER (EVEN IF THE ORDER WAS ERRONEOUS) ELEVEN MONTHS AFTER ITS ENTRY DIRECTLY CONFLICTS WITH DECISIONS HOLDING THAT A TRIAL COURT DOES HAVE THE POWER TO VACATE ITS OWN NON-FINAL ORDERS AT ANY TIME PRIOR TO FINAL JUDGMENT AND WITH DECISIONS HOLDING THAT AN APPELLATE COURT HAS THE POWER TO REVERSE A NON-FINAL ORDER ON APPEAL FROM A FINAL JUDGMENT.

In the case of Alabama Hotel Co. v. J. L. Mott Iron Works, 86 Fla. 608, 98 So. 825 (Fla. 1924), this Court established the following rule of law in regard to a trial judge's power to alter or vacate a non-final (or interlocutory) order:

> It is...well settled that interlocutory judgments or decrees made in the progress of a cause are always under the control of the court until final disposition of the suit, and they may be modified or rescinded upon sufficient grounds, shown any time before final judgment....

98 So. at 826. Accord, Tingle v. Dade County Board of County Commissioners, 245 So.2d 76, 77 (Fla. 1971); North Shore Hospital,

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Inc. v. Barber, 143 So.2d 849, 851 (Fla. 1962); Keathley v. Larson, 348 So.2d 382, 384 (Fla. 2d DCA 1977), cert. denied, 358 So.2d 131 (Fla. 1978); and Holman v. Ford Motor Company, 239 So.2d 40, 43 (Fla. 1st DCA 1970).

The Third District's conclusion that a trial court could not recognize its own error and vacate a non-final order eleven months after entry of the order directly conflicts with this court's ruling that a trial judge has the power to vacate a non-final order at any time before final judgment. The court's finding that plaintiffs below "relied" upon the court's erroneous non-final order by proceeding with the case does not create a distinction because it is obvious that in any case where a non-final order is entered, the parties will proceed in "reliance" upon that order until such time as the order is vacated or reversed. As stated by the Second District Court of Appeal in Keathley, supra, "While it is true that a judge should hesitate to undo his own work ... nevertheless when presented with a prior interlocutory ruling that is based on a clearly mistaken interpretation of the law it is indeed appropriate for the ... judge to vacate or modify the prior order." 348 So.2d at 384.

The Third District's decision that "reliance" precludes reversal also directly conflicts with the well established rule that an interlocutory or non-final order is reviewable, and therefore subject to reversal, on appeal from a subsequently entered final judgment. Auto Owners Ins. Co. v. Hillsborough County Aviation Authority, 153 So.2d 722, 724 (Fla. 1963); Hollywood, Inc. v. Clark, 153 Fla. 501, 15 So.2d 175, 181 (Fla.

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1943); Price v. Gordon, 129 Fla. 715, 177 So. 276, 277 (Fla. 1937). By holding that a non-final order is unassailable if a party has "relied" upon it, the District Court of Appeal has denied the power of an appellate court to reverse that order on appeal from a subsequently entered final judgment. If a case proceeds to final judgment, at least one of the parties will have "relied" upon the prior non-final order, and based on the decision of the Third District in the case at bar, reliance would preclude reversal.

The Third District's decision is in direct conflict with decisions from the District Court of Appeal, First District, in which that court reversed, on appeal from a final judgment, an erroneous non-final order denying a motion to dismiss for lack of prosecution. See Paedae v. Voltaggio, 472 So.2d 768 (Fla. 1st DCA 1985) and 107 Group, Inc. v. Gulf Coast Paving & Grading, Inc., 459 So.2d 466 (Fla. 1st DCA 1984). In both Paedae and 107 Group, an action was dismissed for lack of prosecution and subsequently reinstated by the trial court. The cases proceeded to trial and in each case a judgment was entered in favor of plaintiff. On appeal, the First District reversed, holding that the prior dismissals for lack of prosecution were proper and that the cases should not have been reinstated and should not have proceeded to trial.

Clearly, there is a conflict between the Third District and the First District on the same question of law. In the Third District, based on the decision in Diaz, a court does not have the power to reverse an erroneous interlocutory order denying a motion

to dismiss for lack of prosecution where a plaintiff has "relied" upon the order by furthering the action in the trial court. On the other hand, in the First District, based on the decisions in Paedae and 107 Group, a court does have the power to reverse an erroneous interlocutory order denying a motion to dismiss for lack of prosecution even where a plaintiff has "relied" upon the order by furthering the action through to a full trial and judgment in its favor.

Statement of Why Review Should Be Granted.

Petitioners respectfully submit that review should be granted herein because the decision of the Third District Court of Appeal will create confusion and uncertainty among practitioners in regard to the availability of appellate review in all cases involving the denial of a motion to dismiss for lack of prosecution. Confusion has been created because prior to the decision of the Third District Court of Appeal in Diaz, it was well established that a nonfinal order denying a motion to dismiss for lack of prosecution could only be reviewed on appeal from a subsequently entered final judgment.

Prior case law clearly establishes that an order denying a motion to dismiss for lack of prosecution is unreviewable by appeal from a non-final order pursuant to Rule 9.130, Florida Rules of Appellate Procedure. Bowl America Florida, Inc. v. Schmidt, 386 So.2d 1203 (Fla. 5th DCA 1980). It is equally well established that a non-final order denying a motion to dismiss for lack of prosecution is unreviewable by common law certiorari. Arvida Corporation v. Hewitt, 416 So.2d 1264 (Fla. 4th DCA 1982);

Bowl America Florida, Inc. v. Schmidt, 386 So.2d 1203 (Fla. 5th DCA 1980); Chalfonte Development Corp. v. Beaudoin, 370 So.2d 58 (Fla. 4th DCA 1979); Suez Company v. Hodgins, 137 So.2d 231 (Fla. 3d DCA 1962). Furthermore, a non-final order denying a motion to dismiss for lack of prosecution is not reviewable by writ of prohibition. Lawrence v. Orange County, 404 So.2d 421 (Fla. 5th DCA 1981).

If a motion to dismiss for lack of prosecution is denied, then based on the cited case law, there is no avenue available to obtain immediate review by an appellate court. Instead, a party must wait until the case is concluded in the trial court, and if a judgment is entered in favor of the plaintiff, a defendant could appeal from that final judgment. If, however, a defendant seeks review of the prior non-final order denying dismissal for lack of prosecution, the plaintiff could cite Diaz and argue that it "relied" upon the non-final order denying the motion to dismiss for lack of prosecution and furthered the action. Based on Diaz, the order denying dismissal, even if erroneous, would be unreviewable.

It is clear that the decision in Diaz has the effect of creating a trap for practitioners and also has the effect of rendering non-final orders denying a motion to dismiss for lack of prosecution unreviewable on appeal from a final judgment. The only way in which a practitioner in a district other than the First District can avoid the trap created by the decision in Diaz is to immediately file a petition for writ of certiorari upon the denial of a motion to dismiss for lack of prosecution, despite the

numerous cases holding that certiorari is not available. The defendant would be required to argue that the court should grant certiorari in order to save it from the irreparable harm of a "reliance" by a plaintiff on the order denying dismissal for lack of prosecution. Thus, district courts would be required to review denials of motions to dismiss for lack of prosecution by way of certiorari.

That result is clearly contrary to the intent of the Rules of Appellate Procedure adopted by this Court. Under prior rule 4.2, interlocutory orders "granting or denying dismissal for lack of prosecution" were appealable. See In Re Florida Appellate Rules, 211 So.2d 198, 199 (Fla. 1968). That provision was, however, specifically eliminated from new Rule 9.130, which limits interlocutory or non-final appeals to those categories specifically listed in the Rule. It is clearly contrary to the intention of this Court in adopting the amended rules to now require review of orders denying dismissal for lack of prosecution by way of common law certiorari.

CONCLUSION

Petitioners respectfully urge that there is direct conflict between the decision of the District Court of Appeal, Third District, in the case at bar, and the decisions of this Court and of other district courts of appeal in the cases cited herein. Petitioners respectfully request this Court to exercise its discretionary jurisdiction to review the decision of the Third District Court of Appeal pursuant to Art. V, § 3(b)(3), Florida Constitution.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 15th day of September, 1986 to: EMILIA DIAZ-FOX, ESQ., Suite 424, 200 S.E. First Street, Miami, FL 33131.

THORNTON, DAVID & MURRAY, P.A.

By: _____
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