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 THE MERITS
(With Appendix)

THORNTON, DAVID & MURRAY, P.A.
By: Kathleen M. O'Connor
Attorneys for Petitioner,
Public Health Trust
2950 S.W. 27th Avenue
Suite 100
Miami, FL 33133
(305) 446-2646

ADAMS HUNTER ANGONES ADAMS ADAMS & McCLURE
By: Christopher Lynch
Attorneys for Cedars
66 West Flagler Street
Miami, FL 33130

FOWLER WHITE BURNETT HURLEY BANICK & STRICKROOT, P.A.
By: Steven E. Stark
Attorneys for University of Miami
501 City National Bank Building
25 West Flagler Street
Miami, FL 33130

TABLE OF CONTENTS

THORNTON, DAVID & MURRAY, P. A., ATTORNEYS AT LAW
2950 SOUTHWEST 27TH AVENUE, SUITE 100, MIAMI, FLORIDA 33133 • TELEPHONE (305) 446-2646

TABLE OF AUTHORITIES

THORNTON, DAVID & MURRAY, P.A., ATTORNEYS AT LAW
2950 SOUTHWEST 27TH AVENUE, SUITE 100, MIAMI, FLORIDA 33133 • TELEPHONE (305) 446-2646

THORNTON, DAVID & MURRAY, P.A., ATTORNEYS AT LAW
2950 SOUTHWEST 27TH AVENUE, SUITE 100, MIAMI, FLORIDA 33133 • TELEPHONE (305) 446-2646

RULES

THORNTON, DAVID & MURRAY, P.A., ATTORNEYS AT LAW
2950 SOUTHWEST 27TH AVENUE, SUITE 100, MIAMI, FLORIDA 33133 • TELEPHONE (305) 446-2646

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 Beatriz 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. (R. 1-10)[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. (R. 13) 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. (R. 10-11) Specifically, plaintiffs' attorney alleged that she had met with attorneys in an attempt to refer the case to another

[1] In this brief the Record on Appeal will be referred to by the symbol "R".

THORNTON, DAVID & MURRAY, P.A., ATTORNEYS AT LAW
2950 SOUTHWEST 27TH AVENUE, SUITE 100, MIAMI, FLORIDA 33133 • TELEPHONE (305) 446-2646

law firm for handling. Plaintiffs' attorney also alleged that the case had been referred to experts to determine whether the action should be pursued. According to plaintiffs' attorney, the law firms which she contacted declined to handle the case and 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." (R. 10-11)

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. (R. 12) Plaintiffs' attorney requested and obtained two additional extensions of time in June and August of 1984. (R. 15-19) On September 26, 1984, approximately seventeen months after the complaint was filed, service was attempted on various defendants. (R. 20-14) Answers were subsequently filed on behalf of the defendants, University of Miami (R. 42-43); George Bikhazi, M.D. (R. 50-54), Tilo Gerhardt, M.D. (R. 87-92); Cedars (R. 102-103). The Public Health Trust moved to dismiss based on insufficiency of process, insufficiency of service of process and lack of jurisdiction over the subject matter. (R. 55-56)

Defendants, University of Miami, Bikhazi and Gerhardt moved for summary judgments based on the statute of limitations, or in the alternative, based on plaintiffs' failure to prosecute the action. (R. 119, 131) The trial

THORNTON, DAVID & MURRAY, P.A., ATTORNEYS AT LAW
2950 SOUTHWEST 27TH AVENUE, SUITE 100, MIAMI, FLORIDA 33133 • TELEPHONE (305) 446-2646

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].

(R. 296-297) The court, therefore, entered an order dismissing the action on April 24, 1985. (R. 296-298)

The Third District Court of Appeal reversed. Diaz v. Public Health Trust, 492 So.2d 1082 (Fla. 3d DCA 1986). 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." The district court concluded, however, that the trial court abused its discretion by waiting eleven months before vacating the order staying dismissal,

where plaintiffs' counsel "relied" on the original ruling and furthered the cause by serving the defendants, thereby becoming exposed to liability for additional costs and fees. 492 So.2d at 1085.

POINTS INVOLVED

I.

WHETHER THE DISTRICT COURT ERRED IN RULING THAT THE TRIAL COURT WAS POWERLESS TO VACATE AN ERRONEOUS NON-FINAL ORDER ELEVEN MONTHS AFTER ENTRY OF THE ORDER.

II.

WHETHER THE TRIAL JUDGE CORRECTLY DISMISSED PLAINTIFFS' COMPLAINT PURSUANT TO RULE 1.420(e) WHERE THERE WAS A LACK OF RECORD ACTIVITY FOR A PERIOD OF ONE YEAR.

SUMMARY OF ARGUMENT

Point One

In the case at bar, plaintiffs filed their complaint and undertook no further record activity for a one year period. The trial court noticed the case for dismissal, based on lack of prosecution, pursuant to Rule 1.420(e), Florida Rules of Civil Procedure. Plaintiffs' attorney filed a "Showing of Good Cause" and after an ex parte hearing, the trial judge stayed dismissal. Four months later, defendants were served with plaintiffs' complaint. Upon reviewing the court file, defendants discovered that the grounds set forth by plaintiffs for failure to prosecute were legally insufficient to constitute good cause. After reviewing applicable case law, the trial court vacated its prior order and dismissed plaintiffs' action.

On appeal, the Third District Court of Appeal ruled that the trial court abused its discretion by vacating a prior non-final order and dismissing plaintiffs' action for lack of prosecution. The District Court concluded that the trial judge did not have the power to vacate the original order eleven months after entry, because in the interim plaintiffs "relied" upon the order by incurring costs and becoming liable for payment of attorneys' fees.

The decision of the Third District Court of Appeal conflicts with the well established principle that a trial judge does have the power to vacate an erroneous non-final order at any time prior to final judgment and with the principle that an appellate court has the power to reverse an erroneous non-final order on appeal from a subsequently entered final judgment. Because trial and appellate courts have the power to reverse erroneous non-final orders, litigants have no right to rely absolutely upon those orders. "Financial reliance" does not constitute a detrimental change in position that could preclude reversal by a trial or appellate court. The mere fact that a party continues with litigation and incurs costs cannot be relied upon to insulate an erroneous order from review.

In the case at bar, plaintiffs should not be permitted to argue "reliance" because the trial court's initial erroneous order was secured at an ex parte hearing and the order was based on representations of "good cause" by plaintiffs' counsel that were clearly contrary to well established case law.

THORNTON, DAVID & MURRAY, P.A., ATTORNEYS AT LAW
2950 SOUTHWEST 27TH AVENUE, SUITE 100, MIAMI, FLORIDA 33133 • TELEPHONE (305) 446-2646

Plaintiffs' attorney contended that "good cause" existed for failure to prosecute because she had been contacting witnesses, attempting to associate co-counsel and conducting investigations. At the time those assertions were made, there were numerous cases holding that those non-record activities did not constitute good cause for failure to prosecute.

The decision of the Third District Court of Appeal also creates conflict with the established rule that an appellate court has the power to reverse an erroneous non-final order on appeal from a final judgment. If an appellate court has the power to reverse an erroneous non-final order after trial and after substantial expenses have been incurred, then a trial court should have the power to reverse its own erroneous order before trial and before substantial expenses are needlessly incurred.

The decision of the Third District Court of Appeal has created a trap for practitioners, because there is no existing remedy which would provide for immediate review of an erroneous trial court order denying dismissal for lack of prosecution. There is, therefore, no way to preclude "reliance" by a plaintiff on an erroneous non-final order denying dismissal for lack of prosecution. It is well established that an order denying dismissal for lack of prosecution may not be reviewed by immediate appeal from a non-final order under Rule 9.130, Florida Rules of Appellate Procedure; or by a petition for writ of common law certiorari; or by a petition for writ of prohibition. If a trial court is powerless to reverse its own

erroneous order denying dismissal for lack of prosecution, a defendant must wait and raise the error on appeal from a subsequently entered final judgment. At that point, however, if the decision of the District Court of Appeal in Diaz is applied in a consistent manner, "reliance" would necessarily preclude reversal.

The decision of the District Court in the case at bar should be quashed, because it has the effect of completely insulating erroneous non-final orders denying dismissal for lack of prosecution from review. "Financial reliance" has never precluded an appellate court from reversing erroneous non-final orders, and less significant "financial reliance" should not preclude trial courts from reversing erroneous non-final orders.

Point Two

The trial court's dismissal of plaintiffs' complaint was correct because there was a lack of record activity for one year and plaintiffs failed to establish good cause for failure to prosecute. There are numerous cases holding that non-record activities such as meetings with clients, attempts to associate co-counsel and investigations do not constitute good cause for failure to prosecute.

The pregnancy of plaintiffs' attorney during six months of the relevant one year period is not good cause for failure to prosecute. A finding of good cause for failure to prosecute based on an attorney's health problems will only be found where the attorney suffers from a serious, unexpected disability

which precludes the attorney from prosecuting an action. There was no allegation of any disability in the case at bar. To the contrary, the plaintiffs' attorney affirmatively represented to the trial court that she was engaged in "extensive" non-record activity during the one year period in question. If plaintiffs' counsel was able to conduct extensive non-record activity, then plaintiffs' counsel was certainly able to file at least one piece of paper in the court file.

Based on the foregoing, the decision of the Third District Court of Appeal should be quashed.

ARGUMENT

POINT ONE

THE DISTRICT COURT ERRED IN RULING THAT A TRIAL COURT WAS POWERLESS TO VACATE AN ERRONEOUS NON-FINAL ORDER ELEVEN MONTHS AFTER ENTRY OF THE ORDER.

In ruling that the trial court abused its discretion by waiting eleven months before vacating its order staying dismissal of plaintiffs' claim for lack of prosecution, the Third District Court held, in effect, that a litigant has an absolute right to rely upon an erroneous non-final (or interlocutory) order of the trial court. The district court's ruling conflicts with the well established principle that a trial judge has the power to vacate an interlocutory order at any time prior to final judgment and with the principle that an appellate court has the power to review (and therefore reverse) a non-final order on appeal from a subsequently entered final judgment.

THORNTON, DAVID & MURRAY, P.A., ATTORNEYS AT LAW
2950 SOUTHWEST 27TH AVENUE, SUITE 100, MIAMI, FLORIDA 33133 • TELEPHONE (305) 446-2646

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, 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. As recognized by the Second District Court of Appeal in Keathley v. Larson, 348 So.2d 382 (Fla. 2d DCA 1977), cert. denied 358 So.2d 131 (Fla. 1978), "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.

THORNTON, DAVID & MURRAY, P.A., ATTORNEYS AT LAW
2950 SOUTHWEST 27TH AVENUE, SUITE 100, MIAMI, FLORIDA 33133 • TELEPHONE (305) 446-2646

The Third District's conclusion that plaintiffs below "relied" upon the trial court's erroneous non-final order by proceeding with the case does not distinguish the case at bar from those cases in which the general rule has been applied. It is obvious that in every case where a non-final order is entered, the parties will continue with the proceedings and incur costs. That does not, however, constitute a detrimental reliance which would preclude reversal of the prior non-final order by the trial judge or an appellate court. Incuring litigation expenses as a result of an erroneous non-final order has never been regarded by the courts of this state as a "material injury" to a party. Brown v. Seminerio, 246 So.2d 629, 630 (Fla. 4th DCA 1971) (incurring expenses for representation at unnecessary trial is not a "material injury" which would permit immediate review of non-final order by commond law certiorari); accord, Bowl America Florida, Inc., 386 So.2d 1203, 1204 (Fla. 5th DCA 1980); Whiteside v. Johnson, 351 So.2d 759, 780 (Fla. 2d DCA 1977); Pullman Co. v. Fleishel, 101 So.2d 188, 190 (Fla. 1st DCA 1958). Plaintiffs' continuation of the action below did not constitute a detrimental change in legal position and did not render an erroneous order unreviewable. Cf. Cassidy v. Firestone Tire & Rubber Co., 495 So.2d 801, 802, n. 2 (Fla. 1st DCA 1986) ("financial reliance" on prior case law does not preclude application of change in decisional law to pending case).

In regard to the reliance issue, the Third District Court of Appeal also found it significant that eleven months elapsed

THORNTON, DAVID & MURRAY, P.A., ATTORNEYS AT LAW
2950 SOUTHWEST 27TH AVENUE, SUITE 100, MIAMI, FLORIDA 33133 • TELEPHONE (305) 446-2646

between the stay of the dismissal and the dismissal. That fact should not operate against the defendants, who were not even served with plaintiffs' complaint until four months after the ex parte hearing. The defendants raised the trial court's error in failing to dismiss as soon as they were aware of the prior proceedings. In addition, the initial stay order was procured based on representations by plaintiffs' attorney to the trial court that "good cause" existed because of attempts to associate co-counsel, further investigation of the case and contacts with experts. At the time those representations were made, there were cases directly on point holding that the facts relied upon did not constitute "good cause". See, e.g. 107 Group, Inc. v. Gulf Coast Paving & Grading, Inc., 459 So.2d 466 (Fla. 1st DCA 1984); Carter v. DeCarion, 400 So.2d 521 (Fla. 3d DCA 1981), rev. denied 412 So.2d 464 (Fla. 1982); FMC Corp. v. Chatman, 368 So.2d 1307 (Fla. 4th DCA 1979), cert. denied 379 So.2d 203 (Fla. 1979); Daurelle v. Beech Aircraft Corp., 341 So.2d 204 (Fla. 4th DCA 1977), cert. denied 354 So.2d 980 (Fla. 1977); Castle v. Struhl, 293 So.2d 798 (Fla. 3d DCA 1974); Florida Power & Light Co. v. Gilman, 280 So.2d 15 (Fla. 3d DCA 1973); Fleming v. Florida Power Corp., 254 So.2d 546 (Fla. 2d DCA 1971), cert. denied 262 So.2d 447 (Fla. 1972).[2]

Just recently, the Third District Court of Appeal reminded attorneys that they have an obligation to bring controlling case law to the attention of a trial court. Glassalum

[2] The "good case" requirement is discussed in detail under Point Two of this brief.

Engineering Corp. v. 392208 Ontario Ltd., 487 So.2d 87 (Fla. 3d DCA 1986). In the case at bar, it would be fundamentally unfair to permit plaintiffs' counsel to lead the trial court into an erroneous ruling at an ex parte hearing and to then permit plaintiffs' counsel to argue that the trial judge cannot change that ruling because plaintiffs relied on it.

In ruling that the trial court abused its discretion by waiting eleven months before vacating its order, the District Court has also created conflict with the well established rule that an interlocutory order is reviewable, and therefore reversible, 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. 1943); Price v. Gordon, 129 Fla. 715, 177 So. 276, 277 (Fla. 1937). When the District Court's decision is viewed in light of the rule that non-final orders may be reversed on appeal, then the District Court's decision creates an inconsistency that can only be remedied by either quashing the District Court's opinion, or by receding from the general rule that non-final orders are reviewable on appeal from a final judgment.

The inconsistency arising from the District Court's ruling is as follows. On the one hand, by virtue of the District Court's ruling in the case at bar, an erroneous non-final order denying a motion to dismiss for lack of prosecution cannot be reversed at the trial court level, even where the trial court

THORNTON, DAVID & MURRAY, P.A., ATTORNEYS AT LAW
2950 SOUTHWEST 27TH AVENUE, SUITE 100, MIAMI, FLORIDA 33133 • TELEPHONE (305) 446-2646

recognizes its error and reverses before extensive discovery is undertaken; before a trial on the merits; before the parties have incurred substantial costs and attorneys' fees; and before judicial resources are used to preside over hearings and a trial. On the other hand, based on established case law, an erroneous non-final order denying a motion to dismiss for lack of prosecution can be reversed at the appellate level, after extensive discovery is undertaken; after a trial on the merits; after the parties have incurred substantial costs and attorneys' fees; and after judicial resources are used to preside over hearings and a trial. Paedae v. Voltaggio, 472 So.2d 768 (Fla. 1st DCA 1985); 107 Group, Inc. v. Gulf Coast Paving and Grading, Inc., 459 So.2d 466 (Fla. 1st DCA 1984).

In Paedae v. Voltaggio, 472 So.2d 768 (Fla. 1st DCA 1985), a negligence action was filed in a case arising out of an automobile accident. Defendants answered and minimal discovery was undertaken. A period of thirteen months then elapsed without any record activity, and defendants moved to dismiss for lack of prosecution. The trial judge agreed that it did not appear from the record that the action had been prosecuted for one year and ordered plaintiffs to show good cause why the case should not be dismissed. Plaintiffs filed a "showing of good cause" stating that their attorney's secretary had failed to notify him of the status of the case and that one of the defendants had been uncooperative in complying with discovery requests. The trial judge set aside the dismissal and reinstated the case, which ultimately proceeded to trial.

On appeal from a final judgment in favor of plaintiffs, the First District Court of Appeal reversed and stated:

> The dismissal for failure to prosecute was proper, and since appellees failed to demonstrate good cause for the lack of any record activity for more than one year, the case should not have been reinstated and should not have proceeded to trial.

472 So.2d at 769.

In 107 Group, Inc. v. Gulf Coast Paving & Grading, Inc., 459 So.2d 466 (Fla. 1st DCA 1984), an action was brought for the unpaid balance due on a contract between the parties. The defendant, 107 Group, answered and counterclaimed, and three depositions were taken. One year passed without record activity and the court served the parties with a motion, notice and judgment of dismissal, requiring plaintiff to show good cause why the case should not be dismissed. The plaintiff filed a "showing of good cause" stating that it had encountered difficulty in locating witnesses. The trial court reinstated the action. Another year passed without record activity, and the court filed another motion, notice and judgment of dismissal. The plaintiff again filed a so-called "showing of good cause", stating that it had been interviewing witnesses and contacting experts. The trial court reinstated the action. The case proceeded to trial, which resulted in a judgment for plaintiff. The defendant then appealed the prior non-final order reinstating plaintiffs action. The First District found that interviewing witnesses and contacting expert witnesses did

not constitute "good cause" and reversed with directions that a judgment of dismissal be entered against the plaintiff. If an appellate court can reverse an erroneous interlocutory order on appeal from a subsequently entered final judgment, it is anomalous to hold that a trial judge cannot reverse an erroneous interlocutory order because the plaintiff relied upon the order.

The Third District's decision creates doubt as to whether erroneous interlocutory orders denying a motion to dismiss for lack of prosecution will now be unreviewable on appeal from a subsequent final judgment because the plaintiff in that situation will have "relied" on the erroneous order and furthered the case all the way through to a full trial on the merits. If the Third District's decision is allowed to stand, then consistency could only be achieved by a ruling that erroneous non-final orders denying a motion to dismiss for lack of prosecution could never be reviewed on appeal from a final judgment. Certainly if "reliance" by furthering an action precludes reversal by a trial judge, then "reliance" should also preclude reversal by an appellate court.

If the trial judge (prior to final judgment) and the appellate court (after final judgment) do not have the power to reverse an erroneous non-final order denying a motion to dismiss for lack of prosecution, then those orders become absolutely unreviewable at any stage of the proceedings. 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 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 the decision of the District Court in the case at bar 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 the Diaz decision, if the trial court could not reverse itself because of reliance, then certainly an appellate court could not reverse after more substantial reliance. An

THORNTON, DAVID & MURRAY, P.A., ATTORNEYS AT LAW
2950 SOUTHWEST 27TH AVENUE, SUITE 100, MIAMI, FLORIDA 33133 • TELEPHONE (305) 446-2646

order denying dismissal for lack of prosecution, even if erroneous, would then be unreviewable. It is clear that the District Court's decision has the effect of creating a trap for practitioners by completely insulating erroneous non-final orders from review.

In the case at bar, once the trial judge realized that an error had been made in a prior legal ruling, the court correctly vacated the stay order and entered a dismissal order. By doing so, the court saved the parties and the court the expense of further litigation in a case that should have been dismissed. Had the court not vacated its prior order the defendants would have been required to wait until the entry of a final judgment to appeal the court's failure to dismiss for lack of prosecution. Then, if the district court found that there had been a lack of prosecution, presumably the trial court's order would have been reversed. In the meantime, the parties would have been put to the unnecessary expense of extensive discovery, and could have been required to undertake a lengthy and expensive trial which would have also taxed judicial resources.

In the case at bar, the trial court correctly realized that the plaintiffs' reasons for failing to prosecute the action for a one year period did not, as a matter of law, constitute good cause. The trial court's dismissal of plaintiffs action did not constitute an abuse of discretion. This Court has approved the following test for review of a trial judge's discretionary acts:

> Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. Delno v. Market Street Railway Company, 124 F.2d 965, 967 (9th Cir. 1942).

Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980). The trial court acted reasonably and fairly by taking appropriate action to correct an error. Based upon prior decisions of this Court, it was well within the trial court's power to vacate its prior erroneous non-final order and enter another order dismissing the action.

POINT TWO

THE TRIAL JUDGE CORRECTLY DISMISSED PLAINTIFFS' COMPLAINT PURSUANT TO RULE 1.420(e) WHERE THERE WAS A LACK OF RECORD ACTIVITY FOR A PERIOD OF ONE YEAR.

Where there has been a lack of record activity for one year preceding a motion to dismiss for lack of prosecution, it is an abuse of discretion to deny the motion to dismiss, unless plaintiff can demonstrate good cause for the lack of record activity. Boeing Co. v. Merchant, 397 So.2d 399, 401 (Fla. 5th DCA 1981); Bair v. Palm Beach Newspapers, Inc., 387 So.2d 517, 518 (Fla. 4th DCA 1980); Industrial Trucks of Florida v. Gonzalez, 351 So.2d 744, 746 (Fla. 3d DCA 1977). None of the reasons set forth in Plaintiffs' unsworn "Showing of Good Cause..." constituted good cause for failure to prosecute an

THORNTON, DAVID & MURRAY, P.A., ATTORNEYS AT LAW
2950 SOUTHWEST 27TH AVENUE, SUITE 100, MIAMI, FLORIDA 33133 • TELEPHONE (305) 446-2646

action for one year and the trial court correctly dismissed plaintiffs' action. Plaintiffs' attorney relied upon the following non-record activities in attempting to show good cause:

> 1. That extensive "out of record" activity has taken place. This has included but not been limited to the following:
>
> A. Meetings with the plaintiffs to discuss the details of the incident.
>
> B. Meetings with the Firm of Bill Colson and Hicks who examined the case and referred the case to the firm of Montgomery, Lytal, Reiter, Denney and Searcy in West Palm Beach, Florida.
>
> C. The referral of the above-stated firms to "experts" in order to allow them to examine the cause of action thoroughly and determine whether the matter should be pursued or not.
>
> * * *
>
> 4. That the undersigned is presently conducting further investigations, and will be in a position to proceed with the matter with a co-counsel, or by herself.
>
> * * *
>
> 6. That the undersigned is in a position to establish to the Court that non-record activity has taken place, and in Barnes v. Ross, 386 So.2d 812 (3d DCA 1980), the Court held that non record activity constitutes good cause to avoid dismissal of cases where there has been no record activity.
>
> 7. That, additionally, the Court in Barnes held "that physical disability of plaintiff's attorney constitutes good cause justifying trial court's refusal to dismiss for failure to prosecute." In the herein case, counsel for plaintiff was pregnant during 50% of the period of nonrecord activity.

(R. 10-11)

The non-record activities set forth by plaintiffs' attorney were not good cause for failure to prosecute under Rule 1.420(e). Prior to 1976, trial courts could consider record activity, as well as certain types of non-record activity, in determining whether to dismiss an action for lack of prosecution. Musselman Steel Fabricators, Inc. v. Radziwon, 263 So.2d 221, 222 (Fla. 1972). In 1976, however, this Court specifically amended Rule 1.420(e) to eliminate non-record activity as a basis for tolling the rule's one year time period.

As amended, Rule 1.420(e) allows courts to consider only activity that "appears on the face of the record." The committee note accompanying the amendment specifically states that, "Non-record activity will not toll the one year time period." See In re: The Florida Bar, Rules of Civil Procedure, 339 So.2d 626 (Fla. 1976). The amendment retained the "good cause" defense to dismissals, but only to permit evidence of non-record activity related to extraordinary or compelling events that essentially prevented record activity from occurring. Tosar v. Sladek, 393 So.2d 61, 63 (Fla. 3d DCA 1981); American Eastern Corp. v. Henry Blanton, Inc., 382 So.2d 863 (Fla. 4th DCA 1979), cert. denied 379 So.2d 203 (Fla. 1979).

In American Eastern Corp. v. Henry Blanton, Inc., supra, the court commented upon the amendment to Rule 1.420(e) and stated:

> [T]he amendment to Rule 1.420(e) must not be disregarded. Its purpose was to eliminate most non-record activity of the type recognized prior to the amendment as a basis to establish good cause to avoid a dismissal for lack of prosecution. Consequently, the standard in determining whether particular nonrecord activity constitutes good cause must be set high, and a party must now show a compelling reason to avoid dismissal where there has been no record activity. For example, the party might show estoppel, as in the present case, or a calamity preventing record activity. [Emphasis supplied.]

382 So.2d at 865.

In Tosar, the Third District Court of Appeal stated:

> We do not indicate by this decision that all forms of nonrecord activity are insufficient to prevent the granting of a motion to dismiss for failure to prosecute. We are only indicating that a compelling reason must be demonstrated to overcome such seeming lethargy. See Barnes v. Ross, 386 So.2d 812 (Fla. 3d DCA 1980). [Emphasis supplied.]

393 So.2d at 63.

Plaintiffs failed to demonstrate any compelling reason, such as estoppel or a calamity which prevented record activity during the relevant one year period. The non-record activity described by plaintiffs' attorney consisted of attempts to associate co-counsel, contacts with expert witnesses, investigation and pregnancy of plaintiffs' attorney. Those types of non-record activities were not sufficient to constitute "good cause" even under the prior, more liberal version of Rule 1.420(e), and certainly do not constitute good cause under the present, stricter version of the Rule. Daurelle v. Beech Aircraft Corp., 341 So.2d 204 (Fla. 4th DCA 1977), cert. denied 354 So.2d 980 (Fla. 1977); Castle v.

Struhl, 293 So.2d 798 (Fla. 3d DCA 1974); Fleming v. Florida Power Corp., 254 So.2d 546 (Fla. 2d DCA 1971), cert. denied 262 So.2d 447 (Fla. 1972).

Good cause cannot be demonstrated by contacts with clients, interviewing witnesses or other investigation. 107 Group, Inc. v. Gulf Coast Paving & Grading, Inc., 459 So.2d 466 (Fla. 1st DCA 1984); FMC Corp. v. Chatman, 368 So.2d 1307 (Fla. 4th DCA 1979), cert. denied 379 So.2d 203 (Fla. 1979); Daurelle v. Beech Aircraft Corp., 341 So.2d 204 (Fla. 4th DCA 1977), cert. denied 354 So.2d 980 (Fla. 1977).

Attempts to associate co-counsel or hire substitute counsel also do not constitute good cause for a failure to prosecute. Carter v. DeCarion, 400 So.2d 521 (Fla. 3d DCA 1981), rev. denied 412 So.2d 464 (Fla. 1982); Florida Power & Light Co. v. Gilman, 280 So.2d 15 (Fla. 3d DCA 1973).

Likewise, the mere fact that plaintiff was pregnant for fifty percent of the one year period does not demonstrate good cause. In order for a physical condition to constitute "good cause" it must be shown that the attorney suffered from an unexpected illness or injury which was disabling and which prevented the attorney from working. Barnes v. Ross, 386 So.2d 812, 814 (Fla. 3d DCA 1980) (good cause shown where plaintiffs' attorney was seriously injured in automobile accident and hospitalized on two separate occasions). A temporary illness will not satisfy the good cause requirement. Grossman v. Segal, 270 So.2d 746 (Fla 3d DCA 1972), cert. denied 274 So.2d 237 (Fla. 1973); Davant v. Coachman Properties, Inc., 118 So.2d

844 (Fla. 2d DCA 1960). In Davant, the court construed the statutory predecessor to Rule 1.420(e) and stated:

> Illness of a temporary nature extending over a period of weeks ordinarily presents no problem, for upon recovery ample time still remains within which to avoid the impact of the statute, but where it becomes apparent that the affliction will be of protracted duration or perhaps even permanent in nature, the time eventually comes when something must be done. The legislature contemplated such misfortunes as illness, but in the act drew the line at one year, a liberal and reasonable period within which litigants may readjust themselves to almost any kind of calamity.

118 So.2d at 845. In regard to the pregnancy issue, the majority below overlooked the fact that plaintiffs' attorney never asserted any disability or inability to work due to pregnancy. In the "Showing of Good Cause" plaintiffs' attorney simply stated that "In the herein case, counsel for plaintiff was pregnant during 50% of the period of nonrecord activity." Despite the fact that there was no disability alleged, the majority's opinion in Diaz contains references to a disability, as follows:

> [P]laintiffs' counsel filed a "showing of good cause" and argued to the court that she was physically disabled, owing to a pregnancy, for "50% of the period of record nonactivity."

492 So.2d at 1083.

> Plaintiff's second issue is whether the claimed disability of their counsel, caused by pregnancy, which continued for 50% of the period of nonrecord activity, constituted good cause for failure to prosecute.

492 So.2d at 1084.

> Using the Barnes length of disability as a guide, accepting counsel's uncontradicted testimony that her pregnancy prevented her from practicing law for approximately six months, and applying what is common knowledge that pregnancy, birth and recuperation may preclude a full-time devotion to the practice of law for at least four months, a result the same as that reached in Barnes is only arguably sustainable.

Id. (Emphasis in original.)

It cannot be said that there was uncontradicted testimony that the pregnancy of plaintiffs' attorney prevented her from practicing law for approximately six months, when there was no allegation or testimony at all that plaintiffs' attorney was unable to work. Had there ever been any such allegation, defendants would have disputed it. In addition, the fact that plaintiffs' attorney never contended that she was unable to work was raised in the appellees' briefs. For instance, the brief filed below by the Public Health Trust contained the following argument:

> [T]he mere fact that plaintiff was pregnant for fifty percent of the one year period does not demonstrate good cause. In order for a physical condition to constitute "good cause" it must be shown that the attorney suffered from an illness or injury which was disabling and prevented the attorney from working. Barnes v. Ross, 386 So.2d 812 (Fla. 3d DCA 1980). Plaintiffs' attorney never alleged that she was disabled in any way by her pregnancy, and the mere fact that an attorney was pregnant should not constitute good cause for failure to prosecute.

Brief of appellees, Public Health Trust, et al., p. 15.

A similar argument was raised in the brief filed by appellee, Cedars of Lebanon Hospital:

> Additionally, without disputing the veracity of the plaintiff's allegations, the mere statement that counsel for the plaintiff was pregnant for 50% of the period of non-record activity does also not suffice. The cases interpreting 1.420(e) specifically indicate that a party must demonstrate a disabling injury or illness which prevents the party's attorney from taking action for a certain period of time. C.F. Barnes v. Ross, 386 So.2d 812 (3d DCA 1980). The court below was not presented with any evidence of disability and, thus, plaintiff's allegation in this regard cannot constitute good cause under any interpretation of 1.420(e).

Brief of appellee, Cedars, p. 6-7.

The majority below erred factually by stating that plaintiffs' attorney was physically disabled when no claim of physical disability was ever made. In fact, the only evidence in the record demonstrated that plaintiffs' counsel was not suffering from a physical disability which precluded her from working on this case during the one year period in question. In plaintiffs' "Showing of Good Cause", their attorney claimed that the action should not be dismissed because "extensive" non-record activity had taken place. (R. 10) That extensive activity on the part of plaintiffs' attorney included meetings with the plaintiffs; meetings with other attorneys and investigations. If plaintiffs' attorney was physically able to conduct extensive non-record activity, then certainly she was physcially able to conduct a single act of record activity.

In the absence of serious complications which would be considered a calamity and which would prevent record activity, pregnancy alone is not good cause for failure to prosecute under Rule 1.420(e). As recognized by Judge Baskin in her special concurrence below:

> Pregnancy alone, without complications, is not a physical disability. A review of the record reveals no evidence of complications which might have prevented counsel from attending to appellant's cause. An examination of the unsworn showing of good cause for failing to advance the case discloses that the pregnancy was cited to the trial court merely as an afterthought.

492 So.2d at 1085. A pregnant attorney is well aware of the impending birth of a child and has the opportunity and responsibility to make appropriate arrangements for the proper handing of pending cases.

Pregnancy, and the birth of a child nine months later, is not the type of unexpected calamity contemplated by the court in Barnes v. Ross, 386 So.2d 812 (Fla. 3d DCA 1980), where an attorney's physical disability continued for four months after an automobile accident and involved two separate hospitalizations for a period of five weeks. In discussing Barnes in the context of the case at bar, the majority below stated:

> Using the Barnes length of disability as a guide..., a result the same as that reached in Barnes is only arguably sustainable. If the trial court had dismissed the action in the first instance, there is little probability that plaintiffs, on the record before us, could have demonstrated that the court clearly abused its discretion.

THORNTON, DAVID & MURRAY, P.A., ATTORNEYS AT LAW
2950 SOUTHWEST 27TH AVENUE, SUITE 100, MIAMI, FLORIDA 33133 • TELEPHONE (305) 446-2646

429 So.2d at 1084-5. The majority further stated, "We do not hold, as a matter of law, that counsel's pregnancy constituted good cause for failure to prosecute." Id. at n. 1.

Because plaintiffs' attorney did not suffer from any physical disability which precluded her from working on the case at bar during the relevant one year period, there was no showing of good cause and the trial court correctly dismissed the action for lack of prosecute.

CONCLUSION

The decision of the Third District Court of Appeal reversing the judgment of the trial court should be quashed.

Respectfully submitted,

FOWLER WHITE BURNETT HURLEY BANICK & STRICKROOT, P.A.
Attorneys for University of Miami
501 City National Bank Building
25 West Flagler Street
Miami, FL 33130

ADAMS HUNTER ANGONES ADAMS ADAMS & McCLURE
Attorneys for Cedars
66 West Flagler Street
Miami, FL 33130

THORNTON, DAVID & MURRAY, P.A.
Attorneys for Petitioner,
Public Health Trust
2950 S.W. 27th Avenue, Suite 100
Miami, FL 33133

By: Kathleen M. O'Connor
KATHLEEN M. O'CONNOR

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 23rd day of March, 1987 to: EMILIA DIAZ-FOX, ESQ., Suite 424, 200 S.E. First Street, Miami, FL 33131.

THORNTON, DAVID & MURRAY, P.A.

By: Kathleen M. O'Connor
KATHLEEN M. O'CONNOR

THORNTON, DAVID & MURRAY, P.A., ATTORNEYS AT LAW
2950 SOUTHWEST 27TH AVENUE, SUITE 100, MIAMI, FLORIDA 33133 • TELEPHONE (305) 446-2646