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

REPLY BRIEF OF PETITIONERS ON THE MERITS

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TABLE OF AUTHORITIES

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STATEMENT IN REGARD TO JURISDICTION

Respondents, who did not bother to file any jurisdictional brief in this case, now contend that this Court lacks jurisdiction to review the decision below.

This Court does have jurisdiction for the reasons set forth in Petitioners' brief on jurisdiction. The decision of the District Court of Appeal clearly 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. Tingle v. Dade County Board of County Commissioners, 245 So.2d 76, 77 (Fla. 1971); Alabama Hotel Co. v. J. L. Mott Iron Works, 86 Fla. 608, 98 So. 825 (Fla. 1924); see also Keathley v. Larson, 348 So.2d 382, 384 (Fla. 2d DCA 1977), cert. denied, 358 So.2d 131 (Fla. 1978). Although Respondents asserted that this court lacks jurisdiction, there was absolutely no discussion in their brief of the cases cited above, and no attempt whatsoever to distinguish those cases.

Jurisdiction is proper in this case because the district court incorrectly ruled that a trial court was powerless to reverse an erroneous non-final order, and that ruling conflicts with decisions of this Court and with decisions of other District Courts of Appeal.

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.

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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.

ARGUMENT

I.

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.

Respondents have raised two arguments in support of their assertion that the trial court was powerless to reverse its own erroneous non-final order. First, Respondents contend that they relied upon the order and incurred "massive" fees and costs. (Brief of Respondents, p. 24) Respondents did not, however, have any right to rely upon an erroneous non-final order, which was always subject to reversal by the trial court or by an appellate court. In addition, Respondents obviously did not incur "massive" attorneys' fees in a personal injury case in which there was no recovery and where the case was dismissed because of a complete lack of record activity for a one year period. Furthermore, Respondents have not incurred "massive" fees on appeal. Respondents' attorney filed an initial brief in the District Court of Appeal, but did not file a reply brief and did not file an answer brief in regard to the University of Miami's cross-appeal. In the proceedings before

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this Court, Respondents' attorney did not file a jurisdictional brief, and has only filed an answer brief.

Respondents' second argument is that they were prejudiced by the fact that the trial judge did not dismiss their case for lack of prosecution when the opportunity first arose to do so. Respondents now contend that had the trial judge dismissed their action in May of 1984, they could have refiled their lawsuit. That argument was not raised in the trial court or in the District Court of Appeal. (See Plaintiffs' "Motion for Rehearing of Final Judgment of Dismissal", R. 285; see also "Initial Brief of Appellants") The argument, therefore, may not be raised or considered for the first time at this stage of the proceedings.

In addition, the argument that the trial court's actions deprived the Respondents of an opportunity to refile their lawsuit is absolutely contradicted by the record on appeal. The applicable statute of limitations in regard to the University of Miami and Cedars of Lebanon Hospital was two years, pursuant to section 95.11(4)(b), Florida Statutes (1981), which 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 with 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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The applicable statute of limitations in regard to the Public Health Trust of Dade County, Florida, was four years (from the time the cause of action accrued), pursuant to section 768.28(11), Florida Statutes (1981).

A review of the record in this case clearly demonstrates that the plaintiffs' cause of action accrued (at the latest) in February of 1982. When the trial judge signed the Notice on April 11, 1984, providing that the case would be dismissed for lack of prosecution, the two year statute of limitations had already run. In addition, when the trial judge entered a final judgment, on April 24, 1985, there were still eleven months remaining before the four year statute of limitations would run.

The facts in regard to the statute of limitations, and plaintiffs' notice of the accrual of their cause of action, are as follows. The minor plaintiff, Diana Margarita Diaz was born on April 11, 1981. In answers to Interrogatories by the minor's parents, Manuel C. Diaz and Barbara Diaz, both parents admitted knowledge of the alleged malpractice in 1981. For instance, both parents were asked whether they had refused to pay any of the medical bills in regard to this incident, and both parents filed the same answers:

> 32. Have you refused to make payment of any medical fee?
>
> A. Yes.

33. If so, for each refusal state:

a) The fee which you have refused to pay.

A. Approximately $5,000.00.

b) The date of your refusal.

A. Since it was first billed in 1981.

c) For what reason you refused.

A. Negligence on the defendant's part.

(R. 223-224; 256-257)

In addition, both parents were asked when they became aware of the alleged injury to their daughter:

16. On what date did you become aware of each injury or illness complained of in this action?

A. On or about February, 1982.

(R. 217, 250)

It cannot be disputed, therefore, that the parents were aware of the alleged negligence when they refused to pay the hospital bill in 1981, and that the parents were aware of the alleged injury to their daughter in February of 1982, when they sought medical treatment for their daughter at Variety Children's Hospital. (R. 218) Clearly, the statute of limitations began to run in February of 1982, when the parents were aware of the alleged injury to their daughter. Moore v. Morris, 475 So.2d 666 (Fla. 1985); Almengor v. Dade County, 359 So.2d 892 (Fla. 3d DCA 1978); see also Robinson v. Sparer, 365 So.2d 438 (Fla. 3d DCA 1978), cert. denied, 376 So.2d 75 (Fla.

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1979). The fact that Mr. and Mrs. Diaz were "rural farmers" as asserted in Respondents' brief (p. 11), would not have any effect on the running of the statute of limitations. In addition, in his answers to Interrogatories, Mr. Diaz stated that he was self-employed and that he graduated from the University of Miami with a B.A. in marketing. (R. 231)

When the trial judge entered the notice in April of 1984, stating that the action would be dismissed for lack of prosecution, the two year statute of limitations had already run, and the lawsuit could not have been refiled if the action had been dismissed in May of 1984. In addition, the plaintiffs were not deprived of any opportunity to refile their action against the Public Health Trust when the trial judge ultimately dismissed their action in April of 1985, because the four year statute of limitations did not run until February of 1986.

Based on the foregoing, the trial court had the power to reverse its own erroneous non-final order, and the plaintiffs were not entitled to rely upon a non-final order. In addition, the plaintiffs were not prejudiced by the eleven month period that elapsed between the time the case was first noticed for dismissal and the ultimate dismissal of the action.

II.

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

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Respondents have argued that the trial judge erred in dismissing their action because the court used the language "nunc pro tunc" in the dismissal order. As correctly recognized by the District Court of Appeal, however, the "nunc pro tunc" language was simply superfluous, and had no effect on the substance of the trial court's ruling. Diaz v. Public Health Trust of Dade County, 492 So.2d 1082, 1084 (Fla. 3d DCA 1986).

Respondents have also argued that there was record activity in the trial court, which should have precluded dismissal for lack of prosecution. Although Respondents never made that argument in the trial court, it was raised in their brief in the District Court of Appeal. Respondents base their argument on the incredible assertion that their "Showing of Good Cause Why Complaint Should not be Dismissed", which was served on May 8, 1984, should constitute record activity. The record in this case reveals that although the trial court's Notice of Hearing on Motion for Order of Dismissal was served on April 11, 1984, it was not placed in the court file until May 15, 1984, or one week after plaintiffs' purported good cause showing was filed.

Respondents contend that their "Showing of Good Cause" should be considered record activity because it was placed in the court file before the trial court's sua sponte Notice of Hearing. An identical argument was rejected by the appellate court in Katoski v. Florida Power and Light Co., 455 So.2d 1327 (Fla. 4th DCA 1984).

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In Katoski, the trial court entered a sua sponte order on July 14, 1983, entitled "Sua Sponte Motion to Dismiss For Failure to Prosecute Notice of Hearing and Final Order of Dismissal." The order provided a hearing date on August 8, 1983, in the event a written showing of good cause was filed at least five days prior to the hearing. The Motion showed that it was mailed on July 14, 1983. Thereafter, on July 28, 1983, the plaintiff filed an affidavit of good cause and other pleadings. The action was dismissed by the trial court on August 8, 1983. On appeal, the plaintiff contended that the action should not have been dismissed because the court's sua sponte motion, while served on July 14, 1983, was not filed with the clerk until August 8, 1983, and was not recorded until August 10, 1983. In rejecting that argument, the court stated:

> Appellants argue that the one year period prescribed by Florida Rule of Civil Procedure 1.420(e) is to be measured by calculating the time between the date of the last record activity and the date of the filing of the motion to dismiss. Thus, they say that they caused to be reflected record activity which prevented dismissal because of their filings on July 28, 1983, which filings pre-dated the filing of the court's motion to dismiss on August 8, 1983. While this would normally be the rule or modus operandi where the adversary party, in this case the defendant, filed the motion to dismiss, we hold under the circumstances of this case that such approach or memorializations are not applicable.

455 So.2d at 1328. In explaining the reasons for its ruling, the court stated:

> The differences that we deem significant are that here the court itself took note of the record inactivity and energized Florida Rule of Civil Procedure 1.420(e). Moreover, and most importantly, the plaintiffs actually

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> received a copy of the court's order recording the non-activity reflected on the record prior to the time they filed their affidavit of good cause and other pleadings. Their actual receipt of the motion gives them even more notice and greater due process than would be the case if the court (or the adversary party) filed the motion to dismiss and then served a copy on the plaintiffs by mail. Thus, we are of the opinion that the plaintiffs here cannot be heard to complain because the sequences here were reversed, that is to say, they actually received a copy of the motion taking note of the non-activity before same was filed, rather than having the motion filed first and thereafter to have same served on plaintiffs by mail.
>
> We hold that no error or abuse of discretion has been demonstrated as to this matter.

Id. at 1329.

Based on Katoski, plaintiffs' "Showing of Good Cause", or any other pleading, would not constitute record activity simply because it was placed in the court file prior to the court's sua sponte notice, where the court's sua sponte notice was served well in advance of plaintiffs' response. There was, therefore, no record activity in the case at bar.

Where there has been no record activity for one year preceding a motion to dismiss for lack of prosecution, it is an abuse of discretion to deny the motion, 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), rev. denied, 412 So.2d 468 (Fla. 1982); Bair v. Palm Beach Newspapers, Inc., 387 So.2d 517, 518 (Fla. 4th DCA 1980). Respondents have totally failed to come forward with any showing of "good cause". For the reasons discussed in

Petitioners' initial brief on the merits, the pregnancy of Respondents' attorney, without any serious complications, does not constitute good cause for failure to prosecute.

In regard to the pregnancy, Respondents' attorney stated in the "Showing of Good Cause" filed below that, "In the herein case, counsel for plaintiff was pregnant during 50% of the period of nonrecord activity." (R. 11) It was never quite clear whether Respondents' attorney was pregnant for the first six months or the last six months of the one year period of record inactivity. In the answer brief, however, Respondents' attorney has stated that her child was "born five (5) months into the period of alleged inactivity herein." (Brief of Respondents', p. 9) It is, therefore, clear that a total of seven months elapsed after the birth of the child, during which no record activity was undertaken. There has been absolutely no showing of any illness or disability during that seven month period, and there has been no showing that Respondents' attorney was precluded from undertaking record activity during that period of time. During those seven months, Respondents' attorney was obviously on notice of the fact that she had missed time from work due to the birth of her child, and was on notice that she had a duty to review and properly handle the cases entrusted to her.

Furthermore, Respondents' attorney asserted in the "Showing of Good Cause" filed with the trial court that "extensive" non-record activity had taken place during the one year period of inactivity. (R. 10) Respondents' attorney has

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not set forth any argument to explain why she was physically capable of conducting "extensive" non-record activity, but incapable of conducting any record activity.

Because there was no record activity in the case at bar for a one year period, and because there was no showing of "good cause" for failure to prosecute, the trial court properly dismissed the action below for lack of prosecution.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 26th day of May, 1987 to: EMILIA DIAZ-FOX, ESQ., Courthouse Tower, Suite 350, 44 West Flagler Street, Miami, FL 33130.

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