**IN THE
SUPREME COURT
STATE OF FLORIDA**

78,503

FOURTH DISTRICT COURT CASE NO. 90-02201

KEITH LEROY TONEY and ORKIN EXTERMINATING COMPANY, INC.,

Appellees/Petitioners,

vs.

NEBUCHADNEZZAR FREEMAN and HELEN FREEMAN,

Appellants/Respondents.

**ON APPEAL FROM THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA**

PETITIONERS' BRIEF ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE AND FACTS

On February 9, 1990, following a period of fifteen (15) months without record activity, Broward County Circuit Judge Barbara Bridge entered a status order directing the parties[1] to advise the court in writing within fifteen (15) days as to the status of the case. The petitioners timely filed the mandated response, but no response was filed on behalf of the respondents. On March 6, 1990 the trial court dismissed the case for lack of prosecution.

On appeal the Fourth District Court of Appeal reversed, holding that the trial court's status order and/or petitioners' response constituted sufficient record activity to prevent a dismissal of the case.[2]

Notice of Intention to Invoke the discretionary jurisdiction of this court was filed on August 16, 1991 and this jurisdictional brief follows.

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[1] This action involves a claim for personal injuries arising out of an automobile accident wherein the Respondent, Nebuchadnezzar Freeman, alleges that he sustained personal injuries as a result of the negligence of Keith Leroy Toney while in the employ of Orkin Exterminating Company, Inc., Petitioners.

[2] The per curiam opinion of the Fourth District Court of Appeal, dated July 17, 1991, is substituted for an opinion dated March 20, 1991, which was withdrawn based on petitioners' motion for rehearing.

SUMMARY OF THE ARGUMENT

The petitioners assert that the Fourth District Court of Appeal interpreted Rule 1.420(e), Fla. R. Civ. P., in such a way as to create an express and direct conflict with the decisions of two (2) other district courts of appeal on the same question of law.

Review is sought pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv), which confers discretionary jurisdiction on this court to review decisions of district courts of appeal that expressly and directly conflict with decision(s) of another district court of appeal on the same question of law.

Conflict jurisdiction is created by the holding that "either the trial judge's status order or Orkin's [petitioner's] response tolled the time and prevented an involuntary dismissal." This holding creates an express and direct conflict with opinions of the First and Second District Courts of Appeal on the same question of law.

ARGUMENT

The Fourth District Court of Appeal held "that the trial court's status order and Orkin's [respondent's] response constituted sufficient record activity to prevent a dismissal of the case." Record activity is defined by Rule 1.420(e), Fla. R. Civ. P. as follows:

> [A]ll actions in which it appears on the face of the record that no activity by filing of pleadings, order of court or otherwise has occurred for a period of one year shall be dismissed by the court on its own motion or on the motion of any interested person ... after reasonable notice to the parties, unless a stipulation staying the action is approved by the court or a stay order has been filed or a party shows good cause in writing at least five days before the hearing on the motion why the action should remain pending.

At the time that the court entered the status order on February 9, 1990, there had been no record activity since November 3, 1988. Therefore, at the time that the status order was entered Rule 1.420(e), Fla. R. Civ. P. was already applicable.

Nevertheless, the Fourth District held that the status order and the petitioners' response constituted record activity.[3] This holding creates an express and direct conflict with the decisions of the First District Court of Appeal in Caldwell v.

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[3] "Record activity" has been defined by this court as "an affirmative act (by any party) directed toward the disposition of the cause." Eastern Elevator, Inc. v. Page, 263 So.2d 218, 220 (Fla. 1972).

Mantei, 544 So.2d 252 (Fla. 2nd DCA 1989) and the First District Court of Appeal in Norflor Construction v. City of Gainesville, 512 So.2d 266 (Fla. 1st DCA 1987).

In Caldwell, interrogatories had been submitted to the defendant on May 19, 1986. Despite the fact that responses had been mailed to plaintiff's counsel on June 12, 1986, these responses were not filed until May 28, 1987. Prior to that filing, counsel for the defendant filed a motion to dismiss alleging the lack of record activity for more than one (1) year (May 19, 1986 - May 20, 1987). The plaintiff defended the motion alleging that a status report filed by the trial court in October of 1986 and responses thereto filed by the parties were sufficient to avoid dismissal. The court held that the "status requests and reports, albeit record activity, were not sufficient to avoid dismissal, since they did not move the case forward toward disposition." Caldwell, supra, at 254.

The court relied on the First District case of Norflor Construction v. City of Gainesville, supra, which had previously held that an order to advise of status and counsel's response to the order did not constitute "an affirmative act directed toward disposition of the case" (citation omitted) sufficient to preclude dismissal.

The holding of the Fourth District in the instant case is expressly and directly in conflict with these decisions and justifies the exercise of discretionary jurisdiction pursuant to 9.030(a)(2)(A)(iv), Fla. R. App. P.

CONCLUSION

For all the foregoing reasons, the Petitioners respectfully submit that this court should exercise its discretionary jurisdiction to review the decision of the Fourth District Court of Appeal in the instant case.

Respectfully submitted,

BY 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to: GARY A. MARKS, ESQUIRE, Attorney for Appellants, 303 Southwest 6th Street, Fort Lauderdale, Florida 33316, this 26th day of August, 1991.

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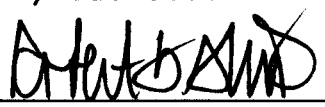
BY 
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