SUPREME COURT OF FLORIDA

CASE NO.: SC 00-1472
Lower Tribunal No.: 5D99-1114

DR. M. HASSEN MOOSSUN, ETC.

Petitioner,

vs.

ORLANDO REGIONAL HEALTHCARE, ETC.
ET AL.,

Respondents.

ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

In the first paragraph of his statement of the case and facts, petitioner recites allegations of the complaint as "facts." These facts are disputed by respondents, but respondents agree that this appeal arises out of a medical malpractice suit which alleges that improper care and treatment by respondents resulted in the death of their patient.

Respondents dispute petitioner's contention at page 2 n.2 that the trial court construed the February 18, 1998 order for substitution of counsel as record activity. The more reasonable explanation is that this order was generated by a computer program that referenced February 18, 1998 as the last docket entry, without analysis of the substance of that entry.

SUMMARY OF THE ARGUMENT

The decision of the Fifth District Court of Appeal is entirely consistent with *Toney v. Freeman*, 600 So.2d 1099 (Fla. 1992) in its refusal to construe appropriate case management activities in such a way as to render Rule 1.420(e) inapplicable and release plaintiffs from their obligation to pursue their cases. The decision of the Fifth District follows *Toney* in that it gives effect to both case management and Rule 1.420 by permitting trial judges to manage litigation without relieving plaintiffs of their obligations. To do otherwise would be contrary to the purpose of both case management and Rule 1.420(e) to encourage efficient and prompt disposition of cases.

The decision of the Fifth District is consistent with both *Toney* and the principle that orders of court do not constitute record activity unless the order was entered in response to some action by a party.

It would be counterproductive and contrary to the analysis of *Toney* to find record activity in court orders that by their nature were prompted by the plaintiff's failure to move the case forward.

ARGUMENT

I. THE ORDER SETTING CASE MANAGEMENT CONFERENCE WAS NOT RECORD ACTIVITY

A. Standard of Review

Respondents agree with petitioner that whether the subject order constitutes record activity is a legal question reviewed by this Court *de novo.*

B. Merits

The decision of the Fifth District Court of Appeal in this case is consistent with both the letter and the spirit of *Toney v. Freeman*, 600 So.2d 1099 (Fla. 1992), in which this Court unanimously construed a status order and Rule 1.420(e) to effectuate (rather than defeat) the purpose of both. This Court approved the holdings of *Caldwell v. Mantei*, 544 So.2d 252 (Fla. 2d DCA 1989) and *Norflor Construction Corp. v. City of Gainsville*, 512 So.2d 266 (Fla. 1st DCA 1987) *rev. den'd* 520 So.2d 585 (Fla. 1988), that status inquiries and the attorneys' responses thereto did not constitute record activity for purposes of Rule 1.420(e). This Court stated:

> We find the opinions in *Norflor Construction* and *Caldwell* to be consistent with the principle that record activity must advance a case toward resolution. As Judge Downey noted in his dissenting opinion below, "[i]n a stretch of the imagination. . . most any activity demonstrates there is life in the case and nudges it along. However, the ideal is to do something affirmative, something of substance."
>
> 591 So.2d at 202 (*Downey, J.*, dissenting). Not every paper placed in the court file may be considered as record activity.
>
> We also find this reasoning to be consistent with the spirit and purpose of the rule. Trial judges should be encouraged to take an active role <u>in keeping themselves informed</u> of the cases assigned to them. We refuse to construe appropriate case management activities in such a way as to give the parties leave to ignore the case for another year before dismissal is possible. Such a construction would thwart the purpose of case management and the purpose of the rule itself to encourage prompt and efficient prosecution of cases and to clear court dockets of cases that have essentially been abandoned. (Emphasis supplied)

Toney at 1100.

This Court's decision in *Toney* was based on a consideration of both the spirit and purpose of Rule 1.420(e). Because it was considering a rule of civil procedure, this Court had final, exclusive authority to amend or construe the rules as necessary. In *Toney* this Court clearly had the option of deciding that the trial court's status order prevented dismissal of the action for lack of prosecution, but unanimously determined that doing so "would thwart the purpose of case management and the purpose of the rule itself . . . ." *Toney* at 1100.

Similarly, in *Barnett Bank of East Polk County v. Fleming*, 508 So.2d 718 (Fla. 1987) this Court unanimously relied on "the meaning, spirit, and purpose of Rule 1.420(e)" to hold that a premature motion to dismiss for lack of prosecution (1) did not constitute record activity precluding dismissal and (2) was not a nullity but rather

was just as effective as a properly timed motion (provided that the remainder of the one year ran after the filing of the premature motion).

Similarly, to construe the trial court's order in the instant case as record activity undercuts, rather than supports, the purpose and spirit of Rule 1.420(e). Under petitioner's interpretation, the issuance of the "standard form" order in this case would thwart the operation of Rule 1.420(e) by relieving the plaintiff from the obligation to diligently advance the case. As in *Toney*, petitioner's construction thwarts both the purpose of case management and the purpose of the rule to encourage prompt and efficient prosecution of cases.

In *Toney* this court noted that "the status order was designed to obtain information about the progress of the case; it did not move the case forward in the sense of a progression toward resolution." *Toney* at 1101. This Court pointed out in footnote 3 at page 1101 that:

> This is not to imply that a status order by the trial judge precludes any further record activity by the parties. Indeed, a status order should serve to warn a neglectful plaintiff that the case is in danger of being dismissed, and prod the plaintiff into taking some affirmative record activity, in addition to responding to the court's inquiries.

The Fifth District correctly recognized that the same considerations present in *Toney* are present in the instant case, and the distinction that the status order under review set a hearing is immaterial. Under petitioner's theory of Rule 1.420(e) the status order is self-defeating because it renders Rule 1.420(e) a nullity by relieving the plaintiff of the obligation to advance his or her case. The construction applied by the Fifth District in this case, consistent with *Toney*, serves the purpose of both Rule 1.420(e) and the trial court's status order in that the plaintiff is not only reminded of

his obligation to advance the case in a timely fashion, but remains bound by that obligation.

A status hearing which results from the plaintiff's inaction is entirely different from a case management conference set by the plaintiff, as occurred in *Charyulu v. Mercy Hospital, Inc*., 703 So.2d 1155 (Fla. 3d DCA) *rev. den'd* 717 So.2d 535 (Fla. 1998). In *Charyulu*, the plaintiff used the approved method prescribed by Rule 1.200(a) to move the action forward. In *Toney* and the present case, the order from the court was triggered by the plaintiff's inaction and lack of diligence.

In *Samuels v. Palm Beach Motor Cars Ltd by Simpson, Inc.*, 618 So.2d 310 (Fla. 4th DCA, *rev. den'd* 629 So.2d 134 (Fla. 1993) the defendants did not attend the status conference because they did not receive proper notice, resulting in a default judgment which was later set aside on the defendants' motion. All of this occurred during the year before the filing of the motion to dismiss for lack of prosecution. Although the *Samuels* court focused on the claimed distinction between a status order and a status conference, the motion to dismiss arguably should have been denied anyway because of the record activity in the form of the default judgment and later vacating of that judgment. In the present case the motion to dismiss for failure to prosecute was filed before even the conference had occurred.

The Fourth District's rationale for construing a circuit court's case management activities as record activity has evolved over time. *Freeman v. Toney*, 591 So.2d 200, 201 (Fla. 4th DCA 1991), the original panel decision of the Fourth District, drew no distinction between a status order and an order setting a status conference. Instead the Fourth District announced agreement with *Miami Beach Awning Co. v. Heart of the*

City, Inc., 565 So.2d 739 (Fla. 3d DCA 1990) (in which the Third District found a status conference order reasonably calculated to advance the cause toward resolution), and acknowledged conflict with *Caldwell* and *Norflor Construction.*

On rehearing, the panel substituted a decision which distinguished *Caldwell, Norflor* and *Miami Beach Awning* on the basis that examination of the status order and defendant Orkin's responses established that the questions and answers were "designed to advance the case toward resolution." *Freeman v. Toney*, 591 So.2d at 202. Contrary to the conclusion of the Fourth District, this Court accepted review of the decision on the basis of conflict with *Caldwell* and *Norflor* and approved those decisions. This Court did not mention *Miami Beach Awning*.

> We begin by noting that not every action taken in a case is sufficient to prevent dismissal under the rule. Record activity must be more than a mere passive effort to keep the case on the docket; the activity must constitute an affirmative act calculated to hasten the suit to judgment. *Eastern Elevator, Inc. v. Page*, 263 So.2d 218 (Fla. 1972)."

Toney at 1100. This Court cited with approval to the holding of the First District in *Norflor Construction* that the plaintiff's response to the status order was a manifestation of an intention to act, but not actual record activity itself. *Id.*

In *Samuels* the Fourth District cited *Miami Beach Awning Co.* for a distinction between a status order and a status conference. The extremely brief opinion in *Brown v. Meyers*, 702 So.2d 646 (Fla. 5th DCA 1997) possibly extends the reasoning of the Fourth District to find that an order scheduling a status conference is itself record activity even where the motion to dismiss is filed before the status conference. *Brown* does not recite when the motion was filed.

In *Toney v. Freedman* this Court unanimously rejected the Fourth District's theory that case management activities such as status orders could suspend the operation of Rule 1.420(e). Consistent with the purpose and spirit of Rule 1.420(e) and this Court's earlier construction of same, this Court should reject the Fourth District's latest theory of record activity, which is based on the mere possibility that a status conference order will result in affirmative movement of the case at some later time.

In *Gulf Appliance Distributors, Inc. v. Long*, 53 So.2d 706, 707 (Fla. 1951) this Court quoted the Louisiana Supreme Court to the effect that:

> We think that a step in the prosecution of a suit means something more than a mere passive effort to keep the suit on the docket of the court; it means some active measure taken by plaintiff, intended and calculated to hasten the suit to judgment. . . .

[Emphasis supplied by this Court] In *Eastern Elevator, Inc. v. Page*, 263 So.2d 218, 220 (Fla. 1972) this Court clarified that although it had referenced the plaintiff, "an affirmative act directed toward the disposition of the cause" on the part of either the plaintiff or the defendant would prevent dismissal.

Application of *Toney* to this case best effectuates the purpose of Rule 1.420(e) and trial court's use of prompting orders. The approach urged by petitioner undermines the purpose of both the rule and the use of prompting orders in that this approach gives delinquent plaintiffs amnesty from application of Rule 1.420(e). As this Court noted in *Toney* at 1101 n.3, the receipt of a prompting order such as that involved in this case may have the effect of preventing a dismissal by alerting the delinquent plaintiff of the need to move the action forward. However, such order

should not be allowed to relieve the plaintiff of his or her obligation to diligently prosecute the action.

Even if some *sua sponte* orders of court could constitute record activity, it is particularly inappropriate to assign such effect to an order which by its nature is prompted by the failure of the plaintiff to promptly prosecute the action. Depending on how a circuit court's computer system is programed, prompting orders of this nature could have the effect (under petitioner's interpretation) of largely repealing Rule 1.420(e) in circuits where such a prompting order is automatically issued.

At page 9 n.4 of his brief, petitioner argues that the "plain language" of Rule 1.420(e) supports his position and that the current state of the law is not sufficiently clear as to what will constitute record activity. Petitioner's "plain language" argument relies upon the principle that legislative intent is determined from the plain language of a statute. Principles of statutory construction, however, are not applicable to a rule promulgated by this Court for which this Court is ultimately responsible for implementing and applying.

Petitioner's argument that all orders of court should be treated equally as record activity would, of course, require overruling the unanimous decision in *Toney v. Freeman*. This construction would also substantially undercut the purpose of Rule 1.420(e) to enforce prompt handling of litigation.

Petitioner further argues that the rule fails to give parties adequate notice of when an action is subject to dismissal notwithstanding an intervening court order. A plaintiff with any doubt about the status of his case under Rule 1.420(e) can protect himself by filing a notice of trial, which will prevent dismissal of the action. *Dixon v. City of Riviera Beach*, 662 So.2d 424 (Fla. 4th DCA 1995). A plaintiff can also

protect himself by seeking a stay order which tolls the one year period, which is explicitly contemplated by the language of Rule 1.420(e). *Modellista De Europa v. Redpath Investment*, 714 So.2d 1098, 1099 (Fla. 4th DCA) *rev. den'd* 728 So.2d 203 (Fla. 1998).

Respondent disputes petitioner's assertion at page 11, n.5 that the trial court "relied on the plain language of Rule 1.420(e)" to construe the February 18, 1998 substitution of counsel order as record activity.[1] Respondent submits that the more plausible explanation is that a computer program generated the preparation of this form order based on the existence of a February 18, 1998 docket entry without regard to the substance of that entry.

In *Boeing Co. v. Merchant*, 397 So.2d 399 (Fla. 5th DCA 1981) the Fifth District Court of Appeal held that a prompting order similar to the order at issue in this case did not constitute record activity, even though the order set a hearing. In *Nelson v. Stonewall Ins. Co.*, 440 So.2d 664 (Fla. 1st DCA 1983) the court examined numerous cases cited in the opinion and stated:

> Our reading of these decisions indicates that the record action held necessary to prevent a Rule 1.420(e) dismissal not only substantially furthered the prosecution of the case but, also, was initiated either by a party to the action or by a court order entered in response to a party's notice or motion that advanced the cause. [Footnote omitted]

Nelson at 665. *Nelson* then went on to cite *Boeing Co.* as an example of such a principle. Significantly, the First District has reiterated this principle in *Norflor Construction Corp.*, approved by this Court in *Toney*; in *Togo's Eatery of Florida v.*

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[1]Motions and orders for substitution of counsel do not constitute record activity. *Dion v. Bald*, 664 So.2d 348, 349 (Fla. 5th DCA 1995); *Gulf Appliance Distributors, Inc. v. Long*, 53 So.2d 706 (Fla. 1951).

Frohlich, 526 So.2d 999, 1002 (Fla. 1st DCA 1988) and in *Wirth v. McGurn*, 598 So.2d 238, 240 (Fla. 1st DCA 1992).

This principle is entirely consistent with *Toney v. Freeman*, and harmonizes Rule 1.420(e) and Rule 2.085(b), Florida Rules of Judicial Administration, which provides in part:

> **Case Control.** The trial judge shall take charge of all cases at an early stage in the litigation and shall control the progress of the case thereafter until the case is determined. The trial judge shall take specific steps to monitor and control the pace of litigation . . . .

The purposes of Rule 2.085 and Rule 1.420(e) are best served by allowing these rules to complement each other rather than to allow routine case management to undermine the provisions of Rule 1.420(e).

What can be gleaned from the developing case law is that (1) court orders which are issued *sua sponte* to allow the court to inform itself concerning the status of the case will not serve as record activity for the purpose of Rule 1.140(e), *Toney v. Freeman*; and (2) court orders prompted by activity generated by either a plaintiff or defendant may be considered record activity for purposes of Rule 1.420(e). *Nelson v. Stonewall Ins. Co.* Neither of these interpretations is affected by whether the court order schedules a hearing or not. These interpretations clearly foster the purpose of Rule 1.420(e) and *Toney v. Freeman*, i.e., requiring the <u>parties</u> to advance the case and permitting trial courts to inform themselves about the pendency of a claim without relieving the parties of the obligation to affirmatively advance the case.

Petitioner's assertion that this Court's denial of review of *Samuels* and *Charyulu* establishes the correctness of those decisions is without merit. *Charyulu*

was entirely distinguishable from other cases in that the plaintiff affirmatively took action to schedule the case management conference, circumstances very different from the court's scheduling of a conference because of the plaintiff's failure to move the case forward.

In *Samuels* the case management conference resulted in the entry of a default which was later vacated on motion of the defendant. All of this occurred before the motion to dismiss was filed. *Samuels* was therefore distinguishable from a case involving only a case management order and attendance of the parties at a conference, or a case involving only the order itself.

Additionally, this Court's conflict jurisdiction is discretionary. Rule 9.030(a)(1), Fla. R. App. P. describes classes of cases which this Court is obligated to review, such as death sentences and district court decisions invalidating state statutes. Review on the basis of conflict, on the other hand, is referenced in Rule 9.030(a)(2) entitled "discretionary jurisdiction."

Petitioner asserts at page 19 that it would have been futile for petitioner to set a case management conference himself after entry of the trial court's order. This assertion is irrelevant to the present case since the motions to dismiss for failure to prosecute were filed two days after entry of the trial court's order. Action taken after the filing of a motion to dismiss for failure to prosecute are irrelevant. *Caldwell v. Mantei*, 544 So.2d 252, 254* (Fla. 2d DCA 1989).

If the motions to dismiss not been filed, there was nothing about the trial court's order that would have prevented petitioner from convening a case management conference, noticing the case for trial, or taking other action to proceed forward. As this court pointed out in *Toney v. Freeman* at page 1101, n.3, a status order does not

preclude further record activity and should serve to prod the plaintiff into taking such action in addition to responding to the court's inquiries.

Other than scheduling a hearing, the order in the present case is very similar to the status order in *Toney*. The order in the instant case could be said to reflect an intention by the trial court to move the case forward. The same could be said for the status order in *Toney*, in which the trial court inquired why the case had been delayed, why it had not been noticed for trial, when discovery would be completed and how many days the trial would take. *Toney*, 600 So.2d at 1099. This Court nevertheless unanimously found a lack of record activity in *Toney* and the fact that a hearing was scheduled in this present case does not change this analysis.[2]

Respondents also maintain that the subject order is defective in that petitioner was the only party served with this order. Although the fact was not discussed in the decision under review, it is nevertheless another reason why the order issued in this case cannot constitute record activity. The order by definition cannot be calculated to move the case forward if the defendants are unaware of it.

At pages 18 to 19 petitioner cites several cases to support the assertion that activity initiated by the court or by a defendant constitutes record activity. Those cases holding that any *sua sponte* activity will constitute record activity were issued well before *Toney v. Freeman*, and are no longer good law.

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[2]The *sua sponte* order at issue in *Boeing Co. v. Merchant*, 397 So.2d 399 (Fla. 5th DCA 1981) *rev. den'd*, 412 So.2d 468 (Fla. 1982) was more detailed than the order in the instant case. The *Boeing Co.* order specified certain actions that the court might take if appropriate, including disposing of pending motions and setting the case for trial. *Id* at 401, n.2.

CONCLUSION

The Fifth District Court of Appeal appropriately held that *Toney v. Freeman* controls this case. This Court should approve the decision of the Fifth District Court of Appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Zahid H. Chaudhry, Esq. Chaudhry Law Offices, 909 East Par Avenue, Tallahassee, Florida 32301, and Richard L. Allen, Jr., Esq., Mateer & Harbert, P.A., 225 E. Robinson Street, Suite 600, P.O. Box 2854, Orlando, Florida 32802 this ___ day of March, 2001.

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