IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

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

Dr. M. HASSEN MOOSUN, Etc.,

Petitioner,

v.

ORLANDO REGIONAL HEALTH CARE, ETC.,
ET AL.,

Respondents.

RESPONDENT ORHS AND DR. PHILIP DAVIS, M.D.'S ANSWER BRIEF

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ADOPTION OF BRIEFS

Respondents adopt the briefs filed by the other Respondents in this case and arguments made therein as if fully set forth in this brief.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with the decision of another district court of appeal or of the Supreme Court on the same question of law. Article V, Section 3(b)(3), Florida Constitution (1980), Florida Rule of Appellate Procedure, Rule 9.030(a)(2)(A)(iv). This Case comes before this Court on its Order Accepting Jurisdiction and Dispensing with Oral Argument dated January 25, 2001.

STATEMENT OF THE CASE AND FACTS

In the first paragraph of Appellant's Statement of the Case and Facts, Petitioner states certain opinions regarding the care and medical treatment received by Ameena Moossun, which are represented as "facts." These facts are disputed by the Respondents, but Respondents agree that this appeal to the Florida Supreme Court arises out of a medical malpractice lawsuit, which alleges that improper care and treatment by Respondents resulted in the death of their patient.

As outlined by the Fifth District Court of Appeals, the facts relevant to this case are as follows: An Amended Complaint was filed on November 3, 1997. Shortly thereafter, Petitioner's out-of-town counsel filed a Motion to Withdraw. The last filing by a party was a Request to Produce filed by Orlando Regional Healthcare System ("ORHS") on January 27, 1998.

In the year following the filing of ORHS's Request to Produce, only two documents appear to have been filed in the action. On February 18, 1998, the trial court issued an Order Substituting New Counsel to represent the Petitioner. Then, on January 26, 1999, the trial court issued an "Order Setting Case Management Conference." The Order provided in relevant part as follows:

ORDER SETTING CASE MANAGEMENT CONFERENCE

After a review of the file, the Court finds the **date of last record activity** was : FEBRUARY 18, 1998.[1]

IT IS THEREFORE ADJUDGED as follows:

UPON RECEIPT OF THIS ORDER, counsel and pro se parties, shall review the case and determine the status thereof. Plaintiff or it's [sic] counsel shall deliver by hand or mail DIRECTLY TO THE UNDERSIGNED JUDGE, no later than FIVE (5) DAYS prior to **March 19, 1999**, a **written report** of the status of this case, including but not limited to, motions pending, discovery taken and expected, estimated time to bring action to trial, and the necessary action recommended to be taken to move the case along or close it out. Such report may be in letter form and a copy shall be furnished to the opposing party.

THERE WILL BE A CASE MANAGEMENT HEARING ON **March 19, 1999,** at **8:30 a.m.** in

Courtroom 19-A, (19th Floor), Orange County Courthouse, 425 N. Orange Avenue, Orlando, Florida, at which time the Court will review the written status report and determine what matters may aid in the disposition of the action. (No phone hearings.)

PURSUANT TO RULE 1.200(c), FLORIDA RULES OF CIVIL PROCEDURE, ON FAILURE OF A PARTY TO ATTEND THIS CONFERENCE ON **March 19, 1999,** THE COURT MAY DISMISS THE ACTION, STRIKE THE PLEADINGS, LIMIT PROF [sic] OR WITNESSES, OR TAKE ANY OTHER APPROPRIATE ACTION, WITHOUT FURTHER NOTICE.

DONE AND ORDERED at Orlando, Orange County, Florida, this January 26, 1999.

_____

Walter Komanski, Circuit Judge

On January 28, 1999, the Defendants/Appellees moved to dismiss the action for lack of prosecution, asserting that "[t]he last record activity in this case was the Request to Produce served in this action by Defendant, Orlando Regional Healthcare System, d/b/a Sand Lake Hospital, which was served on January 27, 1998." On March 15, 1999, the Petitioner filed his status report outlining certain non-record activity which had allegedly taken place after February 18, 1998, and up until January 28, 1999, when the Motions to Dismiss were filed.

On March 24, 1999, the trial court held a hearing and entered an Order dismissing the case for lack of prosecution. The Order reviewed the activity set forth in counsel's letter of March 15, 1999, and concluded that none of the activity constituted "record activity" sufficient to preclude dismissal of the action. The Court further concluded that the Case Management Order entered by the Court was insufficient to establish record activity. The Court explained that "[t]he Case Management Order entered was only designed to determine the status of the case and to clear the Court's docket of cases that have been concluded or abandoned."

The Petitioner timely filed a Notice of Appeal of the trial court's Order dismissing the case. On March 31, 2000, the Fifth District Court of Appeals affirmed the trial court's dismissal of the case. On April 15, 2000, the Petitioner filed a Motion for Rehearing and Motion for Rehearing *En Banc*. The Petitioner also filed a Motion for Certification, asking the Fifth District Court of Appeals for an order certifying that the decision of this case conflicted with decisions in the Third and Fourth District Courts of Appeals on April 15, 2000. On June 2, 2000, the Fifth District Court of Appeals entered its Order Denying Petitioner's Motion for Rehearing and Motion for Rehearing *En Banc* and his Motion for Certification. This Court entered an Order Accepting Jurisdiction and Dispensing with Oral Argument on January 25, 2001.

SUMMARY OF THE ARGUMENT

The Fifth District Court of Appeals correctly affirmed the ruling of the trial court's holding that this case was controlled by *Toney v. Freeman,* 600 So.2d 1099 (Fla. 1992) and dismissing Petitioner's case for lack of prosecution. The reasoning found in *Toney* is consistent with the spirit of Rule 1.420(e), Florida Rules of Civil Procedure and a trial court's ability to conduct case management activities. Trial judges should be encouraged to take an active role in keeping themselves informed

of the cases assigned to them. To interpret Rule 1.420(e) to include a sua sponte prompting order as record activity sufficient to preclude dismissal thwarts the purpose of the rule itself. The trial court's Order Setting Case Management Conference in the instant case is the type of *sua sponte* order which is not initiated by any party that has been held not to constitute record activity. It simply reflects the trial court's effort to determine the status of the cases that have been concluded or abandoned. The cases relied on by Petitioner are factually distinguishable and cannot be said to support the contention that such an order, standing alone, is record activity under Rule 1.420(e).

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL AND THE TRIAL COURT IN THIS CASE WAS CORRECT IN RULING THAT AN SUA SPONTE ORDER SETTING A CASE MANAGEMENT HEARING WAS NOT RECORD ACTIVITY AND IS CONSISTANT WITH THIS COURT'S RULING IN TONEY V. FREEMAN, 600 SO.2D 1099 (FLA. 1992).

The Fifth District Court of Appeals was correct in affirming the trial court's decision to dismiss Petitioners case for lack of prosecution. Dismissal of Petitioners action was proper under *Toney v. Freeman*, 600 So.2d 1099 (Fla. 1992), which this Court unanimously construed a status order to be insufficient to bar dismissal under Rule 1.420(e). In *Toney*, this court held that the trial court's issuance of a status order asking the parties to advise the court of certain information (including why the case had exceeded the regular time limits set for such cases) was not record activity within the meaning of the rule. The trial court's Order in *Toney* requested each party to advise the assigned Judge of the status of the case by mailing the following information:

Reason case has not exceeded time standards:
If case has not been set for trial, what is the reason?
I expect discovery to be substantially completed by:
How many days will this case take to try?

Toney, 600 So.2d at 1099. This Court's analysis, which concluded that the above-referenced status Order, along with the defendant's response thereto did not constitute record activity under Florida Rule of Civil Procedure 1.420(e), approved the holdings in *Caldwell v. Mantei*, 544 So.2d 252 (Fla. 2nd DCA 1989) and *Norflor Construction Corp. v. City of Gainsville*, 512 So.2d 266 (Fla. 1st DCA 1987) rev. den. 520 So.2d 585 (Fla. 1988). In *Toney*, this Court noted that not every action taken in a case is sufficient to prevent dismissal under Rule 1.420(e). *Toney*, 600 So.2d at 1100. "Record activity must be more than a mere passive effort to keep the cause on the docket; the activity must constitute an affirmative act calculated to hasten the suit to judgment." *Id, citing Eastern Elevator, Inc. v. Page*, 263 So.2d 218 (Fla. 1972). This Court went on to say that,

Trial judges should be encouraged to take an active role in keeping themselves informed of the cases assigned to them. We refuse to construe appropriate case management activities [trial court's request for case status report] 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.
Toney, 600 So.2d at 1100.

In *Caldwell v. Mantei*, 544 So.2d 252 (Fla. 2d DCA 1989), a decision cited to favorably by *Toney*, the Second DCA held that a status report requested by the trial judge and responses by attorneys for both parties were insufficient to preclude dismissal. The only activity appearing on the record during the one year prior to the filing of the Motion to Dismiss for lack of prosecution was the trial court's request for status reports and counsels' responses to that request. The Second District Court of Appeals ruled that the status order and the responses, albeit record activity, were not sufficient to avoid dismissal because they did not move the case forward toward disposition. The *Calwell* court also noted that responses to interrogatories, which were filed after the defendant's motion to dismiss, were deemed to be nonrecord activity because they were not filed within the one year period and were preceded by the motion for dismissal.

In *Barnett Bank of East Polk County v. Fleming*, 508 So.2d 718 (Fla. 1987), this Court unanimously based its ruling on the "meaning, spirit, and purpose of Rule 1.420(e)" to hold that a motion to dismiss for lack of prosecution that was filed before the one-year time period of inactivity had passed did not constitute record activity so as to preclude dismissal. This Court reasoned that:

[B]ecause the goal of the motion [to dismiss for lack of prosecution] is to terminate the cause, the motion is the antithesis of activity reasonably calculated, as it must be, 'to advance the cause to resolution.' (Citation omitted.) And just as a court order designed to spur activity is held not to constitute affirmative record activity advancing the cause, (citation omitted), a court order, as here, which rejects the defendant's request to terminate the prosecution, although concedly not impeding the cause, does absolutely nothing to advance it.

Id. at 720. This Court went on to say that to regard a premature motion to dismiss for lack of prosecution as proof of the essential fact necessary to deny the motion, i.e., that there has been record activity, would be illogical. *Id*. "Moreover, to permit a case to be kept alive without any significant movement toward resolution is not consistent with the meaning, spirit, and purpose of Rule 1.420(e)." *Id*.

In the instant case, to construe the trial court's order as record activity is just as illogical and defeats the "spirit and purpose" of Rule 1.420(e). As mentioned above, the purpose of case management activities and Rule 1.420(e) is to encourage prompt and efficient prosecution of cases and to clear court dockets of cases that have essentially been abandoned. *Toney*, 600 So.2d at 1100. Petitioner seeks to construe the rule and interpreting case law to thwart this purpose. Under the interpretation advanced by Petitioner, any attempt by the courts, through a status order, to clear their dockets of cases that have essentially been abandoned would in fact have the effect of reviving these cases for yet another year. That interpretation is absurd when considering the fact that status orders, like the one found in the instant case, are used to sort out those cases that are being prosecuted from those that should be cleared from the court's docket. If Petitioner's interpretation were adopted, Rule 1.420(e) would be rendered a nullity and effectively tie the hands of the courts, leaving them with little case management control over these types of cases, in direct contradiction with Rule 2.085(b), Florida Rules of Judicial Administration, which states that the trial judge shall, at an early stage, control the progress of each case.

A status hearing—as in this case—resulting from a plaintiff's inaction is entirely different from a case management conference set by the plaintiff, as what occurred in *Charyulu v. Mercy Hospital, Inc.,* 703 So.2d 1155 (Fla. 3rd DCA), *rev den*. 717 So.2d 535 (Fla. 1998). Petitioner's reliance on *Charyulu* is misplaced and not dispositive of the issue of whether a status order filed by the court is record activity. In *Charyulu*, the Plaintiff himself filed a Notice to Convene a Case Management Conference less than one year after the occurrence of the last record activity in the case. Clearly such activity is designed to move the case forward and thus should have been considered record activity. However, the Notice filed in *Charyulu* is vastly different than the status order filed in the instant case. The status order was a prompting tool employed by the trial court to ascertain the prosecution status of the case to determine whether it should be been dismissed for lack of prosecution, and to serve as a reminder to the Plaintiff of the obligation to move the case forward. The Petitioner's reliance on the Fourth DCA's decision in *Samuels v. Palm Beach Motor Cars Ltd. By Simpson, Inc.,* 618 So.2d 310 (Fla. 4th DCA) rev den., 629 So.2d 134 (Fla. 1993) is also misplaced. In *Samuels*, the Fourth DCA ruled that a status order, **coupled with attendance by one or more parties at a status conference**, was sufficient record activity to preclude dismissal. In that case, the court noted that the Appellant's counsel had attended a status conference less than one year prior to the filing of a motion to dismiss for lack of prosecution. The *Samuels* court distinguished its factual situation from that which was present in *Toney*. The *Samuels* opinion stated that the *Toney* court did not address the issue of whether an order setting a status conference, coupled by the attendance of one or both parties at such a conference constitutes dismissal under Rule 1.420(e). *Samuels*, 618 So.2d at 311. The court went on to further distinguish *Toney* by stating that "the parties' attendance at a status conference can significantly advance a cause toward resolution. . .".

Just as *Toney* is distinguishable from *Samuels*, so is the instant case because no party attended any sort of status hearing within the one year period prior to the filing of the motion to dismiss for lack of prosecution. While it is true that the trial court's status order fell within the one-year period prior to the filing of the Motion to Dismiss, no party attended, nor was there held, a status hearing in the same one-year period. The Motion to Dismiss was filed after court's order, but was filed more than one year after the last record activity as contemplated in Rule 1.420(e). The opinion of *Samuels* on its face distinguishes itself from situations such as the facts in *Toney* and the instant case.
Petitioner also mistakenly relies on the case of *Brown v. Meyers*, 702 So.2d 646 (Fla. 4th DCA 1997), which can be distinguished from the instant case. The entire opinion in *Brown* is one short paragraph in length with little discussion of the facts involved. The opinion fails to state whether any status conference, such as the one found in *Samuels*, was held, yet relies completely on the holding in *Samuels*. Likewise, any conflict which may exist between the decisions of the lower court in this case and *Brown* can be resolved by simply examining the *Samuels* opinion. As discussed above, the opinion in *Samuels* itself distinguishes itself from factual circumstances such as those found in *Toney*, and the instant case, where the court's prompting order was not coupled with attendance by one or more of the parties at a hearing. As such, because the two cases are factually distinguishable, the opinions are consistent with this Court's interpretation of Rule 1.420(e).

The Fifth DCA's ruling in *Boeing Co. v. Merchant*, 397 So.2d 399 (Fla. 5th DCA 1981), is consistent with the line of reasoning employed by this Court in *Toney*, and the interpretation advanced by Respondent. In that case, the Fifth DCA held that a *sua sponte* prompting order similar to the one at issue in the instant case was not record activity so as to preclude dismissal. *Boeing* stood for the proposition that the motion to dismiss for failure to prosecute, which was filed after the prompting order calling for a hearing, but before the hearing was held, should have been granted. The court noted that the one year period is determined by the filing date of the last action and the filing date of the actual seeking dismissal. *Id*. at 402 (citation omitted). The court determined that the prompting order was not "record activity" and thus it was proper to dismiss the action.

The reasoning in *Boeing* is consistent with this Court's reasoning in *Toney*, as well as the Fourth DCA's reasoning in *Samuels*. That is, a prompting order, by itself, is not sufficient record activity to preclude dismissal. While it may be possible that a prompting order, coupled with other activity, such as the attendance at a hearing, which may take place prior to the filing of a motion to dismiss for lack of prosecution may be sufficient to constitute record activity as contemplated by Rule 1.420(e), those fact simply are not present here.

Petitioner's argument that this Court's denial of review of *Samuels* and *Charyulu* somehow support's her allegations is misplaced as well. This Court's denial of review, however, of those opinions is entirely consistent with the interpretation of the law surrounding Rule 1.420(e). More specifically, that a court's prompting order, standing alone, is not sufficient to preclude dismissal.

CONCLUSION

The trial court's *sua sponte* prompting order is not record activity under Rule 1.420(e) sufficient to preclude dismissal for lack of prosecution. Such a result is consistent with this Court's ruling in *Toney* and the spirit of Rule 1.420(e) and a trial court's ability to conduct case management activities. The cases relied on by Petitioner can be factually distinguished. The Third District Court of Appeal's opinion in Charyulu v. Mercy Hospital, Inc., 703 So.2d 1155 (Fla. 3rd DCA 1997) is distinguishable because in that case, the Plaintiff himself filed a Notice to Convene a Case Management conference, unlike in the instant case where the trial court simply issued a routine prompting order used to ascertain the status of the case. Likewise, the decision of the Fourth District Court of Appeals in Samuels v. Palm Beach Motor Cars Limited by Simpson, Inc., 618 So.2d 310 (Fla. 4th DCA 1993) is distinguishable because not only was the motion to dismiss in *Samuels* preceded by an order, but it was also preceded by the attendance by one of the parties at a case management conference. The spirit of Rule 1.420(e) and interpreting case law require that a *sua sponte* prompting order, standing alone, not be considered record activity sufficient to preclude dismissal.

RESPECTFULLY submitted this 2nd day of August, 2000.

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CERTIFICATE OF TYPEFACE AND SIZE

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by Fed Ex overnight carrier to **ZAHID H. CHAUDHRY, ESQUIRE,** 909 East Park Avenue, Tallahassee, Florida 32301, and by U.S. Mail, postage prepaid to **FRANCIS E. PIERCE, III, ESQUIRE**, P. O. Box 1273, Orlando,

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[1] In its opinion, the 5th District Court of Appeals stated that the February 18, 1998, Order Substituting New Counsel did not constitute record activity. In making that assertion, it cited *Derdion v. Bald*, 664 So.2d 348, 349 (Fla. 5th DCA 1995) "[A] motion to substitute new counsel is not sufficient record activity to prevent dismissal;" *Berenya v. Halifax Hospital Medical Center*, 498 So.2d 655 (Fla. 5th DCA 1986) (same).