IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

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

Dr. M. HASSEN MOOSSUN, etc.,

Petitioner,

v.

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

Respondents.

PETITIONER'S INITIAL BRIEF ON THE MERITS

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TABLE OF CONTENTS

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TABLE OF CITATIONS

FLORIDA DISTRICT COURT CASES

FLORIDA SUPREME COURT CASES

FLORIDA RULES OF CIVIL PROCEDURE AND JUDICIAL ADMINISTRATION

STATEMENT OF THE CASE AND FACTS

This case arose out of the death of twenty-year-old Ameena Moossun

("Ameena") from pneumonia at Sand Lake Hospital, in 1994. (R. 3) Ameena had fallen ill while on vacation with her mother in Orlando and, as plaintiff has alleged, her condition was misdiagnosed and her death was caused by the gross negligence of the defendants in this case. (R.138-215) This suit was filed by Ameena's father, Dr. M. Hassen Moossun (hereinafter "Dr. Moossun", "plaintiff, " or "appellant"), acting as personal representative of Ameena's estate. (R. 138-215) Plaintiff has, throughout this litigation, lived in Michigan. (R. 232) This medical malpractice case has not been heard on the merits. Instead, it was dismissed for failure to prosecute. (R. 306-308)

The facts relevant to the dismissal follow. Shortly after filing an amended complaint on November 3, 1997, plaintiff's out-of-town counsel filed a motion to withdraw. (R. 226-228). On January 27, 1998, Defendant Orlando Regional Healthcare System ("ORHC") filed a request to produce. (R. 239-244). In the year following the filing of ORHC's request to produce, only two documents were placed in the record: the February 18, 1998 Order for Substitution of Counsel for Plaintiff, and the January 26, 1999 "Order Setting Case Management Conference," by Judge Walter Komanski. (R. 236-238). The latter order provided, in relevant part:

ORDER SETTING CASE MANAGEMENT CONFERENCE

After a review of the file, the Court finds the DATE OF LAST RECORD ACTIVITY was: FEBRUARY 18, 1998 [the date of the order allowing the substitution of counsel][2]

IT IS THEREFORE ADJUDGED as follows:

1. UPON RECEIPT OF THIS ORDER, Counsel . . . shall review the case and determine the status thereof. Plaintiff . . . shall deliver . . . 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. . . .

2. THERE WILL BE A CASE MANAGEMENT HEARING ON **March 19, 1999** at **8:30 A.M.**, . . . 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)

3. 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 . . . this January 26, 1999.[3]

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[2] As evidenced by this Order, even the trial court relied on the plain language of Rule 1.420(e) in finding the February 18, 1998 order for substitution of counsel for plaintiff as constituting record activity.

[3] Defendants have attempted to argue that because the above Order has a defect in that its certificate of service indicates that it was not served to the attorneys for the Defendants, it should not be considered "record activity." This

Walter Komanski, Circuit Judge

(R. 238).

On January 28, 1999, the defendants moved to dismiss the action for lack of prosecution. (R. 239-244). In accordance with the January 26, 1999 Case Management Order, the plaintiff filed the status report on March 15, 1999, detailing significant activities since February 18, 1998, the date of the plaintiff's substitution of counsel. (R. 271-293). As per instructions of the January 26, 1999 Case Management Order, the plaintiff's status report specified a discovery cut-off date of June 30, 1999 and further recommended that the court set a trial date.

Because of Judge Komanski's unavailability, the case management conference was held on March 19, 1999, by Judge Alice Blackwell-White, and was attended by all parties as required by Judge Komanski's order of January 26, 1999. (R. 306-310). At the March 19, 1999 case management hearing, upon defendants'

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argument, however, is without any merit. See Rule 1.080(h), Fla.R.Civ.P. (stating, in part, as follows: (1) A copy of all orders or judgments shall be transmitted by the court or under its direction to all parties at the time of entry of the order or judgment. . . . (3) This subdivision is directory and a failure to comply with it does not affect the order or judgment or its finality or any proceedings arising in the action.); see also Samuels v. Palm Beach Motor Cars Limited By Simpson, Inc., 618 So.2d 310 (Fla. 4th DCA 1993).

request the court considered defendants' motion to dismiss filed on January 18, 1999. (R. 306-310). Judge Alice Blackwell-White entered an order on March 24, 1999, dismissing the case for lack of prosecution. (R. 306-308). Judge Blackwell-White's order, in pertinent part, stated that Judge Komanski's case management order "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." (R. 306-308).

The plaintiff timely filed a notice of appeal. (R. 311-317). On March 31, 2000, the Fifth District Court of Appeal filed a 2-1 decision affirming the trial court's dismissal of this case. Mossun v. Orlando Regional Health Care, 760 So.2d 193 (Fla. 5th DCA 2000). In his dissent, Senior Judge M. Orfinger wrote "I would reverse," noting that the majority's decision conflicts with decisions from the Third and Fourth District Courts of Appeal, and with a decision from the Florida Supreme Court.

After Plaintiff's motions for rehearing were denied, he timely filed a Notice to Invoke Discretionary Jurisdiction. This Court entered an Order Accepting Jurisdiction and Dispensing with Oral Argument on January 25, 2001.

SUMMARY OF THE ARGUMENT

A *sua sponte* Order for Case Management Conference expressly setting a **hearing**, which was required to be attended by all parties, constitutes "record activity" for purposes of Rule 1.420(e), of the Florida Rules of Civil Procedure. See Charyulu v. Mercy Hospital, Inc., 703 So.2d 1155 (Fla. 3d DCA 1997), review denied, 717 So.2d 535 (Fla. 1998); Samuels v. Palm Beach Motor Cars Limited by Simpson, Inc., 618 So.2d 310 (Fla. 4th DCA), review denied, 629 So.2d 134 (Fla. 1993); and Brown v. Meyers, 702 So.2d 646 (Fla. 4th DCA 1997). The express language of Judge Komanski's Order Setting a Case Management Conference, which was entered during the year preceding the filing of the defendants' motions to dismiss for failure to prosecute, indicated that one of the purposes of the conference was to determine "what matters may aid in the disposition of the action." Rule 1.200(a), Fla.R.Civ.P., which permits parties or the court to set case management conferences, provides further support to the argument that an Order setting a case management conference is record activity. At a case management conference, according to Rule 1.200(a), the Court may:

> (1) schedule or reschedule the service of motions, pleadings, and other papers;
> (2) set or reset the time of trials, subject to rule 1.440(c);
> (3) coordinate the progress of the action if complex litigation factors are present;
> (4) limit, schedule, **order, or expedite discovery**;

> (5) schedule disclosure of expert witnesses and the discovery of facts known and opinions held by such experts;
> (6) schedule or hear motions in limine;
> (7) pursue the possibilities of settlement;
> (8) **require filing of preliminary stipulations if issues can be narrowed**;
> (9) consider referring issues to a master for findings of fact; and
> (10) schedule other conferences or **determine other matters that may aid in the disposition of the action**.

(Emphasis added).

An order setting a **case management hearing requiring all parties to attend**, therefore, is "record activity" for purposes of Rule 1.420(e), since it is an "**affirmative act** calculated to hasten the suit to judgment." (Emphasis added). See Toney v. Freeman, 600 So.2d 1099 (Fla. 1992), noting that "[r]ecord 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."

That fact that the case management conference was set by the Court, rather than plaintiff, is irrelevant. Rule 1.200(a), Fla.R.Civ.P., permits any party or the court to set a case management conference. Once a defendant or the court sets a case management conference, it would be a futility to require the plaintiff to also set a case management conference. Furthermore, since a request to produce filed

by one of the defendants constitutes "record activity," **a *sua sponte* Court order setting the case management conference** should also constitute "record activity."

The holding in Samuels v. Palm Beach Motor Cars Limited By Sampson, Inc., 618 So. 2d 310 (Fla. 4th DCA 1993), review denied, 629 So. 2d 134 (Fla. 1993), clearly distinguishes between a status order such as in Toney, and an order for a case management conference, in that the former is for the court's own information, while the latter's requirement that the parties attend a case management conference "...can significantly advance a cause toward resolution, for example by narrowing the issues to be tried or through exploration of settlement possibilities;" the Third District concluded similarly in Charyulu v. Mercy Hospital, Inc., 703 So. 2d 1155 (Fla. 3d DCA 1997), review denied, 717 So. 2d 535 (Fla. 1998). The fact that the Supreme Court denied review in both Samuels and Charyulu provides further validity to the conclusion reached in Samuels and Charyulu decisions. Had the Supreme Court found a conflict with Toney, the court would have granted the sought review.

For the foregoing reasons, the Fifth District Court erred in affirming the trial Court's dismissal of the case.

ARGUMENT

A. Standard of Review.

Reviewing courts "must apply different standards of review, depending on the nature of the questions presented. Aspects or components of the trial court's decision resolving legal questions are subject to de novo review, while factual decisions by the trial court are entitled to deference commensurate with the trial judge's superior vantage point for resolving factual disputes." State v. Setzler, 667 So.2d 343, 344-45 (Fla. 1st DCA 1995). Whether a court order setting a case management conference is "record activity" pursuant to Rule 1.420(e) is a legal question. Therefore, the standard of review regarding this issue is *de novo*.

Whether or not a party has shown "good cause" under Rule 1.420(e) is a discretionary decision to be made by the trial court. The standard of review, with regard to the "good cause" issue, is whether the trial court abused its discretion. See Edgecumbe v. American General Corp., 613 So.2d 123, 124 (Fla. 1st DCA 1993). Judicial discretion has been defined as, " 'The power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court.'" See Canakaris v. Canakaris, 382 So.2d 1197, 1202 (Fla.1980).

B. General principles regarding Rule 1.420(e), Fla.R.Civ.P.

Motions to dismiss for failure to prosecute are controlled by Rule 1.420(e), Fla.R.Civ.P., which, in pertinent parts, provides as follows:

> All actions in which it appears on the face of the record that no activity by filing of pleadings, **order of court**,[4] or otherwise has occurred for a period of 1 year shall be

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[4] According to the plain language of the rule, therefore, an "order of the court" constitutes record activity. The legislative intent of a statute is determined from its plain language. See Miele v. Prudential Bache Securities, 656 So.2d 470, 471 (Fla. 1995). Nothing in the plain language of Rule 1.420(e) indicates that an order of court or other pleading in the record must hasten the cause to resolution in order to preclude dismissal for failure to prosecute. Nonetheless, not all "orders of court" or pleadings are treated equally in Florida for purposes of the above rule. Our courts have excluded from "record activity" orders or pleadings which are "passive" in nature (i.e., order granting motion to withdraw, or order granting motion for substitution of counsel). E.g. Gulf Appliance Distributors, Inc. v. Fritz, 220 So.2d 908 (Fla. 1951); Modellista de Europa (Co.) v. Redpath Inv. Co., 714 So.2d 1098 (Fla. 4th DCA 1998) , rehearing denied, review denied, 728 So.2d 203.

Considering that our rules of procedure are a means to achieve justice, Plaintiff suggests that all court orders should be treated equally for purposes of Rule 1.420(e), particularly because there is nothing in the plain language of the rule that would lead a reasonable, but inexperienced or out-of-state attorney to suspect that not all orders of court preclude dismissal for failure to prosecute.

Attorneys and parties in this state should be able to know, with at least some degree of certainty, when does the one-year-failure-to-prosecute-period begin to run, and what actions will prevent the harsh penalty (dismissal) under Rule 1.420(e). Under the present interpretation of this rule, our attorneys and litigants do not receive such notice from the plain language of Rule 1.420(e). Instead, the plain language of the rule has the tendency to deceive plaintiffs into mis-calendaring the Rule 1.420(e) deadline. Thus, under due process concerns, Plaintiff respectfully suggests that this Court amend Rule 1.420(e) so as to make it **expressly clear** that not every pleading or order of court constitutes record activity, or to make any other reforms deemed appropriate.

> dismissed by the court on its own motion or on the motion of any interested person, . . . unless . . . a party shows good cause . . . why the action should remain pending. (Emphasis added).

The one-year period should be measured backwards from the time preceding the filing of the motion to dismiss for lack of prosecution. See Chrysler Leasing Corp. v. Passacantilli, 259 So.2d 1, 3-4 (Fla.1972) (holding that a motion to dismiss for lack of prosecution should be denied when the plaintiff showed record activity within the year preceding the motion to dismiss, even though there had previously been a year of inactivity in the case).

In Del Duca v. Anthony, 587 So.2d 1306, 1308-9 (Fla.1991), this Court explained that application of Rule 1.420(e) is a two-step process:

> First, the defendant is required to show there has been no record activity for the year preceding the motion. Second, if there has been no record activity, the plaintiff has an opportunity to establish good cause why the action should not be dismissed.

The only issue for which Plaintiff seeks review by this Court in the instant case is the issue of record activity. This Court has defined "record activity" as including **any act** reflected in the court file that was designed to move the case forward toward a conclusion on the merits. See Barnett Bank of East Polk County v. Fleming, 508 So.2d 718, 720 (Fla.1987); Toney v. Freeman, 600 So.2d 1099, 1100 (Fla.1992).

C. The Order Setting a Case Management Conference requiring a written report and attendance of the parties at the case management hearing constitutes "record activity" for Purposes of Rule 1.420(e), Fla.R.Civ.P..

Before the motions to dismiss for failure to prosecute were filed by the Defendants in this case, and before one year had expired since the preceding record activity occurred, Judge Komanski entered an Order Setting a Case Management Conference. Judge Komanski's 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 [the date of the order allowing the substitution of counsel][5]
>
> IT IS THEREFORE ADJUDGED as follows:
>
> 1. UPON RECEIPT OF THIS ORDER, Counsel . . . shall review the case and determine the status thereof. Plaintiff . . . shall deliver . . . 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. . . .
>
> 2. THERE WILL BE A CASE MANAGEMENT HEARING ON **March 19, 1999** at **8:30 A.M.**, . . . 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)

[5] As evidenced by this Order, even the trial court relied on the plain language of Rule 1.420(e) in finding the February 18, 1998 order for substitution of counsel for plaintiff as constituting record activity.

3. 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 . . . this January 26, 1999.

_____

Walter Komanski, Circuit Judge

The Third and Fourth District Courts of Appeal addressed the issue of whether a *sua sponte* order setting a case management hearing, such as the one above, hastened the respective suits to judgment and, therefore, constituted "record activity" for purposes of Rule 1.420(e). In Samuels v. Palm Beach Motor Cars Ltd. by Simpson, Inc., 618 So.2d 310 (Fla. 4th DCA), **review denied**, (Emphasis added), 629 So.2d 134 (Fla. 1993), the Fourth District held that the issuance of an order by the trial court setting a status conference and the attendance by one or both of the parties at the conference was sufficient record activity to preclude dismissal for failure to prosecute because the order was reasonably calculated to lead the case to resolution.

The Fourth District followed Samuels in Brown v. Meyers, 702 So.2d 646 (Fla. 4th DCA 1997), holding that a trial court's *sua sponte* order setting a case for a case management conference was sufficient record activity to preclude dismissal for failure to prosecute. Similarly, the Third District held that a plaintiff's filing of

a notice to convene a case management conference is enough to preclude dismissal under Rule 1.420(e) since "such a conference is designed to move the case forward." See Charyulu v. Mercy Hospital, Inc., 703 So.2d 1155 (Fla. 3d DCA 1997), **review denied**, (Emphasis added), 717 So.2d 535 (Fla. 1998).

The above decisions are further supported by Rule 1.200(a), Fla.R.Civ.P., which states, in part:

> At a [case management] conference the court may:
> (4) limit, schedule, order, or expedite discovery;
> (6) schedule or hear motions in limine;
> (7) pursue the possibilities of settlement;
> (8) require filing of preliminary stipulations if issues can be narrowed;
> (9) consider referring issues to a master for findings of fact; and
> (10) schedule other conferences or **determine other matters that may aid in the disposition of the action**.
> [Emphasis added].

According to the above rule, a case management hearing is reasonably calculated to advance an action toward resolution. Thus, by definition, it should constitute "record activity" precluding dismissal for failure to prosecute.

In the present case, the main issue is whether the *sua sponte* order setting a case management conference constituted "record activity" sufficient to preclude dismissal for failure to prosecute. The **Order** Setting Case Management Conference not only requested that the **parties submit a written status report**,

but also **set a case management hearing**. As the dissent, below, noted, "[t]he order requires attendance at the hearing (no phone hearings) at which time the court' . . . will determine what matters may aid in the disposition of the action." The order was entered pursuant to Rule 1.200(a), Fla.R.Civ.P..

For reasons stated above and in light of the contents and requirements of Judge Komanski's order, the trial court's conclusion that Judge Komanski's order was designed **solely** to determine the case status and clear the docket of abandoned cases, was erroneous in effect and law.

D. Toney v. Freeman, 600 So.2d 1099 (Fla. 1992) is factually distinguishable from this case, and the decision below is in conflict with the Toney's principle that an order or pleading is "record activity" if it hastens the suit to judgment.

This Court in Toney v. Freeman, 600 So.2d 1099, 1101 (Fla. 1992), held that a *sua sponte* status order (asking the parties to provide the court with written information about the status of the case) was not record activity, for purposes of Rule 1.420(e), because "it did not move the case forward in the sense of a progression toward resolution." According to Toney "[r]ecord activity must . . . hasten the suit to judgment." Id. at 1100. In Toney, this Court further noted, as follows:

> [w]e 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.

The broad language above, however, was *dictum*. Further, this Court was not addressing, in Toney, whether a sua sponte court order setting a case management conference pursuant to Rule 1.200(a) constituted such "appropriate case management activities." The status order in Toney did not set a case management conference pursuant to Rule 1.200(a), it only asked the plaintiffs to submit a status report, which, in and of itself, did not move the cause of action toward resolution. Further, the status order in Toney was entered after more than one year had elapsed since the last record of activity in that case. See Toney, at 1099. In the instant case, the trial court issued an order asking for a status report and for setting a case management hearing.

Further, in three post-Toney cases, the Third and Fourth District Courts of Appeal had to decide whether a *sua sponte* order setting a case management hearing (rather than just inquiring about the status of the case) hastened the respective suits to judgment and, therefore, constituted "record activity" for purposes of Rule 1.420(e). In Samuels v. Palm Beach Motor Cars Ltd. by Simpson, Inc., 618 So.2d 310 (Fla. 4th DCA), **review denied**, (Emphasis added), 629 So.2d 134 (Fla. 1993), the Fourth District held that the issuance of an order by

the trial court setting a status conference and the attendance by one or both of the parties at the conference was sufficient record activity to preclude dismissal for failure to prosecute because the order was reasonably calculated to lead the case to resolution. The Samuels court reasoned:

> *Toney* 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 record activity sufficient to preclude dismissal under rule 1.420(e). The third district addressed this very issue in *Miami Beach Awning Co. v. Heart of the City*, *Inc.*, 565 So.2d 739 (Fla. 3d DCA 1990), holding that a trial court's order setting a cause for status conference, almost by definition, is reasonably calculated to advance the cause toward resolution, thus is sufficient to preclude dismissal for lack of prosecution. *Id.* at 739. In so holding, the court distinguished *[Norflor Construction Corp. v. City of Gainesville*, 512 So.2d 266 (Fla. 1st DCA 1987) (holding that a status order was not record activity under Rule 1.420(e))].
>
> We agree with the distinction drawn in *Miami Beach Awning Co.* between a status order and a status conference. While responses to a status order such as the one entered in *Toney* are sought simply for the court's own information, the parties' attendance at a status conference can significantly advance a cause toward resolution, for example, by narrowing the issues to be tried or through exploration of settlement possibilities.

Id. at 311; see also Rule 1.200(a), Fla.R.Civ.P..

Similarly, in Charyulu v. Mercy Hospital, Inc., 703 So.2d 1155 (Fla. 3d DCA 1997), **review denied**, (Emphasis added), 717 So.2d 535 (Fla. 1998), the Third

District held that a plaintiff's filing of a notice to convene a case management conference is enough to preclude dismissal under Rule 1.420(e) since "such a conference is designed to move the case forward." It is noteworthy that this court denied review in both Samuels and Charyulu. Furthermore, the Fourth District followed Samuels in Brown v. Meyers, 702 So.2d 646 (Fla. 4th DCA 1997), holding that a trial court's *sua sponte* order setting a case for a case management conference was sufficient record activity to preclude dismissal for failure to prosecute.

Additionally, in the instant case the Order Setting a Case Management Conference was entered prior to the expiration of the one-year period of inactivity from the date of the previous "active" record activity; while in Toney, the status order was entered after the case was inactive for more than one year.

E. Once it is determined that an order or notice for case management conference is record activity because it is calculated to hasten a suit to resolution, it is irrelevant whether the court or the defendant set the conference, and, if the conference was set or ordered within the year preceding the motion to dismiss for failure to prosecute, the motion to dismiss for failure to prosecute must be denied.

The issue in this case is whether setting a case management conference constitutes "record activity". It is irrelevant whether the case management conference was set by the Defendants, the Plaintiff, or the Court. Rule 1.200(a),

Fla.R.Civ.P., provides that any **party**, or the **court**, *sua sponte,* may set a case management hearing. (Emphasis added). By the express language of Rule 1.200(a), a case management **hearing** has the purpose of moving a case toward resolution on the merits. Rule 1.420(e) recognizes, expressly, that an order of court qualifies as record activity. If the order of court at issue, even if *sua sponte*, is calculated to move the case towards resolution, than it constitutes "record activity" for purposes of Rule 1.420(e). See Marschall v. Water-Boggan International Inc., 401 So.2d 1157 (Fla. 3rd DCA 1981) (finding that a *sua sponte* order requiring reservice of process was record activity).

Nothing in Rule 1.420(e) indicates that the record activity must have been initiated by the Plaintiff, or that a *sua sponte* order does not qualify as record activity. This Court has defined "record activity" as including **any act** reflected in the court file that was designed to move the case forward toward a conclusion on the merits. See Barnett Bank of East Polk County v. Fleming, 508 So.2d 718, 720 (Fla.1987); see also Toney v. Freeman, 600 So.2d 1099, 1100 (Fla.1992). Numerous appellate courts have held that activity initiated by the court or by a defendant is sufficient to preclude dismissal for failure to prosecute. See Nektaderes v. Sagonias, 432 So.2d 769 (Fla. 2nd DCA 1983); Marschall v. Water-Boggan Intern., Inc., 401 So.2d 1157 (Fla. 3rd DCA 1981); Eastern Elevator, Inc. v.

Page, 263 So.2d 218 (Fla. 1972); Milligan v. Osborne, 682 So.2d 706 (5th DCA 1996); Jones v. State, 400 So.2d 204 (Fla. 4th DCA 1981); Fisher v. Rodgers, 496 So.2d 241 (Fla. 3rd DCA 1986).

In this case, the case management conference was set by Judge Komanski, *sua sponte.* It should be noted that the order setting the conference was entered less than one year after the preceding "recognized" record activity in the case (the January 27, 1998 request to produce). The defendants' motions to dismiss were filed after the above order was entered. Judge Komanski's order was entered in the year preceding the motions to dismiss. Thus, record activity moving the case to resolution took place in the year preceding the motions to dismiss. It would be a futility to require the Plaintiff, after the trial court entered an order setting a case management conference, to seek to set a case management conference himself. Plaintiff should be able to rely on the trial court's *sua sponte* order as record activity.[6]

CONCLUSION

For purposes of Rule 1.420(e), a *sua sponte* Court order setting a case

[6] Facially sufficient ("active") record activity is not "record activity"for purposes of Rule 1.420(e) only if the pleading is in bad faith and is also without any design to mote the case forward toward a resolution on the merits. See Del Luca v. Anthony, 587 So.2d 1306, 1309 (Fla. 1991).

management conference requiring a **written report** and **attendance of the parties at the case management hearing** is "record activity," since it is an **affirmative act** calculated to hasten the suit to judgement. The express language of Judge Komanski's Order Setting a Case Management Conference, which was entered during the year preceding the filing of the defendants' motions to dismiss for failure to prosecute, indicated that one of the purposes of the conference was to determine "what matters may aid in the disposition of the action." Rule 1.200(a), Fla.R.Civ.P., which permits parties or the court to set case management conferences, provides further support to the argument that a court Order setting a case management conference is record activity.

The holding in Samuels v. Palm Beach Motor Cars Limited By Sampson, Inc., 618 So. 2d 310 (Fla. 4th DCA 1993), **review denied**, (Emphasis added), 629 So. 2d 134 (Fla. 1993), clearly distinguishes between a status order such as in Toney, and an order for a case management conference, in that the former is for the court's own information, while the latter's requirement that the parties attend a case management conference "...can significantly advance a cause toward resolution, for example by narrowing the issues to be tried or through exploration of settlement possibilities"; the Third District concluded similarly in Charyulu v. Mercy Hospital, Inc., 703 So. 2d 1155 (Fla. 3d DCA 1997), **review denied**,

(Emphasis added), 717 So. 2d 535 (Fla. 1998). The fact that the Supreme Court denied review in both Samuels and Charyulu reinforces the conclusion reached by Samuels and Charyulu courts.

The fact that the case management conference was set by the Court, rather than plaintiff, is irrelevant. Rule 1.200(a), Fla.R.Civ.P., permits any party or the court to set a case management conference. Once a defendant or the court sets a case management conference, it would be a futility to require the plaintiff to also set a case management conference. Additionally, since a request to produce filed by one of the defendants constitutes "record activity," a *sua sponte* Court order setting the case management conference should also constitute "record activity."

For the foregoing reasons, the Fifth District erred in affirming the trial Court's dismissal of the case. Therefore, the petitioner respectfully requests this honorable

Court to reverse the decision below and remand the case to the trial court for

further proceedings.

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CERTIFICATE OF TYPEFACE AND SIZE

The type face used in this brief is Times New Roman, 14 pt.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following: Richard L. Allen, Jr., Esquire, Suite 600, 225 East Robinson Street, P.O. Box 2854, Orlando, Florida 32802; Thomas E. Dukes, III, Esquire, 108 East Central Boulevard, P.O. Box 753, Orlando, Florida 32802-0753; and Francis E. Pierce, III, Esquire, Suite 450, 225 East Robinson Street, P.O. Box 1273, Orlando, Florida, 32802-1273, by U.S. Mail, this 19th day of February, 2001.

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Zahid H. Chaudhry, Esquire
Attorney for Petitioner