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 AMENDED REPLY BRIEF

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TABLE OF CONTENTS

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Page(s)

TABLE OF CITATIONS

FLORIDA DISTRICT COURT CASES

FLORIDA RULES OF CIVIL PROCEDURE AND JUDICIAL ADMINISTRATION

ARGUMENT

THE ORDER[2] SETTING CASE MANAGEMENT CONFERENCE WAS RECORD ACTIVITY.

1. The respondents rely primarily upon Toney, and cite Boeing in its support, to argue that the order setting case management conference in the instant case was not record activity. Respondents contend that the holding of the pre-Toney decision in Boeing Co. v. Merchant, 397 So.2d 399, (Fla. 5th DCA 1981), is consistent with this Court's holding in Toney. It is noteworthy that the Boeing decision was rendered by Senior Judge Orfinger, who strongly dissented in the Fifth District Court of Appeal's decision in this case. Judge Orfinger, in his descent, stated that the majority's decision conflicted with this Court's decision in Toney v. Freeman, and that Judge Komanski's order setting the case management conference was record activity. Regarding its decision in Toney, this Court concluded that the order at issue did not move the case toward resolution. See Toney, 600 So.2d at 1100. Conversely, this Court's decision in Toney supports the Petitioner's contention that any order, including a *sua sponte* order, that by its

[2] Respondents argue that the Order Setting Case Management Conference at issue was entered because of Petitioner's inactivity or lack of diligence. However, pursuant to Rule 2.085, Fla.R.Jud.Adm., the purpose of a case management conference order issued under Rule 1.200, Fla.R.Civ.P., is to provide trial courts the means to control progress of litigation. Further, under Rule 2.085(a), all attorneys, not just the plaintiff's, have professional obligation to move cases efficiently toward resolution.

nature tends to move an action forward is record activity. See Id.; 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). In Toney, this Court could have held that any *sua sponte* order setting a case management conference is not record activity, as Respondents contend, but the Court did not make such a determination.

Nonetheless, in *dictum*, this Court stated:

> 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 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.

However, it is important to note that determining the spirit and purpose of case management activities pursuant to Rule 1.200, Fla.R.Civ.P., requires consideration of the effect of Rule 2.085, Fla.R.Jud.Adm., in terms of its relation to Rule 1.420(e), Fla.R.Civ.P. Under Rule 2.085, Fla.R.Jud.Adm., the purpose of

case management activities is to provide trial courts the means to control progress of litigation. Consequently, as the Fourth District held in Samuels, case management activities such as the order in the instant case requiring that the parties attend the 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." Therefore, it is clear that respondents misconstrue the spirit and purpose of Rule 2.085, R.Jud.Adm., and how it relates to Rule 1.420(e).

The fact that the case management conference was set by the court, rather than the plaintiff, is irrelevant. Rule 1.200(a), FLA.R.Civ.P., permits any party or the court to set a case management conference. Once the court or a defendant sets a case management conference, it would be a futility to require the plaintiffs 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.

2. Respondents' interpretation of Rule 1.420(e) does not comport with Rule 1.010, Fla.R.Civ.P., or with the well-established principle that dismissal of claims or defenses is an extreme sanction that should be used only under the most

compelling circumstances. According to Rule 1.010, Fla .R.Civ.P., the Florida Rules of Civil Procedure: "shall be construed to secure the **just**, speedy, and inexpensive determination of every action." (Emphasis added).

Florida courts have long preferred to decide cases **on the merits.** See Torrey v. Leesburg Regional Med. Center, 25 Fla.L.Weekly S 911, S912 (Fla. Oct. 26, 2000) (reiterating "the policy of allowing cases to be decided on the merits whenever possible"); Houston v. Caldwell, 359 So.2d 858 (Fla. 1978) ("The dismissal of a suit is a drastic remedy which should be ordered only under the most compelling circumstances"). "[T]his state has a fundamental interest in resolving controversies involving its citizens." Houston, 359 So.2d at 860.

In deciding whether an action should be dismissed, there are competing considerations: on the one hand, the litigants' right of access to the courts must be preserved; while on the other hand, a rule or statute must be enforced. See Kukral v. Mekras, 679 So.2d 278, 284-285 (Fla. 1996) (reversing a dismissal and holding that the medical malpractice statutory scheme **must be interpreted liberally** so as not to unduly restrict a Florida citizens' constitutionally guaranteed access to the courts).[3] While the rules of procedure should be used to harshly punish bad faith

[3] Dismissal or striking of defenses only available if the party that complied with the pre-suit requirements was prejudiced. See Id. at 284; see also De La Torre v. Orta, (3d DCA, March 21, 2001).

and intentional misconduct, however, they should not serve as means to injustice. The ends of justice should not be defeated by an unreasonable application of procedural rules. See Lake Crescent Development Co. v. Flowers, 355 So.2d 867 (Fla. 1st DCA 1978).

CONCLUSION

Judge Komanski's order setting case management conference was record activity for purposes of the Rule 1.420(e), because this order, by its nature, tended to move the cause toward resolution. The case management conference order in this case is clearly distinguishable from the status order at issue in Toney. The order in Toney merely requested a report, which in itself, did little to advance the cause toward resolution. In this case, the order required more than a mere status report. The order setting case management conference required attendance of parties at the hearing (no phone hearings) at which time the court ". . .will determine what matters may aid in the disposition of the action."

The Fourth District in Samuels v. Palm Beach Motor Cars Limited By Sampson, Inc., 618 So.2d 310 (Fla. 4th DCA 1993, **reviewed denied**, (Emphasis added), 629 So. 2d 134 (Fla. 1993), distinguished between a status order such as in Toney and an order for a case management conference, in that the former was 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". In a later case, the Fourth District, in Brown v. Meyers, 702 So.2d 646 (Fla. 4th DCA 1997), reaffirmed the holding of Samuels.

The Third District Court of Appeal in Charyulu v. Mercy Hospital, Inc., 703 So. 2d 1155 (Fla. 3d DCA 1997), **review denied**, (Emphasis added), 717 So.2d 535 (Fla. 1998), reached a conclusion similar to Samuels and Brown. The fact that this Court denied review in both Samuels and Charyulu reinforces the conclusion reached by Samuels and Charyulu courts.

Based on the foregoing, the Fifth District Court of Appeal erred in holding that Toney v. Freeman controls this case. Therefore, this Court should reverse the decision of the Fifth District Court of Appeal.

Respectfully submitted this 11th day of April, 2001.

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I HEREBY 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 11th day of April 2001.

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