IN THE SUPREME COURT OF THE STATE OF FLORIDA

Case Number SC00-1647
DCA Case Number 99-2794

METROPOLITAN DADE COUNTY, Defendant/Petitioner, v. **WALTER HALL** Plaintiff/Respondent.	

INITIAL BRIEF OF METROPOLITAN DADE COUNTY

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STATEMENT OF THE CASE AND FACTS

Nature of the Case. Metropolitan Dade County (the "County") has invoked the discretionary jurisdiction of this Court after the Third District Court of Appeal reversed the trial court's dismissal for lack of prosecution of a personal injury action.

On October 10, 1995, Hall filed the present action against Gaither Ann Perkins ("Perkins"), Insignia Management Corporation ("Insignia"), and the County in Circuit court[1] R. 1. He alleged that on July 30, 1993 Perkins, with whom he had previously had a "social relationship," demanded entry into an apartment Hall had rented from Insignia. *Id*. When he refused, she allegedly obtained a key from Insignia and gained entry with the assistance of County police, who allegedly allowed her to remove certain property from the apartment over Hall's protest. *Id.*, 6-7.

Course of the Proceedings. After Perkins' pleadings were stricken on January 31, 1997 for failure to obey court orders, R. 27, no activity is reflected in the record on appeal until over two years later, when on August 9 and 16, 1999,

[1] Neither Perkins, whose pleadings were stricken for failure to comply with court orders, nor Insignia, which settled with Hall during the Third District appeal, is party to this appeal.

Insignia and the County filed their respective Motions to Dismiss for Lack of Prosecution. R. 30-34.

Hall filed a memo of law in opposition to the motions. R. 35-39 (App. 1). He therein argued that record activity was demonstrated by certain offers of judgment and proposals for settlement exchanged between the parties, and by the notice and taking of his deposition on August 28, 1998.[2] R. 35-37. He alternatively attempted to demonstrate good cause *not* by virtue of any of the foregoing activity, but rather by claiming that he believed that his former associate had previously noticed the case for trial. R. 37-38. On October 25, 1999, after hearing argument from all parties, the lower court granted the motion and dismissed the action. R. 56.

Disposition in the Lower Tribunal. On appeal to the Third District, Hall expanded the foregoing arguments. He now asserted, for the first time, that the offers of judgment, proposals for settlement, and deposition activity all constituted not only record activity, but also good cause to avoid dismissal. (App. 2.)

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[2] Pursuant to notice served July 28, 1998, Plaintiff's deposition was actually taken on August 19, 1998. The deposition was never filed, and is therefore not part of either the record below or the record on appeal. The notice of deposition was filed, but was not made part of the record pursuant to Rule 9.200(a)(1). Its absence is immaterial; the date the notice was filed—July 28, 1998—was more than one year prior to the Defendants' motions.

The Third District agreed. R 57-62 (App. 3). While the court certified conflict with the two other district courts in the state to address the issue, and which had both concluded that the mere taking of a deposition, without more, within a year of a motion to dismiss for lack of prosecution did not defeat the motion,[3] it nevertheless reversed the lower court's dismissal. R. 57-62. This invocation of this Court's discretionary jurisdiction ensued.

[3] *Levine v. Kaplan*, 687 So.2d 863 (Fla. 5th DCA 1997) and *Smith v. DeLoach*, 556 So.2d 786 (Fla. 2d DCA 1990).

SUMMARY OF ARGUMENT

Florida Rule of Civil Procedure 1.420(e), providing for dismissal of actions for failure to prosecute, is not a mere technicality, but is part of the overall intent embodied in the Rules to "secure the just, *speedy*, and inexpensive determination of every action."[4] Fla.R.Civ.P. 1.010. As Rule 1.420(e) and its statutory predecessor have been construed by this court, it is designed to provide an objective standard for the trial court to apply in determining whether or not record activity has occurred, while at the same time allowing for that court's exercise of judicial discretion to permit continued prosecution of a case without such activity, if good cause is shown.

The trial court concluded, and the Third District Court of Appeals appears to have agreed, that there was no record activity within one year of the filing of the motion to dismiss.

The trial court also exercised its discretion in concluding that Hall failed to demonstrate sufficient good cause to overcome that lack of record activity. The Third District disagreed with that conclusion, rejecting two decisions from other districts supporting the trial judge's dismissal: *Levine v. Kaplan*, 687 So.2d 863 (Fla. 5th DCA 1997) and *Smith v. DeLoach*, 556 So.2d 786 (Fla. 2d DCA 1990). Instead, it read

[4] All emphasis herein is supplied unless expressly noted.

Eastern Elevator, Inc. v. Page, 263 So.2d 218 (Fla. 1972) to hold that the taking of a deposition precluded dismissal for lack of prosecution. That reading was incorrect, not only because the rule at issue has materially changed since that opinion; and not only because this Court ultimately discharged its initially granted writ of certiorari, but also because *Eastern Elevator* expressly dealt only with the issue of record activity, not good cause.

The Third District's disagreement with the trial court's conclusion is of additional statewide significance for two reasons. First, the appellate court substituted its own evaluation of good cause for that of the trial court, and therefore failed to apply the appropriate standard of review. Second, the particular circumstances of this case, particularly the fact that Hall did not even include in his attempted showing of good cause the taking of his deposition, make clear that the trial court was indeed well within its discretion in concluding that Plaintiff had failed in his burden to make a showing of good cause.

ARGUMENT

I. THE THIRD DISTRICT COURT OF APPEAL IMPROPERLY FAILED TO APPLY THE APPROPRIATE STANDARD OF REVIEW, AND INCORRECTLY CONCLUDED THAT PLAINTIFF'S APPEARANCE FOR HIS OWN DEPOSITION CONSTITUTED GOOD CAUSE TO DEFEAT A MOTION TO DISMISS FOR LACK OF PROSECUTION

In reversing the trial court's dismissal of Hall's action, the Third District improperly usurped the role of the trial court, and failed to apply the appropriate standard of review: abuse of discretion. *Cole v. Department of Corrections*, 726 So.2d 854 (Fla. 4th DCA 1999); *Edgecumbe v. American General Corp.*, 613 So.2d 123 (Fla. 1st DCA 1993).

As this court has often recognized, "[A]ppellate courts must recognize the distinction between an incorrect application of an existing rule of law and an abuse of discretion." *Canakaris v. Canakaris*, 382 So.2d 1997 (Fla. 1980). This Court has adopted the following definition of judicial discretion:

> 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.

Id. at 1202, *quoting 1 Bouvier's Law Dictionary and Concise Encyclopedia* 804 (8th

ed. 1914). This Court has consequently adopted the following statement of the test for *review* of the exercise of that discretion:

> Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.

Id. at 123, *quoting Delno v. Market Street Railway Company*, 124 F.2d 965, 967 (9th Cir. 1942); *see also Ford Motor Co. v. Kikis*, 401 So.2d 1341, 1342 (Fla. 1981) (if reasonable people could differ as to the propriety of the action taken by the trial court, then there can be not abuse of discretion.);

This standard has been further adopted by this Court in the specific context of avoidance of a dismissal for lack of prosecution based on good cause:

> [T]he ruling of a trial court in these premises must be regarded as discretionary. The statutory[5] standard of "good

[5] Section 45.19(1), Fla. Stat. (1963), now repealed, is the predecessor to Rule 1.420(e) and states in pertinent part:

> All actions at law or suits in equity … in which there shall not affirmatively appear from some action taken by filing of pleadings, order of court, or otherwise, that the same is being prosecuted, for a period of one (1) year, shall be deemed abated for want of

> cause shown" requires the exercise of a judicial discretion based upon evidence rather than arbitrary in character. We now hold that such an order is subject to attack only upon the ground that it constitutes an abuse of discretion and this heavy burden must be borne by the losing party.

Adams Engineering Co., Inc. v. Construction Products Corp., 156 So.2d 497 (Fla. 1963) (footnote omitted); *see also* *Edgecumbe v. American General* Corporation, 613 So.2d 123 (Fla. 1st DCA 1993). ("Whether or not a party has shown such good cause…is a discretionary decision to be made by the trial court); *Van Den Boom v. YLB Investments, Inc.*, 687 So.2d 964, 965 (Fla. 5th DCA 1997) (lower court's order vested with presumption of correctness).

A showing of good cause "requires some contact with the opposing party and some form of excusable conduct or occurrence which arose *other* than through negligence

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> prosecution and the same shall be dismissed by the court having jurisdiction of the cause, upon its own motion or upon motion of any persons interested, whether a party to the action or suit or not, with notice to opposing counsel, provided that actions or suits dismissed under the provisions hereof may be reinstated by petition upon good cause shown to the court filed by any party in interest within one (1) month after such order of dismissal.

Cases construing the present rule have noted that opinions construing § 45.19 (1) are persuasive as to the meaning of the terms employed. *Chrysler Leasing Corp. v. Passacantilli*, 259 So.2d 1(Fla. 1972); *Lindquist v. Williams*, 262 So.2d 899, 900 (Fla. 1972), *quoting* *Dade County v. Moreno*, 227 So.2d 548 (Fla. 3d DCA 1969).

or inattention to pleading deadlines." *Modellista de Europa (Corp.) v. Redpath Inv. Corp.*, 714 So.2d 1098, 1100 (Fla. 4th DCA 1998). "[A] compelling reason must be demonstrated to overcome such seeming lethargy." *Tosar v. Sladek*, 393 So.2d 61, 62 (Fla. 3d DCA 1981); *see also Eisen v. Fink*, 511 So.2d 1092 (Fla. 2d DCA 1987) ("Where only nonrecord activity [is] offered to the trial court as the basis for good cause…, such activity must meet a standard equating with a compelling reason for failure to prosecute."); *cf. Maher v. Best Western Inn*, 667 So.2d 1024, 1027 (Fla. 5th DCA 1996) (noting, in context of dismissal under Rule 1.070(i), "significant difference between…'good cause'…and 'excusable neglect'[, which is a] lesser standard…."). [6] In this context, we now turn to a review of the Third District's opinion.

In reversing the lower court, the Third District did not express any deference to the

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[6] *See also Laug v. Murphy*, 205 So.2d 695 (Fla. 4th DCA 1968):

> Certainly the standard of 'good cause' required for reinstatement under Section 45.19 requires the exercise of sound judicial discretion. But this is not an arbitrary or unrestrained discretion. The necessary good cause must appear by the petition for reinstatement, and must be established by evidentiary support. Neither the fact that a case is ready to be set for trial, the fact that the dismissal will cause severe hardship, nor the fact that the parties have unsuccessfully negotiated for settlement, constitutes good cause for reinstatement within the intendment of F.S. 1963, Section 45.19(1), F.S.A.

trial court's discretion. Instead, it analyzed the record de novo, and, based on its reading of *Eastern Elevator, Inc. v. Page*, 263 So.2d 218 (Fla. 1972), held that "[w]hile the taking of a deposition no longer routinely generates record activity, it should within the logic of Eastern Elevator be viewed as establishing good cause why the action should not be dismissed." *Hall v. Metropolitan Dade County*, 760 So.2d 1061, 1062 (Fla. 3d DCA 2000).[7]

The Third District overlooked several important distinguishing characteristics of *Eastern Elevator*. That case involved the issue of whether one defendant's filing of interrogatories to be answered by Plaintiff constitutes a sufficient affirmative showing

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[7] The Third District therefore tacitly rejected Plainitff's threshold contention that the deposition, along with offers of judgment, constituted record activity. *See Valdes v. Perez*, 645 So.2d 590 (Fla. 3d DCA 1994) (offers of judgment are neither record activity nor good cause to avoid dismissal).

The Third District also failed to address Plaintiff's alternative arguments that his mistaken understanding about whether the case had been noticed for trial also constituted good cause. *See* App 1 and 2. The arguments are clearly without merit, *Rubenstein v. Iolab Corp.*, 642 So.2d 818, 820 (Fla. 3d DCA 1994) (a failure of a lawyer to timely act "clearly cannot form the basis a [sic] finding of good cause"); *Morris v. NN Investors Life Insurance Company, Inc.*, 553 So.2d 1306, 1307 (Fla. 3d DCA 1989) (affirming trial judge's ruling that "plaintiff's claims that her counsel had changed offices, suffered several secretarial changes, and simply overlooked the case did not constitute sufficient good cause to avoid dismissal"); see *also Railway Exp. Agency, Inc. v. Hoagland*, 62 So.2d 756 (Fla. 1952) (no good cause shown by plaintiff's lengthy absence in Europe, necessity for detailed audit before trial, *or attorney's inadvertent delay*); *Edgecumbe v. American General Corp.*, 613 So.2d 123 (Fla. 1st DCA 1993), and we do not address them further here.

of prosecution to justify the trial court's denial of the motion. The question was therefore not what quantum of activity was necessary to defeat the motion, but rather who was undertaking the activity. *Id.* at 219. More significantly, the question was only one of record activity, not good cause. *Id*. at 220. Ultimately, this Court concluded, after reviewing the authorities said to be in conflict, that no conflict in fact existed, and therefore discharged the writ of certiorari initially granted.

The rule at issue in Eastern Elevator has also changed significantly. Florida Rule of Civil Procedure 1.420(e) now provides:

> All 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 1 year shall be dismissed by the court on its own motion or on the motion of any interested person, whether a party to the action or not, after reasonable notice to the parties, unless…a party shows good cause in writing at least 5 days before the hearing on the motion why the action should remain pending. Mere inaction for a period of less than 1 year shall not be sufficient cause for dismissal for failure to prosecute.

In contrast, the rule at issue in Eastern Elevator did not include the "on the face of the record" italicized above. The Rules Committee Notes specifically indicated that the subsequent 1976 amended was intended to prevent nonrecord activity from tolling the 1-year period.

It is thus apparent that the Third District's extensive reliance on Eastern Elevator was misplaced. Putting aside the fact that the writ was ultimately discharged, the material change to the rule renders moot whatever the express holding of that case might have been. In addition, by limiting its decision to the question of record activity and not good cause, this court recognized the significant difference between the two. Whereas it admittedly does not matter which party initiates record activity under

Gulf Appliance Distributors, Inc. v. Long, 53 So.2d 706 (Fla. 1951), the same cannot be said with reference to demonstrating good cause.

That was precisely the issue in one of the cases with which the Third District certified conflict: *Smith v. DeLoach*, 556 So.2d 786 (Fla. 2d DCA 1990). In Smith, the trial court had granted defendant's motion to dismiss, even though depositions had not only been taken, but also had been filed. There, in contrast to Hall's position before the trial court, plaintiffs argued that the depositions constituted both record activity and good cause to avoid dismissal.

The Second District disagreed. It first noted the obvious: the taking of depositions is nonrecord activity. 556 So.2d at 788. It also concluded that the filing of the depositions was not record activity, "because the filing was not for any intended use by the parties or the witnesses." *Id*. It then turned to the issue of good cause. In affirming the trial court's rejection of Plaintiff's argument, it stated:

> The fact that the appellee took the appellant's depositions would not create a good cause claim on behalf of the appellants. This action by the appellee in no way prevented the appellants from further prosecuting their action.

Id. at 789. The same reasoning should have applied here: nothing about the Defendants taking Hall's deposition afforded him any excuse or explanation for his total failure to prosecute the case.

The Fifth District reached precisely the same conclusion in *Levine v. Kaplan*, 687 So.2d 863 (Fla. 5th DCA 1997), the other decision with which the Third District certified conflict. There, in affirming the trial court's dismissal, the district court first held, citing Smith, that plaintiff's taking of

defendant's deposition did not constitute record activity. *Id.* at 865. It then concluded that plaintiff had failed to satisfy his burden to demonstrate good cause, because he had not presented proof of a compelling reason why the case was not prosecuted.

Here, too, Hall utterly failed to present such a compelling reason. Simply appearing for his own deposition can hardly be considered prosecution, and to this day, he has never suggested how the Defendants' noticing and taking of his deposition prevented him from doing anything.

The Third District additionally failed to apply another fundamental precept of appellate review: Issues not timely raised and ruled upon in the trial court will not be considered on appeal for the first time. *Morales v. Sperry Rand Corp.*, 601 So.2d 538 (Fla. 1992). More specifically, the failure to argue a specific point before the trial court precludes appellate review of that particular point. *See, e.g.*, *Perez v. Winn*-Dixie, 639 So.2d 109 (Fla. 1st DCA 1994).

Here, Hall never submitted to the trial court as part of his showing of good cause the taking of his deposition. Instead, he relied only upon his claim that his attorney believed that an associate had noticed the case for trial. Thus, not only did the Third District decide the issue on the merits incorrectly, it never should have reached it in the first place, because Hall never had properly placed it before the trial court.

Florida Rule of Civil Procedure 1.420(e), providing for dismissal of actions for failure to prosecute, is not a mere technicality, but is part of the overall intent embodied in the Rules to "secure the just, *speedy*, and inexpensive determination of every action." Fla.R.Civ.P. 1.010. As this Court advised in *Toney v. Freeman*, 600 So.2d 1099, 1100 (Fla. 1992):

> 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.

Although the law obviously protects the interest of disposing of litigation on the merits, "it is equally important that litigation proceed in an orderly fashion and expeditiously to a prompt and just conclusion." *Little v.* Sullivan, 173 So.2d 135, 138 (Fla. 1965). Here, the trial court judge properly exercised his discretion to manage his calendar, only to have his considered judgment usurped by the appellate court, in the face not one but two decisions directly supporting the trial judge's order. In so doing, the appellate court has effectively removed from trial judges an effective case management tool, and, more importantly, has eschewed the important standard of review in this and similar cases.

CONCLUSION

The Third District improperly took it upon itself to make a *de novo* determination of whether Hall demonstrated good cause to avoid dismissal. Not only was that an improper usurpation of the trial court's right and duty, the Third District itself incorrectly applied the law. Plaintiff's passive appearance at a his own deposition, without any further evidence explaining why *he* had totally failed to prosecute his case, is not and never can be good cause. For these reasons, as well as all of the foregoing arguments, The COUNTY therefore respectfully requests that this Court ACCEPT jurisdiction over this case, and REVERSE the Third District's decision, and remand with directions that the lower court's order of dismissal be AFFIRMED in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by MAIL on Friday, April 27, 2001 upon: HOFFMAN, LARIN & AGNETTI, P.A., Counsel for Plaintiff/Respondent, Attention John Agnetti, Esquire, Suite 201, 909 North Miami Beach Boulevard, North Miami Beach, Florida, 33162.

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