**IN THE SUPREME COURT OF FLORIDA**
**STATE OF FLORIDA**

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| GREEN CLINIC, INC., f/k/a GREEN CLINIC, P.A., a Florida corporation; J. C. STINE, M.D.; JOHN W. MOORE, M.D.; FRANK J. THORNTON, M.D.; MICHAEL G. DEGNAN, M.D.; GUILLERMO F. ALLENDE, M.D.; and DAVID J. GREEN, M.D. | v. | MANUEL D. JAIN, M.D. |
| Defendants / Petitioners, | | Plaintiff / Respondent. |

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# RESPONDENT'S ANSWER BRIEF ON THE MERITS

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SUPREME COURT CASE NO.: SC02-2595
SECOND DISTRICT CASE NO.: 2D01-1913
CIRCUIT COURT CASE NO.: GCG-97-2493 (POLK COUNTY)

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## PREFACE

Respondent Jain will be referred to in this brief as "Dr. Jain". Petitioners will generally be referred to as Petitioners collectively, except where the reference to the specific name of the party would promote clarity. Green Clinic, Inc., will generally be referred to as "Green Clinic" and Heath Management Associates, Inc., as "HMA".

The 13 volume record will be cited with the designation "R", followed by the record volume and pertinent page or pages.

Appellant's Appendix, filed contemporaneously, will be cited as "A", followed by the pertinent page or pages. Certain of the depositions are in the Appendix in their condensed format for easy review. In such cases, depositions testimony is cited with the corresponding page of the Appendix, followed by the page of the transcript (*e.g.*, A_____, Page ____).

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## STATEMENT OF THE CASE AND OF THE FACTS

Petitioners' statement of the case and of the facts omits huge portions of the record, including most of the arguments and case law (some of which has been overruled), on which they relied to obtain the dismissal order. Dr. Jain accordingly supplies the present statement of the case and of the facts.

### A. The Nature of Dr. Jain's Claims

Dr. Jain commenced the action on September 18, 1997, with the filing of a complaint (A48-87) naming as defendants Green Clinic, Inc., f/k/a Green Clinic, P.A., a medical clinic in Haines City, Florida, and Dr. Jain's former co-shareholders, Stine, Moore, Thornton, Degnan, Allende, and Green, all of whom are physicians. Dr. Jain's complaint arose out of the purchase of the Green Clinic by an affiliate of Health Management Associates, Inc. ("HMA"), a hospital holding company (Barber Depo., A358, Pages 7-8).

Prior to the sale to HMA, the Green Clinic was a Florida professional service corporation organized under the provisions of Chapter 621, Fla. Stat. (LePage Depo., A479). Dr. Jain was a shareholder and one of the directors (*Id.* at 438). In 1995, HMA offered to purchase the Green Clinic (*Id.* at 421-22). At the time, the Green Clinic employed many of the physicians in the Haines City area and accounted for 42 percent of the admissions to the nearby HMA controlled hospital (*Id.* at A406, Page 30).

HMA's offer was initially structured as a purchase of all of Green Clinic's assets (*Id.* at 421-22), but following negotiations, and largely for tax purposes, the deal was restructured as a purchase of stock (*Id.* at 423-25). In the negotiations, HMA insisted that the acquisition, if treated as a stock purchase, be of all of the stock held by all of the Green Clinic shareholders (Stine Depo., A322, Page 59).

Green Clinic's negotiations with HMA were largely handled by its corporate lawyer, Mr. Stark, and its administrator, Robert LePage (Stine Depo., A320, Pages 50-51). According to Dr. Stine, Green Clinic's president at the time, Robert LePage assumed a large role in the negotiations because he "had much more business acumen" than the physician shareholders (Stine Depo., A320, Page 50).

Dr. Jain was opposed to HMA's offer throughout the negotiations (LePage Depo., A404, Page 24). Dr. Jain viewed the proposed $1.5 million purchase price for the clinic as inadequate (*Id.*). As the negotiations progressed, Dr. Jain continued to register his opposition to the sale, and HMA persisted in its position that it would go through with the deal only if all of the stock in the clinic were conveyed (Stine Depo., A322, Pages 59-63). Dr. Stine and the other shareholders in the firm, all Defendants in the case, favored the proposed sale. The lack of unanimity on the issue led to a directors and shareholders meeting on June 20, 1995 (LePage Depo., A437-38). Dr. Jain again expressed his opposition to the sale (*Id.*). Jain was informed in substance

that if he did not sign the proposed purchase papers, he would be fired from Green Clinic (LePage Depo., A409, Page 43; Stine Depo., A322, Pages 59-60). At the meeting, the Defendants took the position that the deal with HMA was "an all or none deal" that "had to be unanimous for the sale to go through" (Stine Depo., A322, Page 59). Petitioners were of the opinion that if Dr. Jain would not agree to the sale "it might be in the best interest of the corporation to exercise that option in his employment agreement and terminate him at will" (*Id.* at A323, Page 63). Dr. Jain continued to dissent from the proposed purchase (LePage Depo., A410, Page 46; A411, Page 50).

Accordingly, on June 22, 1995, Petitioners executed papers to effect the immediate removal of Dr. Jain from Green Clinic. Dr. Jain was removed as a director without prior notice (Stine Depo., A354). LePage Exhibit 11 purported to terminate Dr. Jain's contract of employment with the clinic (A474), and LePage Exhibit 12 informed Dr. Jain that his employment agreement was terminated and that "[w]e respectfully request that you vacate the premises immediately and return all property of the Corporation at this time, and that you do not reenter the premises of the Corporation without the express prior consent of Robert LePage." (A476).

After Dr. Jain's termination, Defendants converted Green Clinic from a professional service corporation to a corporation under Chapter 607, Fla. Stat. (A477)

and signed final sale papers which sold Green Clinic for $1,348,000 (Stine Depo., A331, Pages 93-94). Among the documents of the sale was a stock purchase agreement reciting that the Defendants owned all of the stock in Green Clinic except for the shares of Dr. Jain, but that these shares were "subject to a mandatory repurchase by the Corporation" (LePage Depo., A481). Green Clinic thereafter engaged in the fiction that it had "purchased" Dr. Jain's shares and "resold them" to HMA (Barber Depo., A376, Page 78).

In his complaint Dr. Jain challenged Green Clinic's position that his stock could be redeemed for no consideration and "resold" for a profit and sought damages arising from his summary removal from the practice (A48-87). Count I of the Complaint sought damages for breach of Dr. Jain's written employment contract. The Complaint alleged that Dr. Jain had been terminated without cause and forced to immediately vacate the premises of the clinic, that he had been locked out of the clinic by Defendants, and that he had been denied access to his medical charts (A48-57). Count II sought recovery of the fair value of Dr. Jain's shares in Green Clinic (A57-60). Dr. Jain's theory of recovery was that the HMA purchase had accomplished a share exchange within the meaning of Chapter 607, Fla. Stat., since all of the shares were purportedly exchanged in return for capital and other terms and conditions of sale. Dr. Jain alleged that as a dissenting shareholder, he enjoyed statutory dissenter's

rights under §§607.1301 and 1302, Fla. Stat., and that Green Clinic had failed to comply with its obligations to purchase his shares for fair value (A58-59). Dr. Jain also alleged that the individual doctors were liable on this claim to the extent that they profited from the value of Dr. Jain's share of the practice and to the extent the clinic no longer had assets to satisfy a judgment for the fair value of his stock. In Count III, Dr. Jain sought a declaratory judgment and an injunction to obtain a fair valuation of his shares in the clinic (A60-61). And in Count IV, Dr. Jain sought damages for breach of fiduciary duty (A61-64).

The Circuit Court ultimately dismissed the declaratory judgment claim (A157-161) but left the remaining claims intact. Answers and cross-claims were served by the Defendants. The case was not finally at issue until January 5, 2000, when the Circuit Court entered an order on Dr. Green's Motion to Amend his answer and affirmative defenses (A236).

On August 28, 2000, Dr. Green's counsel filed a notice of hearing (A237-38), purporting to set a hearing on a motion to compel against Green Clinic. The notice claimed service on Green Clinic's lead lawyer in this case, Christopher Griffin (A238). This notice of hearing, though later claimed to be a "nullity", was never corrected or withdrawn from the official record.

### B. The Efforts to Locate, Interview and Depose LePage

During the period between January 5, 2000 and January 8, 2001, Dr. Jain's counsel engaged in nonrecord activity in the case detailed in two separate affidavits (A287-290; A293-295), which focused principally upon locating Robert LePage, Green Clinic's former administrator and an essential witness in the case. On January 8, 2001, attorney Trevor Arnold, an associate lawyer delegated the responsibility to find LePage for Dr. Jain (A288, ¶10), located what appeared to be a good telephone number for LePage (A294). Arnold and other staff under his direction had searched internet telephone directories, State of Florida corporate officer listings, Florida driver's license records, county property ownership records, district and county court records, and professional license databases in an effort to locate LePage (A294, ¶¶5-7). LePage's telephone number had been unlisted until at least November 2000 (LePage Depo., A420, Page 86).

Arnold asked LePage for an interview (A294, ¶7; LePage Depo. A400, Page 7) but he also asked him for convenient dates to take LePage's *deposition*, as defense counsel admitted at the hearing (A44, L. 25), not simply to interview him as Petitioners now claim (A294, ¶7). LePage would not give Arnold dates for his testimony until he spoke to Green Clinic's lawyer (*Id.*). Arnold decided, out of courtesy to opposing counsel, to let LePage make his contact with defense counsel before noticing LePage's deposition (A294, ¶¶7-8). Arnold of course assumed that LePage would do as he said

and would call Green Clinic's lawyers (*Id.*), thus placing a premium on prompt action in actually noticing the deposition.

As Arnold expected, LePage did place a call to defense counsel, and he did it *on January 8*, and not the following day as suggested by Petitioners (A400, Page 8, L. 9). LePage first conferred with Dr. Stine personally (A400, Pages 7-8) and then with Dr. Stine's lawyer, Mr. Trohn, one of the attorneys defending the case (*Id.*). Mr. Trohn informed LePage that he should not talk to Dr. Jain's lawyers but should make Dr. Jain subpoena him for the requested deposition (*Id.*). The following morning, on January 9, 2001, Arnold left messages with *all* of the defense lawyers to obtain *agreeable dates* to depose LePage (A294-95). The actual calls were placed by an assistant, but personally supervised by Dr. Jain's counsel so as to ensure that all defense lawyers were immediately called. (A294, ¶8; A289, ¶12).

### C. The Motion to Dismiss

On January 9, 2001, the day after Arnold's call to LePage and the same day as the calls to all of the defense lawyers to obtain dates to depose LePage, Green Clinic's motion to dismiss was received by the Clerk (A239-40). The service date of the motion is January 8, the very same day of Arnold's call to LePage and LePage's calls to Dr. Stine at Green Clinic and Dr. Stine's lawyer, Mr. Trohn. (A400, Pages 6-8). The

Green Clinic motion was thus served within hours of LePage's conversations with Dr. Stine and Mr. Trohn.

Dr. Jain's phone calls to defense counsel on January 9 all went unanswered. (A295, ¶¶9-10). Arnold accordingly unilaterally noticed LePage's deposition. (A295, ¶10). The notice was faxed on January 11, the same day Arnold received the dismissal motion. (*Id.*)

Green Clinic thereafter demanded that the deposition not be taken until the Circuit Court ruled on the motion to dismiss (A295, ¶11). This proposal was unacceptable to Dr. Jain. The LePage deposition was accordingly taken on February 16, 2001 (A399), without prejudice to the defense motion.

The LePage deposition notice was recorded in the court record on January 16, 2001 (R3-520-21). It was not until after that notice that the remaining Defendants filed their motions to dismiss (R3-522-527).

Dr. Jain filed a detailed memorandum and supporting affidavits in opposition to the defense motions. (R8-1663-1714), along with the LePage deposition and the depositions of Defendants Green Clinic, Dr. Stine. Dr. Moore, Dr. Degnan, and Dr. Allende (R4-8).

### D. The Proceedings in the Circuit Court

The defense motions were heard by the Circuit Court on March 26, 2001 (A3). At the hearing, Dr. Jain's counsel was served for the first time with an affidavit of attorney O'Toole, who had filed the August 28, 2000 notice of hearing for Dr. Green, in which O'Toole testified that the notice of hearing had been mistakenly filed in Dr. Jain's case, but that the notice ought to have been filed in a related case in which Dr. Green had sued Green Clinic (A304-06).

At the hearing, defense counsel urged that Dr. Green's August 28, 2000 notice of hearing was a nullity and therefore not record activity for purposes of Defendants' motions to dismiss (A7-8), relying in part upon the O'Toole affidavit (A304-306) over Dr. Jain's objections (A8). The Circuit Court agreed with this position and peremptorily announced his intention to grant the dismissal motions, without even waiting to hear Dr. Jain's good cause argument (A25). The transcript of the hearing records the colloquy on this point as follows:

> The Court:
>
> ...But it's clear that there hasn't been anything done in this case for over a year, so I think they're entitled to their motion to dismiss for lack of prosecution. So I'll grant –
>
> Mr. Milbrath: Your honor, we haven't argued that point. If I may, we –
>
> The Court: You haven't?

Mr. Milbrath: – we only argued the record activity. We haven't argued the good cause issue. I think that the Court needs to consider my showing of good cause.

The Court: Okay. Go right ahead.

(A25-26)

Now reminded that Dr. Jain was entitled to prove that he had good cause for the lack of record activity, the Court permitted the parties to argue the good cause issue (A25). During the argument (A39-40) Petitioners urged that the search for LePage and the efforts to arrange his deposition prior to the defense motions could not constitute good cause because of this Court's opinion in *Smith v. DeLoach,* 556 So. 2d 786 (Fla. 2d DCA 1990), an opinion subsequently disapproved in *Metropolitan Dade County v. Hall,* 784 So. 2d 1087 (Fla. 2001). On this point Mr. Trohn, the same attorney who had advised LePage to do nothing until he received a subpoena (A400, Page 8), declared:

> And ... by the time he finds him – and if, in fact, he had unilaterally noticed a deposition on January 8th, it wouldn't have *made any difference*. As that *Smith v. DeLoach* case points out, a notice of deposition isn't record activity. And January 8th would've been too late anyway. So ... it really makes no difference whether we're encouraging or discouraging someone to coordinate a deposition. If he had gone ahead and noticed it by himself without coordinating it on that day, it still wouldn't have been record activity, so that really doesn't make any difference. (A39-40).

The Court announced its ruling that good cause had not been shown (A45-46), and granted all of the defense motions (A1-2).

The Order calculated the relevant record activity period not backward from the date of the dismissal motion but forward from the last date of record activity and recited that "[t]here is an absence of record activity between January 5, 2000 and January 5, 2001 to advance the action forward or hasten the action to judgment". (A1, ¶2a). The order found that Dr. Jain "failed to demonstrate good cause as to why the action should not be dismissed" and that even "if the Plaintiff had been able to demonstrate excusable conduct ... the claim still is subject to dismissal because the Plaintiff failed to allege and demonstrate contact with the defendants during the *relevant one-year period.*" (A2, ¶¶c and d) (emphasis added).

Dr. Jain filed a timely notice of appeal (R12-2050-53).

### E. Dr. Jain's Prosecution of the Case and Good Cause

During the hearing Judge Durrance observed that Dr. Jain's complaint had been filed on September 18, 1997. He then stated that the case had bounced "around in violation of the time standards, and then in October of 1999, two years and one month later, you all take a deposition." (A45). The actual record presents a very different picture concerning the prosecution of this case, which should not go unnoticed.

This case was hotly contested from its inception. The Defendants in the case initially contested even the sufficiency of the service of the complaint (R1-68-69; 70-71), necessitating testimony from the process server (R1-135-42) and two hearings directed just to the service of process, one by Defendants to continue the hearing (R1-128-29) and another one on the merits of service (R1-155-56; 166-67; 168-69; 187-88). While this dilatory activity was underway, Dr. Jain promptly served document requests (R1-89-96; 97-105; 106-113) and third party production requests (R1-116-123), most of which were objected to (R1-157-158; 161-165). Dr. Jain thereafter promptly moved to compel production. (R1-170-186), while the parties litigated motions to dismiss the complaint (R1-193-196; 197-202).

From about April 1998 through January 1999, the parties exchanged documents and served discovery responses (R2-203-211; 217-220; 225-227; 229-231; 233-242). There were also additional hearings on dismissal motions (R2-221-222; 223-224) with the Court taking the matter under advisement. On February 26, 1999, the Circuit Court entered an Order dismissing Dr. Jain's declaratory judgment claim but upholding the sufficiency of the remaining claims (A157-161). Additional discovery practice and the filing of answers followed into June 1999 (R2-274-323). During this time the Court also ruled on motions to compel and resolved a number of objections on discovery issues

(R2-296-321). Once these discovery issues had been largely resolved, Dr. Jain noticed the depositions of the Defendants.

Dr. Jain's depositions of the Defendants were rescheduled (R2-380-383; 386-87). Another discovery objection to a subpoena by Dr. Jain was lodged by HMA (R2-388-89), which necessitated a motion to compel (R3-399-411). Dr. Jain was also required to file a second motion to compel directed to his second document request (R3-412-429; 430-39), which was noticed for hearing (R3-440-441) in September 1999. The new discovery dispute again postponed the contemplated depositions of Defendants.

The depositions of Defendants were finally taken in October 1999 (R4, 5, 6, 7, 8). The deposition of Anthony Barber, Green Clinic's corporate representative and the employee of HMA who negotiated the purchase (Barber Depo., A360, Pages 13-16), was taken on October 1, 1999. The Barber deposition consisted of 150 pages and 41 exhibits (R4). Barber's deposition was followed by Dr. Stine on October 5, 1999, consisting of 167 pages and 26 exhibits (R7), Dr. Moore (R8-1516), Dr. Degnan (R8-1558), and Dr. Allende (R8-1617).

In November 1999, the parties stipulated to a confidentiality order (R3-493-507) to clear objections to discovery based on confidentiality. Additional defense discovery

followed (R3-510-513). And on January 5, 2000, the Circuit Court entered an Order on Dr. Green's Motion to Amend his answer (R3-515).

The following day, January 6, 2000, Dr. Jain's counsel received a supplement to the defense discovery in the form of previously unproduced Green Clinic minutes which had been prepared by LePage (LePage Depo., A437). These minutes summarized some of the events at the Green Clinic board meeting on June 20, 1995, two days before Dr. Jain's termination. The minutes declared, among other things, that "Mr. Stark [Green Clinic's lawyer] stated the Board could make some settlement arrangement or terminate Dr. Jain under paragraph 16 of his Employment Agreement in order to proceed with the sale" (*Id.*).

At this point in the case, most of the principal witnesses had been deposed, and the parties had produced large amounts of documentary discovery (A288). Dr. Jain's counsel thus obtained the transcripts and began evaluating the case, particularly on the issue of Dr. Jain's damages and his chances for summary judgment on the claim for dissenter's rights under Chapter 607, Fla. Stat. (*Id.*). Dr. Jain's counsel reviewed the deposition transcripts during late Fall 1999 and early 2000 (*Id.*). Meetings followed with an expert on business valuation and with Dr. Jain (*Id.* at ¶¶4-5) . There was a subsequent meeting between Dr. Jain's counsel and the expert on business valuation (*Id.*). This meeting was held to discuss the case with a view to moving for summary

judgment or noticing the case for trial (*Id.*). After deliberation it was determined that the testimony of one more, but potentially case-dispositive, witness was required: Robert LePage (*Id.* at ¶6).

Dr. Jain's counsel perceived LePage as a critical witness, whose testimony could supply the last link in establishing that Defendants had violated Dr. Jain's rights as a dissenting shareholder under §607.1102, Fla. Stat. (A290). If this claim could be established sufficient to obtain a summary judgment of liability, then what had already proved to be an expensive lawsuit could be brought to a potentially rapid conclusion (A290). LePage, as the administrator of the Green Clinic, had served as a conduit for information between the Defendants on the one hand and HMA on the other (LePage Depo., A320, Page 50-52). It was LePage who had authored some of the letters to HMA (A317, Page 40); it was LePage who had prepared the board of directors minutes for Green Clinic (LePage Depo., A410, Pages 45-46), after witnessing critical meetings between the Defendants and Dr. Jain; it was LePage who had managed the financial information of the practice and who had prepared much of the documentation showing Green Clinic's financial dealings (Barber Depo., A388-391); it was LePage who personally circulated the documents removing Dr. Jain from Green Clinic (LePage Depo., A411, Pages 49-50) and then negotiated the amount of the reduction in purchase price as the result of the termination of Dr. Jain (Barber Depo., A371, Pages

57-58); and it was LePage who had abruptly changed the locks to deny Dr. Jain entry (LePage Depo., A412, Pages 54-56), a detail generally denied by the Defendants (Stine Depo., A328, Page 82). What is more, LePage also had in his possession original board minutes and other documents of Green Clinic (LePage Depo., A408, Pages 38-40), though this fact was not known until he was located and deposed (*Id.*). These documents were supplied to Dr. Stine's counsel, Mr. Trohn, *after* Trevor Arnold finally located LePage (*Id.*). Trohn copied the pages of these documents he wanted (*Id.*) but Dr. Jain could not determine whether all of this information was produced to his attorneys, though board and shareholder minutes had certainly been requested (A95).

In early 2000, Dr. Jain's counsel directed a paralegal to locate LePage, whose whereabouts were then unknown (A288). It was hoped that LePage could be interviewed concerning the case and thereafter deposed. The initial efforts to locate LePage were unsuccessful (A288).

In the Fall of 2000, Trevor Arnold was assigned the task to locate LePage. (A288; A294). Arnold's efforts to locate LePage were extended, consuming over two and one half months and using a variety of sources from driver's license databases to telephone and internet directories (A294). LePage was believed to then be living in Polk County (A294). In fact, he had recently lived in Seminole County and had moved

to Orlando in June 1998 (LePage Depo., A399-400). LePage's telephone number was unlisted for most of this time until about November 2000 (*Id.* at A420, Pages 86-87). On January 8, 2001, no later than noon (*Id.* at A400, Page 6), Arnold finally located LePage, at his residence.

**F. <u>The Accuracy of Petitioners' "Facts"</u>**

Petitioners argue that Anthony Barber, an HMA employee, "gave LePage's location", Brief at 22, at a deposition. In point of fact, Barber was asked where LePage went after the left Green Clinic, a clinic located in Polk County. Barber's response was hardly illuminating, and certainly did not give LePage's location. What Barber testified was "[w]ell, he *lived* in Orlando, I know he continued to live there, *then* he went to work for, I was told that he went to work for a group of doctors somewhere else, a cardiologist, I think, over here in Winter Haven. Beyond that I can't tell you". (A382, Page 101). Arnold, who certainly had no reason to look for LePage in the *wrong* place, testified that his "efforts to find LePage were frustrated because he was believed to be in the Polk County area" (A294), which was where Barber said he *then* "went to work". (A383).

In their statements of alleged facts, Petitioners state:

> During the brief telephone conference, Arnold asked LePage if he was available to "come down and give a voluntary statement"…. *Arnold did not inform LePage that he wanted to take his deposition, nor did*

*Arnold inquire about or obtain potential convenient deposition dates* from LePage. (Brief, 4).

This is a misleading summary of the record. What could be unclear about Arnold's testimony that he identified himself to LePage "and requested convenient dates from him so that I could subpoena him for a *deposition*"? (A294, ¶7). Or Arnold's testimony that LePage "indicated that before he gave me any dates for the taking of his *deposition* he wanted to speak to the Green Clinic, Inc.'s attorneys to discuss the matter"? (*Id.*). Petitioners have chosen to ignore this testimony of a member of The Florida Bar in favor of a convenient construction of LePage's deposition. LePage, a layman with little apparent knowledge of the legal system, did testify that Arnold asked him for a "voluntary statement" (A400, Page 7-8) but he also testified that "because I'm not a lawyer, I used the term synonymous, deposition and subpoena" (A401, Page 9), and he could not even recall Arnold's name (A419, Page 84), confusing him with Arnold's paralegal, who did contact him about a statement (A419, Pages 9-10). Yet even Petitioners admit that they were contacted the next day for a deposition. (Brief, 5), and they *admitted at the hearing* that LePage informed Trohn that he had been contacted not only for a statement, but a *deposition* (A44, L.26). Moreover, if Arnold merely wanted a statement from LePage – which defies not only Arnold's sworn testimony and Trohn's admissions but also common sense in light of the long search for him – why were calls placed the next morning to arrange

a deposition? It is irresponsible to claim as an alleged fact on this record that Arnold "did not inform LePage that he wanted to take his deposition". Brief, 4.

Petitioners claim that "LePage was in the phone book during most, if not all, of the time that Arnold searched for him". Brief, 7. In point of fact, LePage's telephone number was *unlisted* throughout 1999 and most of 2000. (A420, Page 86). LePage testified that he was in the then most current book "which came out, I *believe* in November 2000". (A420, Page 86).

Petitioners say that LePage "personally bumped into Dr. Jain at a local [Polk County] hospital and gave the doctor his business card". Brief, 8. This fact, of course, would suggest that LePage lived in Polk County, not Orange. But what Petitioners leave out is that he soon thereafter quit the job (A400, Page 5), thus leaving no clear way to locate him.

### G. The Real Chronology of Critical Events

In response to Petitioners' chronology of critical events leading to the dismissal, Dr. Jain offers the following chronology, based upon the actual record evidence:

Early to Mid 2000: A review of the depositions and meeting with an expert leads to the conclusion by Dr. Jain's counsel that it is necessary to depose LePage, before moving for summary judgment or noticing the case for trial. (A288, ¶¶4-6). A paralegal

attempts to find LePage. (*Id.* at ¶7). The goal is to interview LePage, if possible, before deposing him. (*Id.*)

Fall of 2000: An associate attorney, Arnold, is instructed to personally locate LePage. (*Id.* at ¶10).

January 8, 2001: – On the morning of January 8, after failed attempts, Arnold locates LePage at his residence, verifies he is the witness in question, and requests convenient dates to subpoena him for deposition. (A294, ¶7).

– Arnold is told by LePage that he wants to speak to Green Clinic's attorneys to discuss the matter before giving deposition dates (A294, ¶7).

– Arnold decides to let LePage make his contact with defense counsel and to then notify them himself to clear dates for a deposition rather than unilaterally noticing the deposition. (A294, ¶7).

– It was the practice of Milbrath and Arnold to coordinate deposition dates with opposing counsel (A289, ¶12). It being still in the late morning hours (A294, ¶7, A400, Page 6, L. 21-22) Arnold could have unilaterally noticed the deposition and hand delivered it to the courthouse before the close of business that day. (A295, ¶9). But Arnold waited until the evening of January 8, 2001 to hear back from LePage or defense counsel. (A295, ¶9; A29).

– LePage calls Dr. Stine at the Green Clinic (A400, Page 7, L. 24) and then Stine's lawyer, Mr. Trohn (A400, Page 8, L. 9)

– Mr. Trohn, who is not LePage's lawyer, learns from LePage of Dr. Jain's effort to set LePage's deposition (A44, L. 26). Trohn tells LePage to "let them subpoena you" (A400, Page 8, L. 16).

– Within hours of LePage's call to Green Clinic's Dr. Stine, Green Clinic serves a motion to dismiss (A239) claiming that the "last record activity was the Court's January 4, 2000" order and thus that "there has been no record activity on the action for a period of one year". Green's calculation of the period of record activity from January 4 forward avoids any discussion of the events of January 8 in the calculus of record activity or good cause (A239).

– Milbrath is personally monitoring Arnold's efforts because he wanted to make sure that LePage was immediately deposed so that he could get the case in a posture for possible summary judgment. (A289, ¶13).

January 9, 2001: – Early in the morning Arnold and Milbrath insure that each defense lawyer is called and left with the message that Dr. Jain wishes to schedule LePage's deposition at a mutually convenient date and time and requests dates as to their availability. (A294-95, ¶8; A289, ¶13). The messages are never returned. (A295, ¶¶9-11).

– During the day, the Clerk receives Green Clinic's motion (A239).

January 11, 2001: – After none of Dr. Jain's counsel's calls were returned by any of the defense lawyers, a unilateral notice of deposition of LePage is served (A295, ¶¶10-11), which is received by the Clerk on January 16, 2001. (R3-520-21)

February 16, 2001: – After all objections were preserved, LePage is deposed. (A399).

## SUMMARY OF ARGUMENT

Petitioners unfairly trivialize the Second District's opinion by attempting to reduce it to one involving a "secretary's voice mail message" about a deposition. The Second District correctly observed that under *Metro. Dade County v. Hall*, 784 So. 2d 1087 (Fla. 2001), if the good faith noticing of the deposition of an important witness is record activity as a matter of law, then the good faith pre-notice steps to promptly schedule such a deposition can qualify as good cause, nonrecord activity under Rule 1.420(e), particularly where (a) the notice could have been filed before the motion but (b) was not so filed only because the witness (LePage) and the opposing counsel were contacted first, out of professional courtesy, and (c) the motion to dismiss was served in the hours intervening between the witness's call to defense counsel about the deposition and plaintiff's request that defense counsel schedule the

deposition, but was received in the clerk's office after plaintiff's request. The Second District's opinion was appropriately limited to the unique facts of the case, which established nonrecord activity to move the case forward as a matter of law.

The Second District did not improperly substitute its findings for those of the Circuit Court. The Circuit Court was misled into employing the wrong standard for calculating the period of record activity, thus enabling defense counsel to side-step Dr. Jain's pre-motion activity to set the LePage deposition. The "findings" embodied in the order signed by the circuit court consequently (a) employed the wrong standard in evaluating the relevant period of record activity, (b) improperly determined that there had been no contact between Dr. Jain and defense counsel in the relevant period, and (c) were tainted by the court's reliance upon *Smith v. DeLoach*, 556 So. 2d 786, 788 (Fla. 2d DCA 1990), which was subsequently overruled by *Hall*. The Second District, in contrast, applied the correct standard and the principles of *Hall* to the essentially undisputed facts.

The Second District's opinion adopts no rule in conflict with *any* of the district court opinions cited by Petitioners. To the contrary, the notion that there was a direct and express conflict between the Second District's opinion and the cited precedent is contrived. What Petitioners would have this Court do, under the guise of resolving a conflict among the districts that does not exist, is adopt a categorical rule that would,

in the context of depositions, equate *record activity* with *good cause for the lack of record activity,* thus improperly eliminating the good cause prong of Rule 1.420(e) in such cases altogether. Such a categorical rule would be improper and would unfairly deprive Dr. Jain of his right of access to the courts.

## ARGUMENT

### I. THE SECOND DISTRICT COURT DID NOT "USURP THE ROLE OF THE TRIAL JUDGE"

Petitioners maintain that the Second District usurped the role of the Circuit Court and substituted "its finding of good cause in place of the Trial Judge's findings". Brief, 12. The District Court's opinion did no such thing.

Consider first the "findings" to which Petitioners refer. (A1-2). Petitioners carefully crafted their motions (A239-244) and the order signed by the Court (A1-2) to calculate the period of record activity *forward*, from January 4, 2000 to January 5, 2001 rather than *backward* from the date (January 9, 2001) the motion was filed. Yet it was unquestionably the law at the time, as now, that the critical period is measured "backwards from the time preceding the filing of the motion to dismiss". *Frohman v. Bar-Or,* 660 So. 2d 633, 636-37 (Fla. 1995). Why, then, did Petitioners urge the Circuit Court to adopt an approach they had to have known was in error? The answer becomes clear when one realizes that in so doing Petitioners were able to discount as irrelevant Dr. Jain's nonrecord activity on January 8 and 9, after Petitioners' contrived

one year window had *expired*. By seizing upon the wrong one year period, Petitioners were able to argue that nothing Dr. Jain's lawyers did after January 5, 2001 mattered (A11-12; A25; A37-38) and that because there was no contact between the lawyers in that wrongly-defined time window, Dr. Jain's argument failed, even if what he offered for good cause might otherwise have been viewed as sufficient. (*Id*.). Hence the "findings" Petitioners say were usurped are all interrelated and are all tainted by the same false methodology.

The order Petitioners presented to the Court consequently recites that there was "an absence of record activity between January 5, 2000 and January 5, 2001" (A1, ¶2a), which is the wrong one year period, and then states that Dr. Jain "failed to demonstrate good cause" (A2, ¶2c), but that even "if the Plaintiff had been able to demonstrate excusable conduct ... the claim *still* is subject to dismissal because the Plaintiff failed to allege and demonstrate contact with the defendants during the *relevant one-year period"*. (A2, ¶2d; emphasis added). The "relevant one year period" conveniently terminated, under Petitioners' deceptively simple but false approach, on January 5, 2001, before Dr. Jain had even located LePage, let alone called defense counsel to arrange the deposition. Having been led into adopting the wrong "relevant one-year period", the Circuit Court attached no weight to Dr. Jain's pre-motion but post-January 5 efforts to set LePage for deposition. (A2; A45). The

Circuit Court's "findings" on which Petitioners rely are therefore fundamentally flawed. This perhaps best explains the Circuit Court's rush to judgment on the good cause issue before Dr. Jain was able to even to argue the point. (A25-26); the Court chose the wrong time window and thus perceived Dr. Jain's emphasis on events after that time, but before the motion, as futile.

These flawed "findings", moreover, were compounded by Petitioner's emphasis upon the subsequently disapproved Second District opinion in *Smith v. DeLoach*, 556 So. 2d 786, 788 (Fla. 2d DCA 1990), *disapproved in Metro. Dade County v. Hall*, 784 So. 2d 1087, 1091 (Fla. 2001). In *Smith*, a Second District panel declared that the filing of a notice of deposition "does not result in activity in the record" and that even the filing of a completed deposition by the court reporter "was not record activity because the filing was not for any intended use by the parties or witnesses." *Smith*, at 788. The application of *Smith* to Dr. Jain's case was heavily argued to the Circuit Court, on the theory that if the noticing of a deposition could not constitute record activity and if the filing of such a deposition was equally insufficient, then Dr. Jain's steps to schedule and depose LePage must perforce be deemed insufficient nonrecord activity. (A12; A39-40). Being bound by *Smith* at the time, the Circuit Court was unquestionably influenced by its holding in concluding that no good cause had been established.

If one simply considers the false one year window urged by Petitioners and adopted by the Circuit Court with the Court's reliance upon the *Smith* decision, is it not clear that Dr. Jain's fate was sealed before his counsel ever had the chance to argue good cause? The Second District did not "usurp" the Circuit Court, it simply followed the law. By the time the case reached the Second District, the *Smith* case was not the law, this Court had decided *Hall*, and even Petitioners now conceded that the Circuit Court "should have calculated the appropriate year by working backward from the date Green Clinic filed its motion". Green Clinic Answer Brief, Second Dist., at 26. The Second District rightly concluded that "the circuit court erred when it used the wrong date from which to measure the one-year period". Panel Opinion, 830 So. 2d 836, 838.

The Second District next turned to the adequacy of Dr. Jain's good cause evidence, viewed in the light of *Hall*. The District Court's conclusion that "[u]nder the particular facts of this case", Dr. Jain's attorney "established good cause for the delay in prosecution", Panel Opinion at 838, did not substitute its findings for those of the Circuit Court. The Second District simply applied the correct legal standard to Dr. Jain's good cause showing, on a factual record that was essentially uncontroverted. What is more, where "a trial judge fails to apply the correct legal rule ... the action is erroneous as a matter of law", and thus correctable regardless of the abuse of

discretion standard. *Canakaris v. Canakaris,* 382 So. 2d 1197, 1202 (Fla. 1980); *Little v. Sullivan,* 173 So. 2d 135, 136 (Fla. 1965). This was the case here.

## II. DR. JAIN'S EVIDENCE ESTABLISHED GOOD CAUSE

As this Court noted in *Hall,* "if there was no record activity, the plaintiff has an opportunity to establish good cause why the action should not be dismissed." *Hall,* at 1090. Dr. Jain's good cause affidavits and testimony focused on the events of January 8 and 9, 2001, after LePage was located and before the motion to dismiss was received by the Clerk of Court.

As Dr. Jain noted, Arnold found LePage on the morning of January 8 and promptly requested dates for his deposition. (A294, ¶7; A44, L. 25). LePage would not commit himself without first speaking to Green Clinic's lawyers (A294, ¶7). Now aware that the defense lawyers would shortly be contacted by the witness, Arnold had a choice: he could give LePage a fair chance to talk to the defense lawyers about scheduling and then coordinate an agreeable date for LePage's testimony, or he could unilaterally notice the deposition for an arbitrarily selected date and race off to the courthouse with deposition notice in hand, thus creating activity of record before Green Clinic got to the clerk's office with a Rule 1.420(e) motion. (A294, ¶7; A295, ¶9). The latter approach had the appeal of creating record activity, but then it also risked the potential of being attacked as an exercise in bad faith or as having been

improperly noticed without coordination of counsel. Out of courtesy to defense counsel, Arnold "decided to let Mr. LePage make his contact with defense counsel and to notify defense counsel myself to clear dates for deposition". (A294, ¶7).

The effect of this decision was that Green Clinic was the first party to the courthouse with a pleading. This was no coincidence. Arnold's call clearly set the events in motion. Arnold spoke to LePage on the morning of January 8. (A294, ¶7; A400, Page 6). LePage promptly called Dr. Stine at Green Clinic. (A400, Page 7). Stine suggested that LePage call Stine's lawyer, Mr. Trohn (*Id.* at 8), who suggested that LePage "let them subpoena you". (A44, L. 25). LePage thus did not call Arnold back, nor did the defense lawyers. (A294-295). But Arnold waited until the evening of January 8 to hear back from LePage or defense counsel. (A295, ¶9; A29). Meanwhile, Green Clinic's dismissal motion, crafted to avoid the events of that day, was served within hours of LePage's calls. (A239, ¶¶2-3). The following morning, Arnold and Milbrath personally made sure that all of the defense lawyers were contacted to schedule the deposition of LePage "at a mutually convenient date and time" and, in Arnold's words, "requesting that Defendants' respective counsel provide us with dates that would be available for the ... deposition". (A294-95, ¶8). Sometime later that day the Clerk's office received and docketed the motion to dismiss. (A239).

As Dr. Jain pointed out in his memorandum (A251) to the Circuit Court, Dr. Jain could have won the race to the courthouse by simply unilaterally noticing LePage's deposition, thereby creating record activity. Yet it was the standard in the circuit, as it was throughout Florida, that "lawyers should cooperate with each other concerning the scheduling of discovery". Handbook on Discovery Practice, Joint Committee of The Trial Lawyers Section and Conferences of Circuit and County Judges, 28-29 (2000). *See, e.g., Canella v. Bryant,* 235 So.2d 328, 332 (Fla. 4th DCA 1970) ("It has been the common practice and courtesy of attorneys throughout the state to cooperate as to the scheduling of depositions, as it is well their *duty to do* in the furtherance of justice and as officers of the court". Emphasis Added).That being the case, ought Dr. Jain's cause of action be at risk of extinction because his lawyers paused, out of concern over professionalism, to contact defense counsel before noticing the deposition of LePage?

In *Hall* this Court made clear that the "factors from Del Duca, whether any activity was done in *good faith* and whether the activity was with any *design to move the case forward*, are components in evaluating whether good cause exists". *Hall,* 1090. (Emphasis Added). In *Hall* "there was no activity on the face of the record". *Id.* at 1091. Hence the issue addressed by the Court was necessarily whether the nonrecord activities at issue were undertaken in good faith to prosecute the case

forward to a conclusion. *Id.* at 1091. This was precisely the analytical approach applied by the Second District here.

As the Second District Court noted in its opinion, LePage was believed to be "important to the ultimate resolution of the case". Panel Op. at 838. LePage was the one insider who might be viewed as a disinterested witness, and his testimony might prove pivotal to either side's case (A290, ¶13). Dr. Jain's counsel believed LePage could clear the way for summary judgment on a key legal issue: the denial of Dr. Jain's statutory dissenter's rights. (*Id.*). Hence setting LePage for deposition would constitute an act calculated in good faith to move the case forward. But LePage's whereabouts were not discovered, whether through a faulty investigation or not, until January 8 (A289, ¶13). Did Dr. Jain waste any time setting LePage for deposition at that point? Clearly not. As the Second District observed, when Dr. Jain's "lawyer asked the witness to provide dates for his deposition, the witness replied that he would not do so until after he had conferred with the attorney for defendant Green Clinic." Panel Opinion, 838. And on that very day LePage did speak to one of the defense attorneys "who informed him that he should not speak with Dr. Jain's lawyer but should require a subpoena for deposition." *Id.* The following day, noted the Court, which was the same day the motion was filed, "Jain's attorney left messages with opposing counsel seeking available dates to depose the administrator." *Id.*, 838. Not

a single lawyer responded. Thus "Dr. Jain's counsel noticed the administrator for deposition, which was taken on February 11, 2001". *Id.*

Applying the *Hall* case, the Second District observed that once Dr. Jain "located the administrator he could have noticed his deposition immediately, and that record activity would have occurred within the one-year period and would have precluded dismissal". *Id.* at 838. The Second District's analysis is fully in accord with the *Hall* opinion.

In discussing the noticing of depositions, the *Hall* Court reasoned that "if the filing of a notice of deposition constitutes activity designed to advance the case toward a conclusion, then, by even greater force of logic, the actual taking of a deposition is also activity designed to advance the case toward a conclusion". *Hall,* 1091. This Court accordingly disapproved *Smith*'s reasoning to the contrary, and approved Judge Griffin's dissenting opinion in *Levine v. Kaplan,* 687 So. 2d 863, 865 (Fla. 5th DCA 1997). Subsequent district courts have, like the Second District here, concluded that filing a notice of taking a deposition in good faith is record activity as a matter of law. *E.g, Abaddon, Inc. v. Schindler,*826 So. 2d 436 (Fla. 4th DCA 2002) (Concluding that deposition notices qualify under *Hall* and thus so do motions to appoint commissioners for deposition).

The Second District next reasoned that if the deposition of LePage had been taken "without placing the notice in the file, that act would have constituted good faith activity designed to advance the pending matter to resolution and also would have avoided dismissal." Panel Op. at 838. This is certainly consistent with the *Hall* ruling.

Next the Second District observed:

> Only because Dr. Jain's lawyer courteously contacted opposing counsel did the time continue to run. Here, to avoid the possibility that an arbitrarily chosen deposition date would later be determined to violate the discovery rules, *Dr. Jain's lawyer contacted opposing counsel in advance. The reward for his courtesy was that the record remained dormant.* Panel Op. 838-39. (Emphasis added).

This analysis is fully supported by the evidence in the record. (A289-295). The ultimate question thus raised was whether Dr. Jain's action should be dismissed, with fatal consequences to his case, because his lawyer "courteously contacted opposing counsel" rather than rushing to the courthouse with a notice. The Court's conclusion that Dr. Jain's attorney "established good cause for the delay in prosecution", Panel Op. at 838, is supported by the evidence and by the Court's ruling in *Hall.* The effort to find and depose LePage was taken in good faith and for the purpose of hastening the case toward a conclusion on the merits. Immediately after LePage was located Dr. Jain took steps to depose him: the witness was asked for dates, he was encouraged to place the call to Green Clinic, and a few hours later the defense lawyers were each called after neither LePage nor the lawyers called back. Accepted norms of

professional courtesy unquestionably dictated that Dr. Jain at least make some effort to prearrange the deposition. *E.g.*, *Canella,* 332. But at the cost of his client's cause? As the Second District appreciated, if Dr. Jain had rushed to clerk's office first with a unilateral notice, filed in good faith, he would have created record activity as a matter of law. Yet by waiting, and courteously contacting defense counsel, the price paid by Dr. Jain included not only the lack of record activity but the termination of the action. Rule 1.420(e) was never intended to work such a result.

No system of justice worthy of the name ought deprive a litigant of his constitutional right of access to court because his lawyer chose the path of professionalism rather than expediency. Rule 1.420 (e)'s good cause standard must be applied in a way that fairly balances the goal of promptly and efficiently resolving cases with the goal of preserving professionalism and the litigant's right of access to the courts, as well as the "policy of allowing cases to be decided on the merits". *Torrey v. Leesburg Reg. Med. Center,* 769 So.2d 1040, 1046 (Fla. 2000) (observing, in the context of the nullity rule, the folly of visiting the sins of the lawyer upon the client). The Second District's opinion appropriately balances these interests and is fully consistent with *Hall.*

Whatever Petitioners may say about the defects in searching for LePage, it remains true, as the Second District recognized, that Dr. Jain's lawyers established

good faith, nonrecord activity to prosecute the case to a conclusion before the filing of the defense motion and that they acted with professionalism in setting the deposition in motion. Having been alerted by LePage, Green Clinic got to the courthouse before the written notice, but not before the setting of the deposition was in effective motion as professionalism dictates. The Second District correctly applied the law.

Petitioners oddly complain, however, that Dr. Jain did not actually contact their lawyers personally, but only left messages with their lawyers' staff. What else is a calling lawyer supposed to do if the opposing lawyer does not come to the telephone? A lawyer who does not return opposing counsel's call – and Petitioners *never* returned Dr. Jain's calls to arrange dates for LePage's deposition before the notice was issued unilaterally (A295, ¶¶9-10) – can hardly complain that there "was no evidence of contact between counsel." Brief, 26.

Remarkably Petitioners nevertheless bemoan the Second District's opinion with this dire prediction: "If the Second District's decision is allowed to stand, good cause will be found in the future anytime a secretary leaves a message with another secretary about scheduling a deposition, regardless of whether the message is received and regardless of whether the message was ever transmitted to counsel". Brief, 10-11. The Court's opinion leaves no room for such an argument, and it is remarkable that Petitioners would even say this when they not only *did* receive the message (A 294-95;

A 289) but had spoken to LePage about his deposition the day before (A44, L. 26), told him to "let them subpoena you" (A 42-43; A400, Page 7), and undertook to beat Dr. Jain to the courthouse rather than cooperating, as professionals should, to arrange LePage's testimony.

Petitioners also question which came first: the calls to defense counsel to schedule LePage or the Clerk's docketing of the motion to dismiss. Brief, 26. Yet the evidence, as opposed to speculation by Petitioners, is that the calls were placed in the morning, and thus before the motion could have been docketed (A294, ¶8).

Petitioners also complain of an alleged imputation of sharp practice in the Second District's opinion. Brief, 26-27. Though it is true that Green Clinic's motion was served within hours, if not minutes, of LePage's conversations with Green Clinic and Mr. Trohn, and it is also true that Dr. Jain believed that he had been "blind sided" by Green Clinic's motion and the failure of the lawyers to return the calls to arrange LePage's testimony (A251), the District Court did not reproach defense counsel; rather it focused entirely on Dr. Jain's *process* of setting the deposition of LePage in motion in a manner consistent with accepted professional practices. This process, noted the Second District, was the only reason why " the record remained dormant", Panel Op. at 830 So. 2d 839, whether Petitioners acted improperly or not. Petitioners simply misperceive the point of the Second District's opinion.

Predictably Petitioners also seek to deflect the Court's attention from the Second District's *Hall* analysis by serving up a variety of post-hoc reasons why Dr. Jain's efforts to locate LePage *prior* to January 8 should be discounted. None of these contentions are factually relevant, but all of them are misplaced in any event. We are told, for example, that Dr. Jain's counsel should have known that LePage lived in Orlando from the deposition of Green Clinic's witness Barber (R4). Did Barber know where LePage could be located? No. (*Id.*) Was LePage listed in the telephone directory? No. (LePage Depo., A420, Page 86). In point of fact, LePage lived in Seminole County until June 1998, then moved to Orlando and had no published telephone number until about November 2000, thereby making it difficult for Dr. Jain's investigator to find him (*Id.*; A399-401). Dr. Jain's lawyers believed that LePage was then residing in Polk County, where he supposedly then worked (A294, ¶6). This assumption was consistent with Dr. Jain's having bumped into LePage and being given a business card for a business in Polk County, a job which LePage, who changed jobs frequently in this time period (LePage Depo., A400, Page 5; A419, Page 82), promptly quit (A400, Page 5). Dr. Jain's counsel's assumption about the whereabouts of LePage proved incorrect, but it was based on the best information Dr. Jain's counsel had at the time and certainly nothing in Barber's remarks supplied meaningful data to believe otherwise, after the usual computer searches proved unavailing (A294).

Defendants also say that Dr. Jain himself should have known how to reach LePage because LePage forwarded a dividend check for a medical partnership to Dr. Jain in December 1999 (LePage Depo A419, Page 83). This argument of course assumes that Dr. Jain opened his own mail, which is doubtful, and appreciated that the sender was LePage, which is even more doubtful, and that all of this was known to Dr. Jain's counsel, which is completely inconsistent with the record and with his counsel's investigative efforts (A293-95).

It is always easy for a defense lawyer, empowered with the perfect vision of hindsight, to contrive reasons why the plaintiff's lawyer bungled the search for a witness. And it may be that Dr. Jain's counsel did bungle the investigation and that LePage ought to have been located earlier. Should Dr. Jain's cause of action be extinguished for such a reason, even though his lawyers ultimately *did find LePage* and immediately set in motion, *before the Green Clinic motion*, the chain of events necessary to depose him in a professionally proper manner? Applying *Hall* to the facts of this case, the Second District properly concluded that it should not.

Petitioners would nevertheless have this case dismissed and even mulct Dr. Jain with their attorneys fees (R228), not content with already having sold Dr. Jain's stock and having pocketed the money. It would be wrong to inflict such an injury upon Dr. Jain for the illusory benefit of clearing the trial court's docket, particularly where the

Green Clinic motion reached the courthouse first *only* because Dr. Jain's lawyers acted professionally in contacting the defense lawyers before issuing the deposition notice. Dr. Jain *did not abandon his case.* Dr. Jain acted in good faith to locate and depose the last witness in the case before Green Clinic filed its dismissal motion. *Hall* forbids a dismissal under these circumstances. The Circuit Court committed clear error. The Second District properly ordered the action reinstated.

## III. THE SECOND DISTRICT'S OPINION DOES NOT CONFLICT WITH THE AUTHORITY CITED BY PETITIONERS

Petitioners argue that the Second District's opinion "directly and expressly conflicts" with a number of cases which Petitioners string-cite in their brief. Brief, 15. This argument plays fast and loose with the cited precedent. Nothing in the Second District's opinion, which the Court limited to "the particular facts of this case", Panel Op., 838, is in conflict with the cited authority. An even more fundamental fallacy in Petitioners' argument is that Petitioners are attempting to distill from the cited cases a principle that would equate *nonrecord activity* with *record activity*, thus eviscerating the good cause standard entirely. Just such a gloss upon Rule 1.420(e) was rejected as inappropriate in *F.M.C. Corp. v. Chatman,* 368 So. 2d 1307, 1308 (Fla. 4th DCA ) *review denied*, 379 So. 2d 203 (Fla. 1979), a case which Petitioners view not only as particularly persuasive, Brief, 12, but which they also cite as proof of the claimed "direct and express" conflict. *Id.* at 16. Even a cursory review of the *F.M.C.* opinion

will prove that the supposed conflict between Jain and *F.M.C.* is a figment of Petitioners' imagination.

The *F.M.C.* Court did view as a necessary component of a good cause showing proof of contact between the opposing lawyers in the case. In *F.M.C.*, such proof of contact was deemed lacking in the plaintiff's affidavit, and thus fatal to the plaintiff's case. *F.M.C.*, 1308. Yet contact between counsel did occur in Jain, as the Second District observed: "Only because Dr. Jain's lawyer courteously contacted opposing counsel did the time continue to run. Here, to avoid the possibility that an arbitrarily chosen deposition date would later be determined to violate the discovery rules, Dr. Jain's lawyer contacted opposing counsel in advance." Panel Op., 838. The "express and direct" conflict between the two opinions posited by Petitioners does not exist.

The same may be said for *Duggar v. Quality Dev. Corp.*, 350 So. 2d 816 (Fla. 2d DCA 1977), also offered by Petitioners as evidence of the claimed conflict. The good cause showing in that case was limited to this: "Quality attempted to contact counsel ... by mail and telephone from time to time ... to ascertain ... the time necessary to set the case for trial". *Id*. at 817. The Second District held that calling "from time to time" to secure an estimate of the time required to try the case was not calculated to "hasten the action to judgment". *Id.* Dr. Jain's case is far from this

factual scenario. The calls in Jain were placed to set the deposition of a necessary witness and preceded the actual deposition notice only, in the words of the Second District, to "avoid the possibility that an arbitrarily chosen deposition date would later be determined to violate the discovery rules". Panel Op., 838.

In *107 Group, Inc. v. Gulf Coast Paving & Grading, Inc.,* 459 So. 2d 466, 467 (Fla. 1st DCA 1984), the good cause showing consisted only of "interviewing witnesses and contacting potential expert witnesses". In *Eisen v. Fink,* 511 So. 2d 1092, 1093-94 (Fla. 2d DCA 1987), the good cause offered was limited to (a) the assertion that defense counsel had represented that at some unspecified point in the future the *defendant* would depose the *plaintiff,* and (b) delays occasioned by the defendant's failure to respond to discovery and by settlement discussions. In *Weitzel v. Hargrove,* 542 So. 2d 392, 393 (Fla. 3rd DCA 1989), the sole showing of good cause was that the lawyers had been in contact with one another during the critical period and "agreed to cancel a previously noticed hearing on the defendant's motion to strike certain allegations in the complaint". None of these cases have any application to Second District's opinion here. Dr. Jain acted to hasten the case to judgment by setting in motion the scheduling of a critical deposition, which was thereafter taken; in the cited cases no such affirmative steps were undertaken.

Petitioners also rely upon *Heinz v. Watson,* 615 So. 2d 750 (Fla. 5th DCA), *rev. denied*, 624 So. 2d 266 (Fla. 1993) for proof of the alleged "direct and express" conflict. But that case dealt almost exclusively with the record activity prong of Rule 1.420(e), rather than good cause. Petitioners would nevertheless have the Court believe that *Heinz* is relevant precedent because there were "phone calls to a necessary witness ... and ... plaintiff's counsel made contact with opposing counsel, to determine a convenient date to depose the witness." Brief, 17. This is a misrepresentation of the *Heinz* opinion. The opinion does quote from a passage of the hearing transcript in which the plaintiff's lawyer mentions conversations with opposing counsel about deposing the "ex-wife" as well as his calls to the witness to arrange her appearance, 615 So. 2d at 751-52, but the Court never even addressed the merits of this contention. For plaintiff's lawyer made no attempt to show good cause in writing prior to the hearing. The Court held that plaintiff's "failure to show good cause before the hearing in compliance with rule 1.420(e) warrants a dismissal of the action". Accordingly, *Heinz* offers no precedent relevant to the issues in this case.

Apparently untroubled by this fact, however, Petitioners go on to state: "... the appellate court held 'the attorney's action in this instance may properly be characterized as the manifestation of an intention to act but not actual record action'". Brief, 17. In their rush to manipulate this passage of the *Heinz* opinion to fit Jain,

Petitioners fail to disclose that the court's remark dealt solely with plaintiff's neglect to set a hearing on the motion on which plaintiff relied as proof of record activity – an oversight that condemned plaintiff's filing of the motion as passive and thus irrelevant to the creation of record activity. *Id.* at 752. Once again, Petitioners have misused *Heinz* as precedent. The passage quoted has nothing to do with good cause and no pertinence to Dr. Jain's case. The claimed conflict between the Second District's opinion in Jain and *Heinz* is entirely contrived.

This brings us to the last two "conflict" cases cited by Petitioners: *Spikes v. Neal,* 792 So. 2d 571 (Fla. 1st DCA 2001) and *Edgecumbe v. American General Corp.*, 613 So. 2d 123 (Fla. 1st DCA 1993). Both cases address what Petitioners contend were mere "attempts" to set depositions. Neither opinion is in conflict with the Second District's opinion in Jain.

In *Edgecumbe,* plaintiff's good cause showing rested entirely upon the contention that the defense lawyer "was not available to set deposition dates" during the critical period, and that it "would have been unethical for...[plaintiffs] to notice such depositions without having first worked out available dates with Defendants' counsel". 613 So. 2d at 134. The clear implication of the First District's opinion is that this argument, if it had been true, would have satisfied the good cause standard. But it was not true. The uncontroverted affidavit of the defense lawyer established that

indeed plaintiff's counsel had been given dates for the requested depositions. What is more, although plaintiff's request for the deposition dates "was only two days before the expiration of the one-year period of record inactivity, he [defense counsel] did not file a motion to dismiss until October 23, 1991, thus affording Plaintiff's counsel fifteen days in which to *issue notices of depositions*." 613 So. 2d at 124. (Emphasis Added). It was this fact that was fatal to plaintiff's argument. As the Court noted "it is clear that Plaintiff's counsel obtained the deposition dates *prior to the expiration of the one-year period and failed to promptly issue notices* pursuant to the dates so obtained." *Id.* at 125. (Emphasis Added). It was the neglect to notice the depositions on dates cleared with defense counsel that undermined the good cause argument, for it could scarcely be concluded that merely asking for deposition dates at the last possible moment and then *doing nothing* to schedule them was the sort of activity calculated to move the case forward to a conclusion.

In Dr. Jain's case, in contrast, plaintiff's counsel acted promptly upon finding LePage: Arnold asked the witness for deposition dates, he was informed that Green Clinic's lawyers would be contacted, and he paused only an interval of hours to hear back from someone before all defense counsel in the case were called to schedule LePage's deposition. In contrast to *Edgecumbe*, Dr. Jain's counsel did not neglect to follow through on noticing the deposition; Dr. Jain's counsel acted vigorously to set

the deposition in motion and to move the case forward to a conclusion. The Second District's opinion does not conflict with *Edgecumbe.* Indeed, *Edgecumbe* is authority for the Second District's conclusion that good cause existed and that the record activity clock continued to run only "because Dr. Jain's lawyer courteously contacted opposing counsel" to "avoid the possibility that an arbitrarily chosen deposition date would later be determined to violate the discovery rules". Panel Op., 830 So. 2d at 838.

Neither does the *Edgecumbe* opinion announce a hard-and-fast rule applicable to Dr. Jain's case. To the contrary, that opinion, like the Second District's opinion in Jain, turned on its own unique facts. *Edgecumbe,* 125. Petitioners nevertheless have extracted from the opinion the notion that "the First District held that conferences with potential witnesses or the exchange of telephone calls between lawyers will not preclude dismissal". Brief, 17. This is a distortion of *Edgecumbe* . The placing of the calls to set the depositions, consistent with accepted professional norms, failed as nonrecord activity only because plaintiff *did nothing to notice them* once defense counsel, also acting consistent with accepted professionalism, supplied the necessary dates.

The First District's subsequent opinion in *Spikes* also addressed a plaintiff's failure, during the critical period, to notice the very deposition which plaintiff's

counsel had called to schedule. In *Spikes*, plaintiff's counsel noticed the case for trial, but then convinced the circuit court to remove the matter from the trial docket so that the plaintiff could attend spring football practice. 792 So. 2d at 572. The case was later settled as to some defendants, but was allowed to languish as to another. The circuit court's ensuing order of dismissal recited that since the last record activity "counsel for the parties had telephone conversations and written correspondence" and also that plaintiff "also alleges that an attempt was made to set a deposition, however, *no date was ever agreed upon by the parties*". *Id.* at 573. (Emphasis Added). Commenting on the good cause issue, the First District, citing *Edgecumbe,* declared that "mere contact between opposing counsel, including attempts at setting depositions, is not enough to establish sufficient non record activity". *Id.* at 573. The Court thus concluded that there was no showing of "affirmative record activity which was reasonably calculated to advance the case toward resolution as contemplated by the rule." *Id.*

The First District's explanation for its ruling in *Spikes* is somewhat cryptic. But the court does cite *Edgecumbe* and it notes that no date for the deposition "was ever agreed upon by the parties.". *Id.* The fair inference from the opinion is that (a) the parties talked about a deposition but never got around to agreeing to a date to conduct it and (b) plaintiff did nothing to pursue these discussions to a conclusion by issuing

a deposition notice or undertaking other action to force the discovery issue to a resolution. Thus in *Spikes* the "attempt" to take depositions was unavailing as nonrecord activity because it was not thereafter pursued with any appreciable "design to move the case forward". *Hall,* 784 So. 2d at 1090. A plaintiff truly having such a design would brook little delay in obtaining mutually acceptable deposition dates, and would either unilaterally notice the deposition, as Dr. Jain was forced to do, or file a motion to bring the matter to the attention of the Court.

Dr. Jain's case does not fit, and cannot be made to fit, the pattern of *Spikes.* Dr. Jain's lawyers did not simply "attempt" to take LePage's deposition and then allow the case to languish until a motion to dismiss was ultimately filed. They contacted LePage with a set purpose to depose him, they involved LePage in the effort at coordination, they contacted defense counsel to set the deposition out of professional courtesy, and they unilaterally noticed the deposition when no one was willing to return the call. The motion to dismiss reached the clerk's office before the LePage notice only because of this contact, as the Second District noted. Dr. Jain's effort to depose has all the earmarks of a good faith effort to move the case forward to trial or summary judgment, and none of the characteristics of the failed and half-hearted attempts which were fatal to the plaintiffs in *Edgecumbe* and *Spikes.* Petitioners' contention that the Second District opinion is in conflict with these cases is mistaken.

Rather than relying upon a genuine conflict between Jain and *Spikes*, Petitioners have seized upon a single sentence in *Spikes* to fashion into a categorical rule the statement that "mere contact between opposing counsel, including attempts at setting depositions, is not enough to establish sufficient non record activity". 792 So. 2d at 573. Such a rule makes sense for *Spikes* because the plaintiff at best made only a half-hearted effort to request deposition dates with no followup. It also makes sense for *Edgecumbe*, cited as authority by *Spikes*, because plaintiff did nothing to *notice* the depositions once requested dates *were supplied*. But it makes no sense in Jain. Dr. Jain did not just sit around and do nothing after asking for deposition dates, as in the above cases; his counsel moved as quickly in setting the LePage deposition as professionalism would have dictated, and in the interim Green Clinic forwarded its motion to the courthouse in anticipation of the LePage deposition notice. In Jain, unlike *Spikes*, the application of such a categorical rule would work an injustice, and would effectively eviscerate the good cause component of the analysis. Consider the post-*Hall* "logic" of Petitioners as applied to this case:

> In light of *Hall*, the good faith filing of a deposition notice is record activity as a matter of law;

Yet contacting counsel to set such a deposition will never suffice as good cause, for that would merely be an "attempt" to set a deposition, no matter the circumstances;

Therefore, only the filing of a deposition notice will constitute good cause;

Good cause and record activity are thus one and the same; ergo the good cause prong of the Rule 1.420(e) has no meaning where the good cause offered involves an attempt to schedule the deposition of an essential witness.

Such a process of analysis, if adopted by this Court, would improperly equate *record activity* with *good cause for nonrecord activity* and would be antithetical to the text of Rule 1.420(e), and even the authority on which Petitioners rely. *F.M.C.*, for example, rejected just such an approach, as did this Court in *Hall.* And nothing in *Spikes* or *Edgecumbe*, read in context, would suggest such a categorical and illogical and case-terminating and unjust rule. The proper standard for the analysis is the one set forth in *Hall*: Was the nonrecord activity taken in good faith? Was it designed to move the case forward? If so, the activity qualifies as good cause whether or not one chooses to treat it as a "mere attempt" to take a deposition. If the good faith filing of a deposition notice of an important witness is record activity as a matter of law, then the good faith efforts to promptly schedule such a deposition, consistent with

standards of professionalism, is certainly good cause under the *Hall* standard. This is precisely what Dr. Jain did. The Second District's opinion is not in conflict with the cited cases or any of their underlying principles.

Petitioners' proposed categorical rule, in contrast, would not only erode the principles of *Hall* but would be on a collision course with such cases as *Canella,* which recognizes that lawyers have a duty to cooperate with one another in the scheduling of depositions – including the return of calls to schedule depositions. 235 So.2d at 332. Under Petitioners' constricted conception of good cause, the professionalism required in *Canella* would have no application where the record activity clock is about to run or has run, for all that would matter then would be whether plaintiff's deposition notice was received in the clerk's office before defendant's motion. This Court should be loath to adopt such a myopic approach to determining good cause under Rule 1.420(e).

## CONCLUSION

The Second District's opinion is not in conflict with any of the cited District Court cases, nor is it inconsistent with *Hall.* The Second District acted appropriately to reinstate a case extinguished on the authority of now-overruled cases and "findings" that did not apply long-standing precedent. Dr. Jain's counsel undertook the necessary measures, consistent with professionalism, to depose an essential witness before

Green Clinic motion was received. Good cause for the lack of record activity was shown. The Second District's decision should be affirmed.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a correct copy of Respondent's Answer Brief on the Merits has been served by U.S. First Class Mail this ___ day of June, 2003 to: **Jonathan B. Trohn, Esq.,** and **Theodore W. Weeks, IV, Esq.**, Gray Harris & Robinson, P.A., Post Office Box 3, Lakeland, Florida 33802-0003; **Robert L. Rocke, Esq.** and **Jonathan B. Sbar, Esq.**, P. O. Box 3391, Tampa, FL 33601; **Tracy S. Carlin, Esq.,** P. O. Box 240, Jacksonville, FL 32201; and **Neal L. O'Toole, Esq.,** P.O. Box 50, Bartow, FL 33830.

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## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is submitted in Times New Roman 14-point font in compliance with Rule 9.210(a)(2), Fla.R. App.P., and that a WordPerfect format, virus free disc has been submitted herewith.

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