Case No. SC02-2595

IN THE SUPREME COURT OF FLORIDA
STATE OF FLORIDA

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, Respondent.

Plaintiff /

PETITIONERS' BRIEF ON THE MERITS

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

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PREFACE

This Appeal arises out of a Second District Court of Appeal Order reversing the Tenth Judicial Circuit, where the Trial Judge entered a Final Order dismissing without prejudice the above-styled action on the Defendants / Petitioners' Motion to Dismiss for Failure to Prosecute. In this Initial Brief on the Merits, Defendants / Petitioners, J. C. Stine, M.D., John W. Moore, M.D., Frank J. Thornton, M.D., Michael G. Degnan, M.D., and Guillermo F. Allende, will be referred to as the "Doctors", "Defendant(s)", and their individual surnames. Plaintiff / Respondent will be referred to as the "Plaintiff," "Dr. Jain" and "Jain". Co-Defendant, Green Clinic, Inc. f/k/a Green Clinic, P.A. will be referred to as "co-Defendant," and the "Green Clinic, Inc." Co-Defendant, David J. Green, M.D., will be referred to as "co-Defendant," "Dr. Green," and "Green".

The record consists of 13 volumes, including a transcript of the hearing where the Trial Court dismissed the above-styled action. The Record on Appeal is cited with the designation "R. at ___ : ___"; representing the record volume number, and record page number(s); Appellant's Initial Brief to the Court of Appeal is cited with the designation "Jain App. Brief, p. ___."

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STATEMENT OF CASE AND FACTS

A. The Case.

On April 29, 2003, this Court dispensed with oral argument and accepted jurisdiction to review on the merits the Second District Court of Appeal's ("Second DCA") Opinion dated April 19, 2002. The Second DCA's Opinion reversed and reinstated MANUEL G. JAIN, M.D.'s ("JAIN") action, which was previously dismissed without prejudice by the Trial Court pursuant to Rule 1.420(e), Fla. R. Civ. P. *Jain v. Green Clinic, Inc.*, 830 So. 2d. 836 (Fla. 2d DCA 2002).

This Court's discretionary jurisdiction was invoked by Defendants/Petitioners, J.C. STINE, M.D.; JOHN W. MOORE, M.D.; FRANK J. THORNTON, M.D.; MICHAEL G. DEGNAN, M.D.; and GUILLERMO F. ALLENDE, M.D. (the "Doctors"), after their Motions for Rehearing, Rehearing *en banc*, Clarification, or Certification had been denied by the Court of Appeal.

B. The Facts.

JAIN initiated suit against the Doctors, GREEN CLINIC, INC. f/k/a GREEN CLINIC, P.A. (hereinafter "Green Clinic, Inc."), and DAVID J. GREEN, M.D. on September 18, 1997. (R. at 12: 2048-49.) As alleged in JAIN's Amended Complaint, in 1995, JAIN and all Defendant physicians were medical doctors licensed to practice medicine as shareholders and directors through the medical clinic, Green Clinic, Inc. (R. at 1: 2.) Approximately from July, 1994 through December, 1995, Robert LePage (hereinafter "LePage") was employed by the Green Clinic, Inc. as the office administrator. (R. at 9: 1722.) LePage was also administrator of Medical Offices, Inc., which was a separate corporation in which all the doctors belonged, found to hold the building in which they practiced. (R. at 9: 1730-1.) In 1995, JAIN alleged that the Defendant physicians chose to sell the Green Clinic, Inc. to a company that owns and operates the Heart of Florida Hospital in Polk County, Florida, against the wishes of JAIN and in violation of an employment agreement. (R. at 1: 4.) Thereafter, in 1997, JAIN filed a four count complaint against the Green Clinic, Inc. and the Doctors alleging actions for (a) breach of an employment agreement; (b) recovery of the fair

value of JAIN's shares; (c) declaratory judgment and injunctive relief; and (d) breach of fiduciary duty. (R. at 1: 1-40.)

The record activities occurring after the Complaint was filed and prior to January 5, 2000 are not relevant to the issues on appeal. From January 6, 2000 through and including January 8, 2001, there was no record activity filed with the clerk of the court or listed in the subsequent appellate record.[1] On January 8, 2001, the Green Clinic, Inc. served its Motion to Dismiss for failure to Prosecute, because the case had laid dormant for over one year without any valid record activity. (R. at 3: 518-519.) The next day, on January 9, 2001, the Motion was received and filed in the Clerk's office. (Id.) Two days after the Clerk filed Green Clinic, Inc.'s Motion, on January 11, 2001, JAIN noticed LePage for a deposition. (R. at 3: 524-525.) Following, on January 17, 2001, Doctors filed their Motion to Dismiss for Failure to Prosecute. (R. at 3: 522-523.) The governing law holds that the Doctors' Motion related back in time to Green Clinic, Inc.'s Motion filed on January 9, 2001.[2]

On February 9, 2001, JAIN filed a Memorandum in Opposition to the Motion to Dismiss for Failure to Prosecute. (R. at 8: 1663-1714.) The fifty-one page

[1] Both the Trial Court and Second DCA held that a companion case's Notice of Hearing inadvertently filed in this case was a legal nullity and did not constitute "record activity" to preclude dismissal.

[2] *See, Magers v. Walker's Cay Air Terminal, Inc.*, 451 So. 2d 867, 868 (Fla. 4th DCA 1983).

memorandum included: (a) a copy of the record of the court; (b) and affidavits from JAIN's lead counsel, Stephen D. Milbrath, Esq. ("Milbrath") and associate attorney, Trevor Arnold, Esq. ("Arnold"). (Id.) The memorandum and affidavits alleged that in October, 1999, Milbrath identified Mr. LePage as a witness who may have knowledge concerning the case. (R. at 1706 and Jain App. Brief, p. 38.) Ten months later, in late October, 2000, Arnold allegedly began searching for LePage's address and phone number. (R. at 8: 1712.) The associate attorney's "time-consuming and difficult" search was limited to internet phone directories, and State of Florida corporate officer listings and professional license databases, county property ownership records, district and county court records, and the Florida drivers' license database presumably, all of which can be searched using the internet. (Id.) In Milbrath's affidavit, he alleged that dismissal for failure to prosecute was inappropriate because his activities during the preceding year included "reviewing deposition testimony, meeting with an expert, evaluating the merits of a Motion for Summary Judgment, directing the location of LePage, and finally locating LePage on January 8, 2001." (R. at 8: 1708.)

On January 8, 2001, the same day Green Clinic, Inc. served its Motion to Dismiss, Arnold allegedly located LePage and called him. (R. at 3: 518-19 and 8: 1712.) During the brief telephone conference, Arnold asked LePage if he was available to "come down and give a voluntary statement." (R. at 9: 1722-24.) Wary of Arnold's request, LePage told Arnold that he would like to speak with the Doctors about the case before giving him a voluntary statement. (Id.) During that telephone conversation, 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. (Id.) Immediately thereafter, LePage contacted Dr. Stine, who told LePage to speak with his attorney, Jonathan Trohn, Esq. about giving the opposing counsel a voluntary statement. (R. at 9: 1723-26.) LePage called Trohn on either January 8 or 9, 2001. (R. at 9: 1724-25.) During their conversation, Trohn told LePage not to give a voluntary statement, but rather let JAIN's attorneys subpoena him for a deposition. (Id.) In sum, JAIN's attorney's non-record activity on January 8, 2001, was limited to the brief telephone conference with LePage.

The next day, on January 9, 2001, the same day Green Clinic, Inc.'s Motion to Dismiss was filed with the clerk, (R. at 3: 518-519), Milbrath's secretary, Mary Leavy,

left a voicemail message with opposing counsel's secretary indicating an intention to schedule LePage for a deposition. (R. at 8: 1707-8, 1712.) Other than this telephone voicemail message, JAIN's attorneys did not perform any other non-record activity on January 9, 2001.

In summary, prior to the filing of Defendants' Motion to Dismiss, the only activities of any kind related to LePage were as follows:

October, 1999 -- Milbrath completes the depositions of all principal witnesses and determines that he would like to interview LePage before taking his deposition. (R. at 8: 1706.)

October, 2000 -- Milbrath's associate begins looking for LePage's address and phone number. (R. at 8: 1712-14.)

January 8, 2001 -- Green Clinic, Inc.'s counsel serves its Motion to Dismiss for Failure to Prosecute (R. at 3: 518-519 and 13: 83.)

-- Milbrath's associate locates and telephones LePage. (R. at 8: 1712 and 8: 1722-25.)

January 8 or 9, 2001 -- LePage telephones Dr. Stine, then Mr. Trohn about

giving JAIN's attorneys a voluntary statement. (R. at 9: 1723-26.)

January 9, 2001 -- Polk County Clerk files Green Clinic, Inc.'s Motion to Dismiss for Failure to Prosecute. (R. at 3: 518-519.)

-- Milbrath's secretary leaves a telephone voicemail message with opposing counsel's secretary seeking potential dates to depose LePage. (R. at 8: 1707 and 8: 1712-13.)

January 17, 2001-- Doctors file their Motion to Dismiss. (R. at 3: 522-23.)

Importantly, there is no evidence that any of JAIN's attorneys ever contacted any of the Defendants' attorneys during the relevant one year period.

On March 26, 2001, a hearing was held on Defendants' collective Motion to Dismiss for Failure to Prosecute. (R. at 3: 531-535.) During the hearing, JAIN argued that good cause to avoid dismissal was shown by (1) Arnold's telephone conference with LePage on January 8, 2001, (2) Milbrath's secretary's voicemail message with Doctor's secretary about scheduling LePage's deposition on January 9, 2001, and (3)

JAIN's attorneys' efforts to locate LePage. (R. at 13: 48-92.) After carefully listening to counsels' arguments, reviewing the record, affidavits, and other pertinent evidence, the Trial Court held that JAIN's non-record activities did not establish good cause to preclude dismissal under Rule 1.420(e). (R. at 11: 2045-2046.) The Trial Judge received evidence that (1) no contact was made with Mr. Trohn personally to schedule LePage's deposition, or discuss any matter or issue in the case (R. at 8: 1705-1714); (2) that JAIN's attempt to contact Mr. Trohn was limited to Milbrath's secretary's voicemail message indicating an intention to schedule the deposition of a witness (Id.); (3) that the voicemail message was left with opposing counsel's secretary, not Mr. Trohn personally, on the day the Motion to Dismiss was received and filed by the Polk County Clerk (Id.); (4) that no discovery efforts were utilized by JAIN's attorneys to locate LePage (R. at 13: 75-6); (5) that no contact was made by telephone or correspondence prior to January 9, 2001, alerting opposing counsel of their difficulties in locating LePage or interest in deposing him (R. at 8: 1705-1714); (6) that JAIN's search efforts to locate LePage were focused in Polk County, when earlier deposition testimony showed he lived in Orlando (R. at 8: 1712 and 13: 73); (7) that LePage was ultimately "found" by Arnold when he called LePage at home (Id.); (8) that LePage

was in the phone book during most, if not all, of the time that Arnold searched for him (R. at 9: 1801-03); (9) that LePage had lived at the same address in Orlando since 1998 (Id.); (10) that LePage personally bumped into Dr. Jain at a local hospital and gave the doctor his business card (R. at 9: 1797-99); and (11) that Dr. Jain was receiving mail from LePage with LePage's return home address listed on the envelope. (R. at 9: 1731-32, 1797-1800). Utilizing his discretionary authority, the Trial Judge found no compelling evidence which established good cause and dismissed the entire case without prejudice for a lack of prosecution.

On April 20, 2001, JAIN filed an appeal arguing that the Trial Court applied an incorrect legal standard and abused its discretion. (Jain App. Brief, pp. 31-36.) Following the submittal of briefs and oral argument, the Second DCA entered an Opinion reversing and remanding the Trial Court's decision, and holding that the Trial Judge had abused his discretion. (*Jain*, 830 So. 2d at 836.) While the Second DCA conceded that JAIN had performed no record activity during the relevant twelve month period, (*Jain* at 838), the Appellate Court held that JAIN's attorneys' non-record activities, established good cause to reinstate JAIN's suit. (Id.) The Second DCA ruled,

> Under the particular facts of this case, we conclude that Dr. Jain's attorney established good cause for the delay in prosecution. 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. Furthermore, if the deposition had been taken without placing 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. (citations omitted.) Only because Dr. Jain's lawyer courteously contacted opposing counsel did the time continue to run. (Id. at 838.)

After the Second DCA denied the Doctors' timely Motion for Rehearing, Rehearing *en banc*, Clarification, or Certification, the Doctors invoked the discretionary jurisdiction of this Court to review on the merits the Second DCA's Opinion reinstating JAIN's suit.

SUMMARY OF ARGUMENT

The issues in this case include whether or not a secretary's voicemail message left with another secretary on the day a Motion to Dismiss for Lack of Prosecution was filed can be considered "good cause" to avoid dismissal under the Rule. A wealth of case law over the years has established that such informal contact does not satisfy the high burden of a plaintiff to avoid dismissal. Secondly, a critical issue is whether a trial judge is entitled to deference by the reviewing Appellate Court for his finding of fact on what constitutes "good cause." Here, the trial judge reviewed the evidence describing the efforts made by counsel, and was fully justified in concluding that good cause was not demonstrated. The Second District Court of Appeal substituted its own findings of good cause when it ruled the trial judge abused his discretion. The Second District Court of Appeal's ruling conflicts with every other Appellate Court in this State, and even conflicts with earlier pronouncements from the Second District Court of Appeal as well. Its decision was founded, at least in part, on a perceived lack of courtesy which somehow victimized Respondent. There was absolutely no evidence for the Appellate Court to make that finding of fact, and this tortured reasoning must be corrected here. 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. This would completely remove any practical application from the rule.

ARGUMENT

I. THE SECOND DISTRICT COURT OF APPEAL ERRED BY USURPING THE TRIAL COURT'S DISCRETIONARY AUTHORITY AND CREATING NEW AND CONFLICTING CASE LAW.

A. Determination of Good Cause is a Discretionary Decision That Should Not Be Disturbed By An Appellate Court Unless the Decision Is Arbitrary, Fanciful, or Unreasonable.

The Second DCA erred by usurping the role of the Trial Judge and substituting its finding of good cause in place of the Trial Judge's findings. What constitutes "good cause" to preclude dismissal pursuant to Rule 1.420(e), Fla. R. Civ. P., is not defined in the Rule itself, but rather by case law. *Blythe v. James Lock & Company Limited*, 780 So. 2d 237, 238 (Fla. 4th DCA 2001), *rev. denied*, 796 So. 2d 535 (2001). Good cause has repeatedly been defined as (1) contact with the opposing party, and (2) some form of excusable conduct arising other than through negligence or inattention to deadlines. *F.M.C. Corporation v. Chatman*, 368 So. 2d 1307, 1308 (Fla. 4th DCA 1979), *cert. denied*, 379 So. 2d 203 (Fla. 1979) (Emphasis added.)[3]

[3] (*cited approvingly* by all Florida Courts of Appeal; *107 Group, Inc. v. Gulf Coast Paving & Grading, Inc.*, 459 So. 2d 466, 467 (Fla. 1st DCA 1984); *American Eastern Corp. v. Henry Blanton, Inc.*, 382 So. 2d 863, 865 (Fla. 2d DCA 1980); *Tosar v. Sladek*, 393 So. 2d 61, 62 (Fla. 3d DCA 1981); *Chandler v. Florida Farm Bureau Mutual Ins.*, 546 So. 2d 1179, 1180 (Fla. 4th DCA 1989), *rev. dismissed*, 553 So. 2d 1165 (Fla. 1989); and *Weaver*

Whether or not the plaintiff has satisfied his "high" burden by identifying some compelling reason to establish good cause and avoid dismissal is a discretionary decision best determined by the trial court. *Edgecumbe v. American General Corporation*, 613 So. 2d 123, 124 (Fla. 1st DCA 1993); and *American Eastern Corporation v. Henry Blanton, Inc.*, 382 So. 2d 863 (Fla. 2d DCA 1980). Since the Trial Judge's good cause determination was discretionary, the standard of review for the dismissal of JAIN's action is an abuse of discretion standard. *Metropolitan Dade County v. Hall*, 784 So. 2d 1087, 1090 (Fla. 2001) n.4; *see also Spikes v. Neal*, 792 So. 2d 571, 573 (Fla. 1st DCA), *rehearing denied*, (2001).

The test for determining whether there has been an abuse of the trial judge's discretionary power was described in *Canakaris v. Canakaris*, 382 So. 2d 1197 (Fla. 1980):

> "In reviewing a true discretionary act, the appellate court must fully recognize the superior vantage point of the trial judge and should apply the 'reasonableness' test to determine whether the trial judge abused his discretion … Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is

v. The Center Business, 578 So. 2d 427, 429 (Fla. 5th DCA 1991), *rev. dismissed*, 582 So. 2d 624 (Fla. 1991.)

> 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." (Citation omitted) *Canakaris*, 382 So. 2d at 1203.

Therefore, a trial court's discretionary power is subject only to *Canakaris*' test of reasonableness, and should be disturbed only when the lower court's decision fails to satisfy this test. *Id.*

The Second DCA should have recognized the "superior vantage point of the trial judge" and not disturbed the Trial Judge's discretionary ruling. Clearly, the Trial Court's determination on the issue of good cause was supported by the evidence in the record before the Trial Judge. Such evidentiary facts included: (1) JAIN's attorneys made no contact with Mr. Trohn personally to schedule anyone's deposition or discuss any issue in the case (R. at 8: 1705-14); (2) JAIN's attempt to contact Mr. Trohn was limited to Milbrath's secretary's voicemail message indicating an intention to schedule the deposition of a witness (Id.); (3) the secretary's voicemail message was left with Mr. Trohn's secretary, not Mr. Trohn personally, on the day the Motion

to Dismiss for Failure to Prosecute was received and filed by the Polk County Clerk (Id.); (4) no contact was made by telephone or correspondence prior to January 9, 2001 alerting opposing counsel of their difficulties in locating the Green Clinic, Inc.'s former administrator (R. at 8: 1705-14); (5) no discovery efforts were utilized by JAIN's attorneys to locate LePage (R. at 13: 75-6); (6) JAIN's search efforts to locate LePage were inappropriately limited to the Polk County area, when deposition testimony established he lived in Orlando (R. at 8: 1712 and 13: 73); (7) LePage was ultimately "found" by Arnold when he called LePage at home (Id.); (8) LePage was in the phone book during most, if not all, of the time that Arnold searched for him (R. at 9: 1801-03); (9) LePage had lived at the same address in Orlando since 1998 (Id.); (10) LePage personally spoke to Dr. Jain at a local hospital and gave the doctor his business card (R. at 9: 1797-99); and (11) Dr. Jain was receiving mail from LePage with LePage's return home address listed on the envelope. (R. at 9: 1731-32, 1797-1800) Per *Canakaris*, the Trial Judge's determination that JAIN's attorneys failed to show good cause was not "arbitrary, fanciful, or unreasonable". To the contrary, the Trial Judge's ruling was within his discretionary authority, satisfied the "test of reasonableness", and was supported by the facts and evidence in the record.

B. The Second District Court of Appeal's Opinion Holding That An Attorney's Secretary's Voicemail Message Left With Opposing Counsel's Secretary Establishes Good Cause to Preclude Dismissal Is In Direct Conflict With All District Courts of Appeal.

The Second DCA's determination of good cause directly and expressly conflicts with all District Courts of Appeal. In short, the Second DCA's Opinion is in conflict with *Spikes v. Neal*, 792 So. 2d 571 (Fla. 1st DCA), *rehearing denied* (2001); *Edgecumbe v. American General Corporation*, 613 So. 2d 123 (Fla. 1st DCA 1993); *Heinz v. Watson*, 615 So. 2d 750 (Fla. 5th DCA 1993), *rev. denied*, 624 So. 2d 266 (Fla. 1993); *Eisen v. Fink*, 511 So. 2d 1092 (Fla. 2d DCA 1987); *Duggar v. Quality Development Corp*., 350 So. 2d 816, 817 (Fla. 2d DCA 1977); *Weitzel v. Hargrove*, 543 So. 2d 392-93 (Fla. 3d DCA 1989); *F.M.C. Corporation v. Chatman*, 368 So. 2d 1307 (Fla. 4th DCA 1979), *cert. denied*, 379 So. 2d 203 (Fla. 1979); and *107 Group, Inc. v. Gulf Coast Paving & Grading, Inc.*, 459 So. 2d 466 (Fla. 1st DCA 1984). All of the foregoing decisions state that a mere conference between an attorney and a witness or opposing counsel does not constitute valid non-record activity to establish good cause to preclude dismissal under the rule.

In *Spikes v. Neal, supra*, the plaintiff alleged that the "parties had telephone conversations and written correspondence relating to this matter … [and] that an attempt had been made to set a deposition; however, no date was ever agreed upon by the parties." *Spikes*, 792 So. 2d at 573. The First District held that all of the plaintiff's non-record activity, including attempts to set a deposition, failed to establish good cause. "[M]ere contact between opposing counsel, including attempts at setting depositions, is not enough to establish sufficient non-record activity to preclude dismissal." *Id.* at 573. (Emphasis added.) In reaching its conclusion, the *Spikes'* Court relied upon that court's previous decision in *Edgecumbe v. American General Corporation*, *supra*. In *Edgecumbe*, the plaintiff attempted to show good cause to avoid dismissal through a variety of non-record activities, including "calling Defendant's attorney on the telephone from August to October 1991 in an attempt to schedule depositions of essential witnesses employed or formerly employed by the Defendants." *Edgecumbe*, 613 So. 2d at 124. Despite numerous phone calls placed over a period of several months, (as opposed to our case where a phone call was placed on the day a motion to dismiss was filed), the First District held that conferences with potential witnesses or the exchange of telephone calls between

lawyers will not preclude dismissal. *Id.*[4] In *Heinz v. Watson, supra*, the Fifth District found that plaintiff's counsel placed approximately 12 phone calls to a necessary witness during the course of a year and that plaintiff's counsel made contact with opposing counsel, to determine a convenient date to depose the witness. *Heinz,* 615 So. 2d at 751. However, 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." *Id.* at 753. In *Eisen v. Fink, supra*, the Second DCA overturned a Trial Court's refusal to dismiss for failure to prosecute, where the plaintiff's actions included an intention to set a deposition. "[The plaintiff] tendered as reasons for her inertness [opposing counsel's] representations that the [defendant] would be scheduled for a deposition"; however, those grounds "do not satisfy the good cause standard necessary to overcome the extended period of stagnation." *Eisen*, 511 So. 2d at 1093-4. In *Duggar v. Quality Development Corp., supra,* the plaintiff "attempted to contact counsel for appellant by mail and telephone from time to time during the one-year period to ascertain from him the time necessary to set for

[4] Cases cited in *Edgecumbe* included, *Norflor Constr. Corp. v. City of Gainesville*, 512 So.2d 266 (Fla. 1st DCA 1987) *rev. denied,* 520 So.2d 585 (Fla. 1988)(no good cause shown where the non-record activity involved settlement negotiations, non-record conferences, correspondence and review of records); and *Weaver v. The Center Business*, 578 So.2d 427 (Fla. 5th DCA), *rev. dismissed,* 582 So.2d 624 (Fla. 1991)("Most courts agree that exchange of mail and telephone calls between lawyers, settlement negotiations, conferences with potential witnesses, exchange of proposed exhibits, verbal or letter requests for discovery, if that is all, will not suffice to preclude dismissal under the amended rule.").

trial." On appeal, the Second DCA held, "[plaintiff's] non-record activity falls short of the standard … [i]t cannot be said to hasten the action to judgment and does not demonstrate good cause to toll the running of the time period." *Duggar*, 350 So. 2d at 817. In *Weitzel v. Hargrove*, *supra*, "the sole showing of good cause why this action should remain pending, notwithstanding the lack of record activity of over one year, was that counsel for both parties had been in contact with one another during the aforesaid one-year period and agreed to cancel a previously noticed hearing." In response, the Court wrote, "Contrary to the plaintiff's contention, we conclude that this non-record activity between counsel did not excuse the lack of record activity below and in no way advanced the cause … this non-record activity does not satisfy the plaintiff's heavy burden of establishing a compelling reason why this action should not have been dismissed for lack of prosecution." *Weitzel*, 543 So. 2d at 393. In *F.M.C. Corporation v. Chatman*, *supra*, the Fourth District held that "telephone calls, conferences, and letters between the plaintiff's attorney, his client, and potential witnesses, without any contact with the opposing party … is not the kind of good cause that the rule envisages." *F.M.C. Corporation*, 368 So.2d at 1308, *citing*, *Daurelle v. Beech Aircraft Corporation*, 341 So.2d 204 (Fla. 4th DCA 1977), *cert.*

denied 354 So. 2d 980 (Fla. 1977). "In the case before us there may have been extensive non-record conferences with a '… necessary and vital expert witness,' but such do not prevent, or hinder, compliance with the rules." *Id*. at 1308. Likewise in *107 Group, Inc. v. Gulf Coast Paving & Grading, Inc., supra,* the parties agreed that the plaintiff's non-record activity was limited to "interviewing witnesses and contacting experts to testify in the matter". *107 Group, Inc.*, 459 So. 2d at 467. Relying heavily upon *F.M.C. Corporation v. Chatman*, the First District stated, "[u]pon the authority of *F.M.C.*, we hold that the good cause here asserted – interviewing witnesses and contacting potential expert witnesses – was insufficient." *Id*. at 467.

The Second DCA's Opinion is in direct conflict with all of the District Court of Appeal decisions cited above. The overwhelming weight of authority holds that an attempt to schedule a deposition is not good cause. Here, the rule is even more applicable because there is no direct contact between counsel. Under JAIN's theory, an attorney's secretary's unreturned email, fax, telephone call, or letter indicating an intention to act would always establish good cause. The secretary's attempt to get deposition dates on January 9, 2001 may only be properly characterized as "an intention to act, but not actual record action." *Heinz,* 615 So. 2d at 753.

JAIN argued in his Initial Brief below that the Trial Judge applied the wrong legal standard in coming to his conclusions. (Jain App. Brief, pp. 31-36.) Specifically, JAIN argued that this Court's recent decision in *Metropolitan Dade County v. Hall*, 784 So. 2d 1087 (Fla. 2001) changed the legal standard in deciding the issue.[5] That is, the standard that a party must show a compelling reason to avoid dismissal (*See*, eg, *American Eastern Corporation v. Henry Blanton, Inc.*, 382 So. 2d 863 (Fla. 2d DCA 1980); *Tompkins v. First Union National Bank*, 833 So. 2d 199, 202 (Fla. 5th DCA 2002)), has now been reduced to whether a party can show some "good faith" effort to move his case along. A clear reading of *Hall*, shows that its reach is not so far. There, this Court ruled,

> "We hold that, within the meaning of Rule 1.420(e), depositions taken and offers of judgment made in accordance with the Florida Rules of Civil Procedure are good cause to avoid dismissal if the depositions and offers are taken and made in good faith to move the case forward to a conclusion." *Hall*, 784 So. 2d at 1091.

While *Hall* has cleared the waters regarding a deposition taken, it does not remove the factors traditionally analyzed by courts in deciding whether the efforts

[5] *Hall* came out a short time after the hearing before the Trial Judge, but in time for JAIN to include it in his brief to the Second DCA.

actually are designed to move the case forward. *Hall* does not broadly overrule all of the cases cited herein which stand for the proposition that insignificant contact between attorneys is not good cause. *Hall* does not overrule every case decided after the amendment to Rule 1.420(e) which set the bar higher than before. Certainly no appellate decision following *Hall* has ruled that the standard has been lowered. Under any standard, the efforts made by JAIN are insufficient.

C. The Search Efforts by JAIN's Attorneys To Locate A Witness Did Not Establish Good Cause To Avoid Dismissal.

JAIN's search for LePage from October, 1999 through January 8, 2001 did not constitute a viable excuse to preclude dismissal. After learning that LePage would be a critical witness in late 1999, JAIN's attorneys delayed any search efforts to locate the witness until October, 2000. (R. at 8: 1712.) Then, almost one year after all discovery had been completed, JAIN's associate attorney began searching for LePage's address and phone number. (Id.) As alleged by JAIN's associate attorney, the "time-consuming and difficult" search was limited to "internet phone directories, and State of Florida corporate officer listings and professional license databases, county property ownership records, district and county court records, and the Florida drivers' license database", none of which required an independent investigation firm and could have been accessed and researched on the internet. (Id.)

In defense of their lack of activity, JAIN's attorneys argued, "[t]he efforts to find Mr. LePage were frustrated because he was believed to be in the Polk County area when in fact he lives in Orange County." (R. at 8: 1712 and R. at 13: 73.) This excuse was not given much weight by the Trial Judge perhaps because one of the first

witnesses to be deposed gave LePage's location. Anthony Barber testified that LePage was living in Orlando.

Q: Milbrath: Where did [LePage] go [after he left the Green Clinic]?

A: Barber: Well, he lived in Orlando, I know he continued to live there, then he went to work for, doctors somewhere else, a cardiologist, I think over here in Winter Haven. Beyond that, I can't tell you. (R. at 4: 638.)(Emphasis added.)

"The mis-impressions and erroneous assumptions of plaintiff's counsel do not constitute good cause ... why the action should remain pending." *Shanley v. Allen*, 346 So. 2d 548, 549 (Fla. 1st DCA 1976).

The Trial Judge understood that LePage was not a difficult witness to locate. The items enumerated above show that JAIN's efforts do not meet the high standard of good cause to avoid dismissal. The fact that an earlier witness had placed Mr. LePage in Orlando, along with the fact that Dr. Jain had personal contact and correspondence from LePage seemed to be rather significant factors, let alone that no

discovery method was used, and no direct contact was made with opposing counsel.

JAIN relies on *Weaver v. The Center Business*, 578 So. 2d 427 (Fla. 5th DCA 1991) to argue that their search efforts to locate LePage demonstrated good cause. *Weaver*, involved an exhaustive search which is easily distinguishable from the instant case.

In *Weaver*, a tenant filed a negligent hiring claim against his landlord after some of his equipment was stolen. The thrust of his claim was that the landlord had hired a criminal as a custodian, who had stolen his equipment, and then vanished. The criminal had two different Social Security Numbers and two different birth dates, and the tenant was forced to hire an investigator to conduct a search through all fifty states until he was finally found in California. *Id.* at 429. Once he was located, the tenant's attorney set about trying to confirm the identity of the person found in California, as the same man employed by his landlord. The Fifth District found that good cause in this case existed to avoid dismissal, and based its opinion largely on the fact that establishing the identity of this person, and further establishing a criminal history, was a critical element to the case. The tenant could not very well go to trial and argue that

the landlord was negligent for hiring this criminal, unless and until he could prove the criminal history of this person.

In our case, however, the "search" lasted 2 ½ months, was directed to a man who had been living at the same house in Orlando for years, and who was in the phone book. Also, JAIN might have begun his search in the one place where a previous witness testified he lived – Orlando.

There is hardly any similarity between the facts in *Weaver* and the facts here. It is significant to note, however, that even the *Weaver* Court held that good cause is not established by such things as "mail and telephone calls between lawyers", or "conferences with potential witnesses." *Id.* at 430.

At the hearing on Defendants' Motions to Dismiss for Failure to Prosecute, the Trial Court stated,

> "By your own affidavits, [Mr. Milbrath's] and Mr. Arnold's, you have a one-year gap from October of 1999 to October of 2000 before Mr. Arnold commences to start looking for him ... And its clear that Mr. LePage is disclosed in that deposition as living in Orlando ... So that raises the question of why weren't you-all

> looking for Mr. LePage since October of 1999 when you first learned that he was somewhere in Orlando. Be that as it is, I just don’t find this to be good cause." (R. at 13: 91-92.)

After receiving evidence to support the above-enumerated facts, the Trial Judge was completely justified in determining that JAIN’s search efforts to locate LePage were not good cause to preclude dismissal under Rule 1.420(e), Fla. R. Civ. P.

D. Implication of Unprofessional Conduct Was Improperly Found As Good Cause.

Curiously, in the instant case, the Second DCA observed what things JAIN "could" have done to avoid dismissal – such as noticing, or taking a deposition. The panel was obviously influenced by a perceived lack of courtesy which allegedly frustrated JAIN's efforts. JAIN argued that they were "blind sided" by Green Clinic's Motion to Dismiss. (R. at 8: 1669 and 8: 1707.) He argued that rather than return their phone calls to schedule LePage's deposition, Green Clinic raced to the Courthouse to file its Motion to Dismiss, and frustrated JAIN from creating record activity. (Id. and Jain App. Brief, pp. 18, 43-44.) The Second DCA apparently did not notice that Green Clinic, Inc.'s Motion was served the day before any alleged phone messages were left with opposing counsels' offices.

> "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." (*Jain,* 830 So. 2d at 838-9.)(Emphasis added.)

This ruling is troubling in several respects. First, the Appellate Court's finding of fact that Dr. Jain's "lawyer contacted opposing counsel" is obviously wrong, as there was no evidence of contact between counsel. Their finding that this contact was done "in advance" is also misplaced, as there is no evidence one way or the other as to when the secretary's message was left, in relation to the time in which the Motion to Dismiss was clocked in with the Clerk. Even more troubling than these findings of fact, is the implication that is left to the reader. That is, JAIN's counsel "courteously" contacted defense counsel, who must have then raced a Motion to Dismiss to the Courthouse rather than agree to scheduling a deposition. There was simply no evidence of this kind of sharp practice before the Trial Judge, but the suggestion by JAIN apparently left an impression with the Second DCA. The fact that Green Clinic had served their Motion the day before Milbrath's secretary left her message must have been overlooked by the Second DCA.

At the risk of overreacting, the decision is personally troubling to Mr. Trohn as a subsequent decision has limited the Second DCA's decision to its facts based on

issues of "professionalism", *Tompkins v. First Union National Bank,* 833 So. 2d 199, 201 n.3 (Fla. 5th DCA 2002), where the Court held "the JAIN decision…turns on a professionalism issue not present here."

If the Second DCA had questioned the professionalism of counsel, it should have sent it back to the Trial Judge to conduct a hearing on whether or not such an odd conspiracy was ever present. If Mr. Trohn had known the Second DCA would make such findings of fact, he would at least like the opportunity to take an oath and testify because there was no evidence of this, and he is left with what he considers to be a blemish on his reputation.

CONCLUSION

Based upon the foregoing, this Court should reverse the Second DCA's Order and enter and order reinstating the Trial Court's decision.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a correct copy of this Initial Brief on the Merits has been served by U.S. First Class Mail this 27th day of May, 2003, to: **STEPHEN D. MILBRATH, ESQ.,** Post Office Box 3791, Orlando, FL 32802-3791; **ROBERT L. ROCKE, ESQ.** and **JONATHAN B. SBAR, ESQ.,** Post Office Box 3391, Tampa, FL 33601; **TRACY S. CARLIN, ESQ.,** Post Office Box 240, Jacksonville, FL 32201; and **NEAL L. O'TOOLE, ESQ.,** Post Office Box 50, Bartow, FL 33831-00050.

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

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.

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