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.,

Defendants / Petitioners,

v.

MANUEL G. JAIN, M.D.,

Plaintiff / Respondent.

JURISDICTIONAL BRIEF FOR PETITIONERS

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

JONATHAN B. TROHN, ESQ.
Florida Bar No. 0880558
MONTEREY CAMPBELL, ESQ.
Florida Bar No. 0011387
THEODORE W. WEEKS, IV, ESQ.
Florida Bar No. 0288468
GRAY HARRIS & ROBINSON, P.A.
Post Office Box 3
Lakeland, Florida 33802-0003
Telephone (863) 284-2200
Facsimile (863) 688-0310
Attorneys for Petitioners: Stine, Moore, Thornton, Degnan and Allende

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STATEMENT OF CASE AND FACTS

A. The Case.

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") invoke this Court's discretionary jurisdiction to review the Second District Court of Appeal's opinion dated April 19, 2002. The Second District's opinion reversed the Order of the Circuit Court which dismissed, pursuant to Fla. R. Civ. P. 1.420(e), MANUEL G. JAIN, M.D.'s action for failure to prosecute and directed the trial court to reinstate the action. On November 5, 2002, the Second District Court denied Petitioners' timely Motion for Rehearing, Rehearing *en banc*, Clarification, or Certification. A conformed copy of the Second District's opinion and order denying Petitioners' Motion for Rehearing, Rehearing *en banc*, Clarification, or Certification are attached as the Appendix to this brief. *See* Fla. R. App. P., Rule 9.120(d). Reference to the Appendix shall be by "App." followed by the tab number and page number(s), e.g., (App. 1 at 7.)

In accordance with Rule 9.120(d), Florida Rules of Appellate Procedure, this Brief is limited solely to the issue of this Court's jurisdiction.

B. The Facts.

Tailoring the facts of this action to the issue of this Court's jurisdiction, the Second District based its decision to reverse and remand the trial judge's dismissal

for failure to prosecute solely on JAIN's telephone call to a witness on January 8, 2001 and a telephone voicemail message attempting to schedule a deposition left with opposing counsel on January 9, 2001, the last day of the relevant twelve month period beginning January 9, 2000.

Because the case had laid dormant for over a year without any valid record activity, co-Defendant, GREEN CLINIC, INC. served its Motion to Dismiss for Failure to Prosecute, pursuant to Fla. R. Civ. P. 1.420(e) on January 8, 2001. At the same time, unbeknownst to any party or opposing counsel, JAIN allegedly had been searching for Robert LePage, a former administrator of the GREEN CLINIC, INC. On the same day GREEN CLINIC, INC.'s Motion was served, JAIN found LePage's telephone number in an Orlando directory and contacted him requesting a voluntary statement about the merits of the underlying lawsuit. After speaking briefly with LePage on the telephone, JAIN made no additional telephone calls or conducted other non-record activity on January 8, 2001.

On the following day, January 9, 2001, the Polk County Clerk of Court received, docketed, and filed GREEN CLINIC, INC.'s Motion to Dismiss, thereby tolling any of JAIN's record or non-record activity.[1] On the same day the Motion was filed, JAIN attempted to contact opposing counsel to schedule LePage's deposition. However, JAIN did not speak directly with any opposing counsel; but

[1] DOCTORS joined GREEN CLINIC, INC.'s Motion to Dismiss for Failure to Prosecute on January 17, 2001. The governing law holds that DOCTORS' Motion automatically related back to GREEN CLINIC, INC.'s Motion filed on January 9, 2001.

rather, only left a telephone voicemail message with opposing counsel's secretaries. Beyond leaving a message with opposing counsel, JAIN performed no other non-record activity on that day. On January 16, 2001, five days after GREEN CLINIC, INC. filed its Motion to Dismiss, JAIN unilaterally noticed LePage for a deposition.

JAIN has the burden of demonstrating that good cause existed prior to GREEN CLINIC, INC.'s Motion to Dismiss being filed. The only evidence offered by JAIN in opposition to the Motion concerned his alleged efforts to coordinate the taking of a deposition, i.e., contacting the potential witness directly on January 8, 2001 and attempting to contact opposing counsel on January 9, 2001. Good cause requires actual contact with an opposing counsel. Since, JAIN's non-record activity on January 8 and 9, 2001 was limited to a telephone call with a witness and only an attempt to contact opposing counsel, JAIN failed to meet his burden.

SUMMARY OF ARGUMENT

This case falls squarely within this Court's discretionary jurisdiction. The Second District held that JAIN avoided dismissal pursuant to Fla. R. Civ. P. 1.420(e) because of a brief telephone conversation with a witness and a telephone voicemail message left with opposing counsel attempting to schedule a witness' deposition. The Second District's opinion is contrary to other District Court

decisions that evaluate non-record activity sufficient to avoid dismissal pursuant to Fla. R. Civ. P. 1.420(e). No case has held that mere contact with a witness and attempted contact with an opposing counsel constitutes valid non-record activity.

In that regard, the Second District's opinion expressly and directly conflicts with *Spikes v. Neal*, 792 So.2d 571 (Fla. 1st DCA 2001); *Edgecumbe v. American General Corporation*, 613 So.2d 123 (Fla. 1st DCA 1993); *107 Group, Inc. v. Gulf Coast Paving & Grading, Inc.*, 459 So.2d 466 (Fla. 1st DCA 1984); and *F.M.C. Corporation v. Chatman*, 368 So.2d 1307 (Fla. 4th DCA 1979). These cases hold that telephone calls between lawyers or conferences with witnesses do not preclude dismissal under the rule. "[M]ere contact between opposing counsel, <u>including attempts at setting depositions</u>, is not enough to establish sufficient non record activity to preclude dismissal," (*Spikes*, 792 So.2d at 573; *citing*, *Edgecumbe*, 613 So.2d 213 (Emphasis added)), and extensive non-record conferences with a 'necessary and vital expert witness' are not compelling reasons to avoid dismissal. *F.M.C. Corporation*, 368 So.2d at 1308. Whereas, in the instant appeal, JAIN's activities do not constitute the required contact with an opposing counsel, just attempted contact.

Accordingly, this Court has discretionary jurisdiction to review this case and should, therefore, accept jurisdiction.

ARGUMENT

I. THE SECOND DISTRICT'S OPINION IS IN DIRECT CONFLICT WITH OTHER DISTRICT COURT DECISIONS REGARDING NON-RECORD ACTIVITY THAT WOULD PRECLUDE DISMISSAL FOR FAILURE TO PROSECUTE

The Second District's determination of good cause to preclude dismissal for failure to prosecute under Fla. R. Civ. P. 1.420(e) directly and expressly conflicts with *Spikes*, *Edgecumbe*, *F.M.C. Corporation* and *107 Group, Inc*. Even though the Second District held that if JAIN had noticed a deposition unilaterally, or if JAIN had taken the deposition of a witness within the previous twelve months without placing the notice in the file, then such actions would have constituted a compelling reason to preclude dismissal. (App. 1 at 4.) However, it is clear that JAIN took neither action. The Second District's decision conceded that during the last two days of the relevant twelve month period, JAIN's non-record activity was limited to a brief telephone conference with a witness and a telephone voicemail message with opposing counsel attempting to schedule the same witness' deposition. (App. 1 at 4.) All other District Court decisions have held 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*, the First District found that the plaintiff alleged that "parties had 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 a phone call placed on the day a motion to dismiss is filed, the First District held that conferences with potential witnesses or the exchange of telephone calls between lawyers will not preclude dismissal.[2] *Id.* The Fourth District, in

[2] Cases cited in *Edgecumbe* include, *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 taking of deposition without filing of transcript of the deposition for record in the court file, settlement negotiations, non-record conferences, correspondence and review of records); *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.");

F.M.C. Corporation, also has 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. "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*. Likewise in *107 Group, Inc.*, 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*.

In the instant action, the Second District held,

> "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 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 the dismissal." (App. 1 at 4.)

Weitzel v. Hargrove, 543 So.2d 392 (Fla. 3d DCA 1989)(dismissal for lack of prosecution was warranted where the non-record activity involved contact between counsel for both parties and an agreement to cancel a previously noticed hearing on the defendant's motion to strike certain allegations of the complaint).

However, JAIN did not notice a deposition immediately, nor did JAIN take the witness' deposition within the relevant one-year period. Rather the Second District reversed and remanded the trial court's decision because JAIN left a telephone voicemail message with opposing counsels' secretaries attempting to schedule LePage's deposition. (App. 1 at 4.)

> "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." (App. 1 at 4.)

The Second District's opinion is in direct conflict with the First and Fourth District's decisions cited above. GREEN CLINIC, INC. served its Motion to Dismiss on January 8, 2001. On the same day, unbeknownst to any opposing party or counsel, JAIN located and telephoned LePage to obtain a voluntary statement in support of its action. A conference with a witness is not the type of valid non-record activity that can avoid a dismissal. *F.M.C. Corporation*, 368 So.2d at 1308 and *107 Group, Inc.* 459 So.2d at 467. On the following day, the Polk County Clerk of Court received, docketed, and filed GREEN CLINIC, INC.'s Motion to Dismiss thereby tolling any further record or non-record activity. On the same day the Motion was filed, JAIN <u>attempted</u> to contact opposing counsel to schedule LePage's deposition. However, JAIN did not speak directly with an opposing

counsel; but rather, only left a telephone voicemail message. "[M]ere contact between opposing counsel, including attempts at setting depositions, is not enough to establish sufficient non-record activity to preclude dismissal." *Spikes*, 792 So.2d at 573, *see also, Edgecumbe, supra.* (Emphasis added.) The record is unclear as to whether GREEN CLINIC, INC.'s Motion was received and filed with the clerk's office before JAIN left its telephone message with opposing counsel's office. Despite this indiscernible point, it is clear that the Second District relied upon JAIN's unreturned telephone message with opposing counsel to avoid dismissal – a clear contradiction to other appellate decisions. Rather than this Court's requirement of "direct contact" with opposing counsel in order to establish good cause within the purview of the rule, JAIN's attempt to contact an opposing counsel on January 9, 2001 may only be properly characterized as an intention to act. *See Metropolitan Dade County v. Hall*, 784 So.2d 1087, 1090 (Fla. 2001).

JAIN had the high burden of demonstrating to the trial judge that good cause existed prior to the Motion being filed. A plaintiff has a high burden to establish good cause, which includes showing the court a compelling reason to avoid dismissal where there has been no record activity. *American Eastern Corporation v. Henry Blanton, Inc.*, 382 So.2d 863, 865 (Fla. 2d DCA 1980). Whether or not a party has shown "good cause" is a discretionary decision that is best determined by the trial court. *Edgecumbe*, 613 So.2d at 124. By its opinion, the Second District

usurped the discretion of the trial judge. The District Court created new and conflicting authority, whereby a plaintiff may always show good cause to avoid a Rule 1.420(e) dismissal, as long as a plaintiff leaves a voicemail message with opposing counsel indicating an intention to set the deposition of a witness. Yet, as conceded in the District Court's decision, JAIN did not attempt to contact an opposing counsel about difficulties in locating LePage or attempting to schedule LePage's deposition until after GREEN CLINIC, INC.'s Motion had been served and on the same day the Motion was filed. Such activities do not constitute the required direct contact with an opposing counsel or valid non-record activity to establish good cause and avoid a dismissal; as such, JAIN failed to meet his burden as the trial judge found.

Since the Second District's opinion directly and expressly conflicts with *Spikes, Edgecumbe, F.M.C. Corporation* and *107 Group, Inc.*, this Court should grant jurisdiction.

CONCLUSION

Based on the foregoing reasons, this Court should accept jurisdiction in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a correct copy of the foregoing Answer Brief of Appellees has been served by U.S. First Class Mail this 13th day of December, 2002, 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**., P.O. Box 240, Jacksonville, FL 32201; and **NEAL L. O'TOOLE, ESQ**., Post Office Box 50, Bartow, FL 33830.

JONATHAN B. TROHN, ESQUIRE

Florida Bar No. 0880558

MONTEREY CAMPBELL, ESQUIRE

Florida Bar No. 0011387

THEODORE W. WEEKS, IV, ESQUIRE

Florida Bar No. 0188468

Gray Harris & Robinson, P.A.

Post Office Box 3

Lakeland, Florida 33802-0003

Telephone (863) 284-2200

Facsimile (863) 688-0310

Attorneys for Petitioners, Stine, Moore,

Thornton, Degnan and Allende

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is submitted in Times New Roman 14-point font in compliance with Rule 9.100(1) and Rule 9.210(a)(2), Fla. R. App. P.

JONATHAN B. TROHN, ESQUIRE
Florida Bar No. 0880558
MONTEREY CAMPBELL, ESQUIRE
Florida Bar No. 0011387
THEODORE W. WEEKS, IV, ESQUIRE
Florida Bar No. 0188468