IN THE SUPREME COURT OF FLORIDA
STATE OF FLORIDA

J.C. STINE, M.D.; JOHN W. MOORE, M.D.; FRANK J. THORNTON; 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.

Case No: SCO2-2595

(2D01-1913)

(Polk County Cir. Ct. No: GCG-97-2493)

JURISDICTIONAL ANSWER BRIEF OF RESPONDENT JAIN

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STATEMENT OF THE CASE AND OF THE FACTS

Petitioners declare in their statement of the facts that they have tailored "the facts of this action to the issue of this Court's jurisdiction". Brief, at 1. The only facts of relevance to the petition, however, are those stated in the District Court of Appeal's panel opinion. Rule 9.120 (d), Fla. R. App. P. Petitioners have steered far afield of those facts. Where for example does the Court's opinion state that "Jain found LePage's telephone number in an Orlando directory" or that LePage was then asked only to give "a voluntary statement"? Brief, at 2. These assertions of fact do not appear in the Second District's opinion. The same may be said for most of the purported " facts" at pages 2 and 3 of Petitioner's Brief: they are tendentious, and in some cases distorted, assertions lacking support in the Second District's opinion.

The facts actually deemed relevant to the Second District may properly be found in that Court's written opinion. There the court notes that Dr. Jain's attorney was "attempting to locate a witness believed to be important to the ultimate resolution of the case." (Id.). That witness, the former administrator of Green Clinic, was "finally tracked down" on January 8, 2001. (Id.). Dr. Jain's lawyer "asked the witness *to provide dates for his deposition"* (Id., emphasis added). The witness "replied that he would not do so until after he had conferred with the attorney for defendant Green

Clinic". (Id.). The very same day the administrator spoke "with 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.). " Then, on January 9, 2001 - - the same date on which the motion to dismiss was filed by Green Clinic's lawyers - - Dr. Jain's attorney left messages with opposing counsel seeking available dates to depose the administrator. After receiving no response, on January 11, 2001, Dr. Jain's counsel unilaterally noticed the administrator for deposition, which was ultimately taken on February 11, 2001." (Id.).

From essentially these facts, the Second District proceeded to determine whether the Circuit Court had erred in applying the "wrong date from which to measure the one-year period." (Id). The Court initially reasoned that Green Clinic's motion had been filed on January 9, 2001 and thus that the relevant period of prosecution was the period January 9, 2001 backward to January 9, 2000. (Slip Op. 4). The Circuit Court had "measured one year forward from January 5, 2000, the date of the last alleged record activity." (Id.). This approach, concluded the Court, was error. And because Dr. Jain attempted to establish good cause during the appropriate one year period, it was necessary to "review the court's order under the abuse of discretion standard." (Id.). The Court then proceeded to an analysis of the good cause

issue, citing *Metro. Dade County v. Hall,* 784 So. 2d 1087, 1090 (Fla. 2001) and *Del Duca v. Anthony,* 587 So. 2d 1306, 1308-09 (Fla. 1991).

In evaluating the good cause issue, the Second District concluded that "[u]nder the particular facts of this case, we conclude that Dr. Jain's attorney established good cause for the delay in prosecution" . (Slip Op. 4). The Court reasoned that Dr. Jain's attorney could have noticed the administrator for deposition "immediately" (that is, on January 8, when he was first located and contacted for a deposition date). (Slip Op. 4). If Dr. Jain had done so "that record activity would have occurred within the one-year period and would have precluded dismissal. "(Id). Furthermore, noted the Court, "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". (Id.). The Court observed that the time continued to run only "because Dr. Jain's lawyer courteously contacted opposing counsel in advance" and that "[t]he reward for his courtesy was that the record remained dormant." (Id.) Under these "particular facts", concluded the Court, Dr. Jain had established good cause, albeit only through "the proverbial close shave". (Id.). The Second District accordingly ordered that Dr. Jain's case be reinstated.

SUMMARY OF THE ARGUMENT

The opinion of the Second District is narrowly focused upon the unique facts of the case. The Second District established no rule contrary to existing precedent. What is more, nothing stated within the four corners of its opinion can be objectively viewed as contrary to the decisions on which Petitioners rely. Petitioners have accordingly failed to establish that the Second District's opinion expressly and directly conflicts with the decision of another district court of appeal, as claimed.

ARGUMENT

In order to establish conflict jurisdiction, Petitioners must establish the existence of a "point of law contrary to a decision of this Court or another district court." *The Florida Star,* 530 So. 2d 286, 289 (Fla. 1988). The necessary conflict over a specific point of law must appear within the "four corners" of the District Court's opinion; it may not be established by reference to the underlying record. *E.g.*, *Martin v. State of Florida*, 823 So. 2d 124 (Fla. 2002). Neither may Petitioners properly recite, as they have done in their brief, "facts not appearing in the decision below". *Reaves v. State of Florida*, 485 So. 2d 829, 830 (Fla. 1986). Petitioner's have failed to show the existence of a such a conflicting point of law within the text of the Second District's opinion in Dr. Jain's case.

In the *Hall* case, this Court reiterated the principle that the plaintiff responding to a motion to dismiss under Rule 1.420 (e), Fla. R. Civ. P., must be afforded the

opportunity to show that it engaged, during the relevant one year period, in good faith activity calculated to move "the case forward to a conclusion so as to meet the good cause basis for not dismissing the action."*Hall,* 784 So. 2d at 1091. Under the ruling in *Hall,* the noticing of a deposition of an important witness or the taking of the deposition of such a witness are equally valid as examples of the kind of non-record activity calculated to prosecute the case toward a conclusion. *Id.* 1091. In the present case Dr. Jain was searching for just such a witness: the former administrator of the Green Clinic. As the Second District noted, the witness was located on January 8, 2001 and was asked to give Dr. Jain's lawyers dates for his deposition. The witness declined to do so, until he could talk to Green Clinic's lawyers. (Slip Op. 3). At this point Dr. Jain's counsel could have unilaterally noticed the witness for deposition, and rushed to the court house to record the notice, thereby satisfying the requirement of *record* activity before defense counsel, now alerted by the witness, could file their Rule 1.420 (e) motion. (Slip Op. 4). *E.g, Hall,* at 1091. Rather than taking the chance that "an arbitrarily chosen deposition date would later be determined to violate the discovery rules, Dr. Jain's lawyer contacted opposing counsel in advance". (Slip. Op. 4). This course of action was dictated not only by norms of professional courtesy but also by precedent. *See, e.g., Canella v. Bryant,* 235 So. 2d 328, 332 (Fla. 4th DCA 1970). Hence Dr. Jain's lawyers gave the witness time to talk the matter over with

defense counsel and then placed calls to all of the defense lawyers on January 9, 2001. (Id.). When those calls went unheeded, the deposition was unilaterally noticed, and subsequently taken. (Id.). The Court concluded that under the "particular facts of this case", Dr. Jain's attorney had established good cause for the delay in prosecution". (Id.).

The Court's holding is unremarkable. If lawyers are expected to coordinate depositions, rather than simply unilaterally noticing them at their own convenience, an appropriate step in the process of properly arranging a deposition is to contact opposing counsel. Dr. Jain's counsel located the witness, contacted him about his deposition, understood that he would in turn contact defense counsel, gave the witness a few hours to do so, and then called all the other lawyers to arrange the deposition, which was then in due course taken. This is the kind of conduct that exemplifies good faith, non-record activity to move the case toward a conclusion on the merits. The Second District's opinion is limited in its scope to the specific facts of the case, as one court has recently observed. *Tompkins v. First Union Nat'l Bank,* 2002 Fla. App. LEXIS 18279, n. 3. (Fla. 5th DCA December 13, 2002).

Nor is there any holding or rule of law in the Second District's opinion that expressly and directly conflicts with the pre-*Hall* authority on which Petitioners rely. In *Spikes v. Neal*, 792 So. 2d 571 (Fla. 1st DCA 2001), for example, the plaintiff had

previously noticed the matter for trial and then requested that the case be removed from the trial docket. Once the court did so, the plaintiff inexplicably allowed the case to languish. In affirming the dismissal, the First District's opinion observes that plaintiff "*alleges* that an attempt was made to set a deposition, however, no date was ever agreed upon by the parties.". *Id. at* 572-73 (Emphasis Added). The deposition was never taken or noticed. The *Spikes* court found that the alleged attempt to set the deposition was not by itself sufficient evidence of good cause. Dr. Jain, in contrast, did not simply "allege" or "attempt" to depose somebody; he found the witness, immediately asked for deposition dates, he contacted the defense lawyers to clear a date for taking the deposition (rather than immediately rushing to the court house with a notice), and he then noticed and completed the deposition. The difference between the two cases resides in an assertion of effort belied by the actual failure to do anything in *Spikes* versus the genuine search for the witness and the necessary follow up, consistent with norms of professionalism, to take the deposition in Dr. Jain's case. Both cases turn on their own particular facts.

The *Spikes* court relied in part upon its earlier decision in *Edgecumbe v. American General Corp.,* 613 So. 2d 123 (Fla. 1st DCA 1993), also cited by Petitioners. Here again the facts in *Edgecumbe* concerning the issue of good cause are dramatically different from those presented in Dr. Jain's case:

> Defendants' counsel filed an affidavit, which is not controverted in this record, averring that ...he gave Plaintiffs' counsel dated for the depositions and, although this was only two days before the expiration of the one-year period of record inactivity, he did not file a motion to dismiss until October 23, 1991, *thus affording Plaintiffs' counsel fifteen days in which to issue notices of depositions*. This affidavit also avers that Plaintiffs' counsel had commenced taking two depositions, which had not been completed and which were not noticed for completion during the period of record inactivity.
>
> (*Edgecumbe*, 613 So. 2d at 125; emphasis added).

As this passage of the opinion makes clear, the Plaintiff in *Edgecumbe* secured agreeable dates for depositions and did *nothing;* he also knew of other depositions which he could have completed during the one year period but again did nothing. The clear implication of the opinion is that if the plaintiff had only followed through with noticing the depositions that were cleared with defense counsel, there would have been no basis for dismissal- - even though the notices themselves would likely have issued *after* the expiration of the one year period. It was the failure to follow through in the critical days following the discussion between the lawyers that tipped the scale against the plaintiff on the good cause issue. Dr. Jain in contrast, did what the plaintiff in *Edgecumbe* did not do. He searched for and found the witness, he contacted opposing counsel preliminary to issuing a deposition notice, and he issued the notice unilaterally after none of the defense lawyers bothered to respond to the request for deposition dates.

Petitioners purport to read in both *Spikes* and *Edgecumbe* a hard-and- fast rule that "mere" contacts between counsel, including an attempt to set depositions, is not sufficient activity to make out a showing of good cause. This is an oversimplification of the ruling in both cases. The decisive factor in both cases is that the lawyer had the opportunity to follow through and create record activity by taking the depositions that had been discussed among counsel and did *nothing.* Talking about taking a deposition, by itself, would not suffice as good cause. The Second District in Jain has announced no rule to the contrary. Rather it found on the "particular facts of this case" (Slip Op.4), that Dr. Jain had done more than merely making an "attempt" at taking a deposition. For Jain set in motion the process of noticing and taking the deposition of the administrator and thereafter did so. Dr. Jain's lawyers held off in issuing the deposition notice only to obtain an agreeable date for taking the administrator's deposition. These facts established the good faith activity to move the case forward and the contact with counsel deemed lacking in *Spikes* and *Edgecumbe.*

For similar reasons Petitioners' reliance upon *107 Group, Inc. v. Gulf Coast Paving & Grading, Inc.*, 459 So. 2d 466 (Fla. 1st DCA 1984) and *F.M.C. Corp. v. Chatman,* 368 So. 2d 1307 (Fla. 4th DCA 1979) is also misplaced. In *F.M.C.* the affidavit detailing good cause outlined only contact with witnesses; there was no contact "with the opposing party". *Id.* at 1308. Likewise in *107 Group*, there was no

contact with opposing counsel, only "interviewing witnesses and contacting experts". *Id.* at 467. In Dr. Jain's case there *was* contact with opposing counsel after the witness himself contacted defense counsel in response to Dr. Jain's effort to arrange the deposition. (Slip Opinion, 4).

Remarkably, Petitioners take issue with the Second District's opinion by asserting that leaving messages with the opposing lawyer's staff, as opposed to making contact with the opposing lawyer personally, cannot be viewed as the requisite "contact" between the plaintiff and the opposing parties. Brief, 8-9. Nothing in Petitioners' cited cases or any other known precedent, however, would support the evisceration of a litigant's claim under Rule 1.420 (e) simply because the contact to notice a deposition was not made upon the opposing lawyer personally. Such a rule would not only encourage defense counsel to avoid calls from their opponents but it would also exalt form over substance, the very kind of result this Court sought to discourage in *Hall*.

CONCLUSION

Petitioners have failed to establish a basis for conflict jurisdiction. The Second District's opinion is but a narrowly focused decision based upon the unique facts of the case. Accepting this case for review would neither add clarity to the law nor promote the public interest. The Court should accordingly deny review.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief was provided by U.S. First Class Mail on this the 27th day of December 2002, to: **Jonathan B. Trohn, Esq., Monterey Campbell, 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 9.100(1) and 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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