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, Plaintiff / Respondent.

PETITIONERS' REPLY BRIEF

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

References to the parties and the record on appeal will follow the same format as set forth in Petitioner's Initial Brief on the Merits. References to Respondent's Answer Brief will be designated as "Ans. Br. _____," and references to the Appendix attached to Respondent's Answer Brief will be designated "A. ____." All emphasis in the Brief is supplied unless otherwise noted.

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ARGUMENT

The recurring theme in JAIN's Answer Brief is that it would be unfair to uphold the dismissal of this case because he has been unfairly victimized. He would have this Court believe that his attempts to be professional have been frustrated by opposing counsel's schemes and machinations. In one sentence, JAIN argues he should not be deprived of his cause of action because his lawyer "chose the path of professionalism rather than expediency." (Ans. Br. pg. 32). Juxtaposed with the admirable standards championed by JAIN's counsel, are the deceptive and stealthy methods of defense counsel which hatched the "chain of events" that has caused this case to be dismissed. There is no basis in the record for these blatant mischaracterizations. JAIN's case was dismissed not because of some wild conspiracy but because the case was allowed to sit for over a year without moving.

JAIN argues that it would be "unfair" to dismiss his case under a normal application of the rule. Every lawyer who is on the wrong end of a deadline complains that it is "unfair." Deadlines are a part of law practice in the state of Florida. A plaintiff has 120 days to serve their complaint under Rule 1.070(j). A defendant has 20 days within which to answer the complaint or suffer default under Rule 1.140. We have but 30 days to answer discovery, or risk waiving our objections. We have just

10 days to file a motion for new trial after return of the verdict, and just 30 days to file a notice of appeal or they are abandoned. Without deadlines, cases do not move forward. Unless deadlines are enforced by the Courts, they are useless. JAIN has provided no legal excuse for his failure to abide by this deadline. Instead, he has provided mischaracterizations that go beyond fair argument.

It might be easiest to begin by stating where the parties are in agreement regarding the record. The parties agree that GREEN CLINIC served its Motion to Dismiss on January 8, 2001. The parties agree that on that same day, JAIN called a witness, Robert LePage. There is a dispute in the record as to whether LePage was asked at that time to come down to Milbrath's office for a voluntary statement, or schedule a deposition, or both. It makes no difference, and for the sake of argument, Petitioners will assume a deposition was mentioned. Mr. LePage then called Dr. Stine and Mr. Trohn. Mr. Trohn then advised LePage that he is under no legal obligation to give a voluntary statement, but he would have to appear if subpoenaed for a deposition. The following day, on January 9, 2001, GREEN CLINIC's Motion was received and clocked in by the Clerk. Also on that day, a secretary from Milbrath's office leaves messages about scheduling a deposition. That is where the record ends.

Even though that is where the evidence ends, JAIN goes further in concocting a conspiracy theory that set in motion a "chain of events" which prevented him from making record activity. He argues that Mr. Trohn must have called counsel for GREEN CLINIC, Jonathan Sbar, and prompted Sbar to file his Motion. He then argues that we must have avoided his calls to schedule the deposition the following day. These things never happened. In fact, Mr. Sbar spoke directly on this point at the hearing when he stated:

> Judge, the next big issue is this argument, which is a complete mischaracterization, that somehow I, as Green Clinic's counsel, inappropriately, after finding out that they were trying to set his deposition, immediately ran to the courthouse and filed a Motion to Dismiss for Lack of Prosecution. That is not true. In fact, as Mr. LePage testified, he did not talk to me until February 14th, more than a month after my filing of the Motion to Dismiss for Lack of Prosecution. As an officer of this Court, I represent that I did not talk to a single attorney in this case about this matter before filing it. The reason I filed it is because there was no record activity for a year." (R. at 13:81-82; A. 36-37).

Not only is there no evidence to support JAIN's theory, there is the statement from Mr. Sbar attesting that this just never happened. Why would it? Why would Mr. Trohn call another lawyer and ask him to file a Motion which he could file himself?

If the Court is entertaining unsupported argument, then it should know that a much easier construction is as follows:

> After Mr. Trohn spoke to Mr. LePage, he hung up the phone and did not give it another thought because he had no idea that the one (1) year period had run until he opened his mail the next day and saw GREEN CLINIC's Motion.

Of course there is no record evidence to support this construction anymore than JAIN's (although Doctors' construction has the advantage of being the truth). That is why we have hearings and trials. This is why we have trial judges that receive evidence, weigh it, and make decisions. It is not for the Second DCA to make findings of fact, particularly those that are wholly unsupported in the record.

Likewise, there is no record evidence to support the theory that defense counsel was avoiding the secretary's call. JAIN would have this Court believe that defense counsel stood behind their secretaries and made the "throat-cutting" gesture as a means of avoiding the call. There is no evidence in the record as to why defense counsel's secretary did not return the call on January 9, 2001. Perhaps she was at the copy machine, perhaps she took the afternoon off, but most likely she was working on other matters which required more urgent attention. Apparently, it is acceptable for JAIN to delay a year before looking for Mr. LePage, but if a secretary does not return JAIN's call within the hour, then we are up to no good. The important thing is, there is no evidence whatsoever that the secretary was avoiding a call, or was ever instructed by a lawyer to avoid the call. Even if she did return the call and schedule the

deposition, for all we know the Motion to Dismiss was already clocked in with the Clerk.

Perhaps the requirement of contact between counsel in establishing good cause is there for situations just like this. The whole thing might have been avoided if JAIN had only contacted opposing counsel at any time during the previous 365 days.

As said above, JAIN goes beyond fair argument in making these accusations. For example, JAIN argues "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." (Ans. Br. pg. 46). This argument is completely baseless. What evidence is there that shows GREEN CLINC served its deposition notice after JAIN attempted to set LePage's deposition? There is none, because GREEN CLINIC served their Motion the day before JAIN attempted to set the deposition. Further, what evidence is there that GREEN CLINIC served their Motion "in anticipation" of the deposition notice? There is none at all. How can JAIN make these arguments? What does the Discovery Handbook have to say about candor to the Court? JAIN must pay attention to the record when making argument, one would think that "professionalism" requires it.

I. One Year Period

JAIN argues that defense counsel "misled" the Circuit Court into employing a time period they "knew was error" through "carefully crafted" Motions to Dismiss. (Ans. Br. pgs. 22-23). The Motions were supposedly meant to prevent the Court from considering any non-record activities after January 5, 2001. JAIN states that this "deceptively simple but false approach" (Ans. Br. pg. 24) was enough to prevent him from convincing the Trial Judge of good cause.

The Motions to Dismiss all use the same language and are completely benign. (R. at 3:518-519; 522-523; 526-527; A. 239-244). Each of them states that "there has been no record activity on the action for a period of one year." Id. Further, a review of the hearing transcript shows that Mr. Milbrath's evidence concerning his non-record activities was allowed to be presented in full, while defense counsel were permitted to refute it. (R. at 13:71-91; A. 26-46). The Court did not at all ignore JAIN's evidence regarding his attempts to contact LePage. On the contrary, the Court was more struck by the fact that JAIN did not begin his search for LePage until a full year had passed after completing depositions showing LePage's involvement, and his location. (R. at 13:90-91; A. 45-46).

JAIN also insinuates impropriety by Mr. Trohn for advising the Circuit Court that the then-controlling law in the Second District provided that deposition notices were not record activity. (Ans. Br. pg. 10). *Smith v. DeLoach*, 556 So. 2d 786 (Fla. 2d DCA 1990) was the controlling law in the Second District at the time, although it was overruled by *Metropolitan Dade County v. Hall*, 784 So. 2d 1087 (Fla. 2001), which came out after the hearing. Although the law is now that deposition notices are record activity, *Hall* does not change longstanding law on how a court is to judge non-record activity. Here, since the Trial Judge received and ruled upon JAIN's non-record activities, and there is nothing in the record to show that *Smith v. DeLoach* provided even the slightest basis for the Trial Judge's decision, JAIN's argument proves to be a red herring. As is the case with most of the Answer Brief, the argument is intended to show how defense counsel devised yet another method of bamboozling JAIN. This time by brazenly discussing controlling law at the time.

Most important, if the Trial Court applied the wrong time period, JAIN is to blame because he suggested that period. At the hearing, Mr. Milbrath stated;

> But if you consider under your ruling that the last record activity was January 5, 2000, that would mean that the bar date would accrue on January 5, 2001, at the earliest. (R. at 13:71-72; A. 26-27).

JAIN cannot expect the appellate court to correct an error which he himself helped to create. As this Court has held, it is inappropriate to raise an issue for the first time on appeal. *Dober, M.D. v. Worrell*, 401 So. 2d 1322 (Fla. 1981).

If JAIN truly believed that the Trial Judge did not consider his non-record activities on January 8th and 9th, why did he not demand that the Second DCA send it back to take evidence? On one hand, JAIN claims his evidence was not considered by the Trial Court, but on the other hand, he is quite happy with the findings of fact made by the Second District Court of Appeal. It was not the Second District's place to find these facts. Although JAIN describes his activities on the 8th and 9th as "largely uncontroverted" (Ans. Br. pg. 26), as shown above, there is nothing at all which is uncontroverted regarding his conspiracy theory.

II. Factual Record

The Answer Brief contains a tremendous amount of irrelevant and unsupported facts. For example, JAIN spends a great deal of time describing the purchase of the clinic, Dr. Jain's termination, and his alleged entitlement to damages (Ans. Br. pg. 1-4). He spends even more time explaining the activity involved in this case preceding the one (1) year period at issue. (Ans. Br. pgs. 11-18). Descriptions of extensive motion practice and discovery, are mentioned for no reason other than to accuse opposing counsel of "dilatory" activity. (Ans. Br. pg. 11). It makes no difference which motions were granted in favor of Defendants, as long as JAIN can continue to boldly characterize activity in an unfavorable light, for whatever effect this may have on the reader.

The issues in this case do not at all concern what happened prior to January 9, 2000. Also irrelevant are references to a Motion to Compel filed in a companion case determined to be a nullity. (Ans. Br. pg. 5). JAIN argues that this nullity was never corrected or withdrawn (Id.), but does not bother to explain that they were never even served with the pleading as it arose in a completely different action. (R. at 13:64-66; A. 19-21). JAIN also would like this Court to believe that Dr. Jain is being cheated into paying Defendants' attorney's fees after "already having sold Dr. Jain's stock and

pocketing the money." (Ans. Br. pg. 37). These types of arguments, which are entirely denied as baseless, are meant to divert the Court's attention from the issues in this case. It is consistent with the insulting and inflammatory language used throughout the Brief.

Not only are there blatant mischaracterizations, much of the argument is completely unsupported by the record. For example, JAIN states that "in Early to Mid 2000" a paralegal was directed to locate LePage. (Ans. Br. pg. 18). The affidavit supplied by Mr. Milbrath contains no such specificity. It only states that "I directed my paralegal to begin a search for Mr. LePage…". (R. at 8:1706; A. 288). JAIN also argues in his Answer Brief that Milbrath determined "early to mid 2000" that it was necessary to depose LePage. (Ans. Br. pg. 18). Again, the affidavit does not state anything about when in the year 2000 Mr. Milbrath decided he needed to depose LePage and only states that "after a thorough review of the file, I determined it was necessary to take the deposition of one additional witness, Mr. Robert LePage." (R. at 8:1706; A. 288). JAIN's efforts to artificially elongate their "search" for Mr. LePage is an oversight that ironically appears under the heading "The Real Chronology of Critical Events." (Ans. Br. pg. 18). This, according to JAIN is "based upon the actual record evidence." (Id.)

III. The Law on Informal Contact

JAIN does not explain how he can avoid the "contact" requirement which is a prerequisite to all findings of good cause. Further, JAIN fails to adequately address the long history of case law holding that informal contact between counsel, such as that to schedule a deposition, does not constitute good cause.

The reasoning behind contact would seem to have a solid foundation. If a litigant allows his case to idle for over a year, and attempts to present some good cause as to why it should not be dismissed, a prerequisite should be some contact with opposing counsel to see if the problem could have been solved between counsel. For example, if a critical piece of evidence in a products liability case is missing, it would seem to make sense that the plaintiff's lawyer would contact the lawyer for the manufacturer to see if he can assist in finding the evidence. If it truly is "critical" evidence, then both sides have an interest in procuring it. Similarly, if Mr. LePage was so "critical" to JAIN, why then did they not simply pick up the phone and ask GREEN CLINIC where their former administrator might be? Why did JAIN not send out an interrogatory asking for his last known address? If JAIN were to arrange a deposition of Mr. LePage, all sides would have the right to be there and question him, so why the secrecy? Obviously, JAIN was hoping to locate LePage and obtain a favorable

statement from him in advance of, or in place of, a deposition. They chose that method over contact with opposing counsel, which would have likely generated record activity, and would have at least helped form good cause. See, for example, *Blythe v. James Lock & Co. Ltd.,* 780 So. 2d 237, 238 (Fla. 4th DCA 2001) where the court held "contact with the defendants may have facilitated the prompt location of (the evidence). Still, in most situations, the contact requirement will at least serve the useful purpose of keeping the channels of communication open between the parties while their open case languishes in the court system…". See also *F.M.C. Corp. v. Chatman*, 368 So. 2d 1307 (Fla. 4th DCA 1979); and *107 Group, Inc. v. Gulf Coast Paving & Grading, Inc.*, 459 So. 2d 466 (Fla. 1st DCA 1984).

Nor can JAIN escape the law that conferences between attorneys to schedule depositions and hearings are not good cause, and that the Second District decision here is in direct conflict. In *Spikes, Jr. v. Neal, M.D.*, 792 So. 2d 571 (Fla. 1st DCA 2001), counsel had telephone conferences, written correspondence, and attempts to schedule a deposition, but nevertheless, the First District held that "mere contact between opposing counsel, including attempts at setting depositions, is not enough to establish sufficient non-record activity to preclude dismissal." *Id.* at 573. The same holding was made in *Edgecumbe v. American General Corporation*, 613 So. 2d 123

(Fla. 1st DCA 1993) where the parties had even more extensive contact about scheduling depositions.

There are solid reasons for holding that conferences to schedule depositions are insufficient to preclude dismissal. Scheduling depositions is ordinarily a ministerial matter left to secretaries, and thus does not result in any real contact between counsel. Most secretaries do not have the authority to decide how to manage the case. Therefore, scheduling conferences do not accomplish weightier goals in moving cases forward, such as locating critical evidence, or entering into stipulations regarding the handling of evidence. And, practically speaking, it adds two more people to the mix where misunderstandings can arise, which results in more affidavits, more accusations, and more counter-accusations.

JAIN attempts to distinguish the Second DCA's decision here from those in *Spikes* and *Edgecumbe* by claiming that the plaintiffs in those cases had attempted to schedule the depositions, and then slept on their rights, before the motion to dismiss was served. That logic is difficult to follow. At least the plaintiffs in *Spikes* and *Edgecumbe* had an excuse for their inactivity by arguing that they justifiably relied on their discussions to schedule a deposition, and believed the case was moving. Here, that argument is not available to JAIN, who made no attempts to schedule the

deposition, not even "half-hearted" ones, prior to the Motion to Dismiss being served.

Therefore, scheduling conferences are understandably not good cause. It is not good cause to call a lawyer and schedule a deposition. *Edgecumbe; Spikes; Eisen v. Fink*, 511 So. 2d 1092 (Fla. 2d DCA 1987). Nor is it good cause to call a lawyer and attempt to schedule a trial. *Duggar v. Quality Development Corporation*, 350 So. 2d 816 (Fla. 2d DCA 1977). If scheduling conferences between attorneys is not good cause, then how can a secretary's voice mail message left with another secretary be good cause? If this passes for good cause, then the rule will have absolutely no teeth to it. Anytime a lawyer, or even a lawyer's secretary, intends to speak with the other side, that alone would be good cause to avoid dismissal. If *Hall v. Metropolitan Dade County*, is read to mean, as urged by JAIN, that all that is required to establish good cause is a good faith intention to act, then the rule mean nothing. It should be understood by this Court, that for all of JAIN's attempts to distinguish the cases cited by Doctors, he does not cite a single case in support. That is because there is no case stating that an attempted scheduling conference passes for good cause. The cases are uniform on the subject.

Instead JAIN misses the point on what it takes to establish good cause. First, contact is required between counsel. This is not accomplished by a secretary who leaves a message with another secretary, after the Motion to Dismiss is served and likely filed already. JAIN incorrectly argues that Doctors attempt to equate good cause with record activity. Doctors would only show the Court that good cause requires contact, and more than what has been shown here. Good cause also requires something more than taking a couple of months to look for a witness who is in the phonebook, without using discovery, or picking up the phone to call opposing counsel. These efforts do not establish a "compelling reason which prevented or excused JAIN from actively pursuing the case in court." *Weaver v. The Center Business*, 578 So. 2d 427, 430 (Fla. 5th DCA 1991).

JAIN's whole argument is based on the premise that he would have made contact with opposing counsel, and he would have noticed the deposition in time, if not for the miserable conduct of opposing counsel. A lawyer better have evidence of that kind of conduct before making the argument to the Trial Judge. He must have the findings of fact by the Trial Judge before making the argument to an Appellate Court. If he does not, he has no one else to blame but himself for not making contact with opposing counsel at any time within the previous year.

CONCLUSION

There was no reason for the Second DCA to disturb the Trial Judge's determination that good cause was not established. The Second District Court of Appeal wrongly substituted its own findings of fact when it held that ill rewarded courtesies prevented JAIN's counsel from making record activity. That is a decision that can only be made by a trier of fact. In this case, there was absolutely no evidence of such a bizarre conspiracy, but if there were any doubts at all, it should have been sent back to the Trial Judge to determine. Here, the Supreme Court should reinstate the Trial Judge's decision because it is clear he did consider all of the non-record activity done by JAIN and made his rulings accordingly. Furthermore, all of the non-record activities, such as contacting opposing counsel about a deposition, do not, and have never, formed a basis for good cause to avoid dismissal.

On January 8, 2001, GREEN CLINIC, INC. served a Motion to Dismiss for Lack of Prosecution. Apparently, on that same day, JAIN's counsel contacted a witness about a statement or deposition. That is it, and any argument beyond that is unsupported by the record. For the above reasons, Petitioner requests that the Supreme Court reinstate the Trial Court's decision and dismiss this matter for lack of prosecution.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a correct copy of this Reply Brief on the Merits has been served by U.S. First Class Mail this 7th day of July, 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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