IN THE SUPREME COURT OF THE
STATE OF FLORIDA

CASE NO: SC03-58
LOWER TRIBUNAL CASE NO: 5 D01-3624

RAYMOND W. TOMPKINS,
TRUSTEE,

Appellant,

vs.

FIRST UNION NATIONAL BANK,
et al.,

Appellees.
_____/

APPELLEES' ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Appellant, RAYMOND W. TOMPKINS, Trustee ("TOMPKINS") omits many facts important to this Court's determination of the issues presented to it on this appeal and also includes *"facts"* within his Initial Brief that are not in the record and therefore not properly before this Court. The history of this case, moreover, involves a situation where TOMPKINS filed *two* separate lawsuits, each of which was dismissed for lack of prosecution.

First Lawsuit Dismissed for Lack of Prosecution (1996-1998)

In 1996, TOMPKINS sued Appellees, FIRST UNION NATIONAL BANK OF FLORIDA and FIRST UNION BROKERAGE SERVICES (collectively "FIRST UNION") and additional Defendants consisting of Cecil T. Winters and Charles Bernardi, individually and as members of the last Board of Directors of Capital Trading of North America, Inc., a dissolved Florida corporation, (ROA 152-173), (the "First Lawsuit). The First Lawsuit arose from a transaction in which TOMPKINS invested the sum of $300,000.00 in a scheme proposed by Winters and Bernardi. Id. TOMPKINS sued FIRST UNION in the First Lawsuit for breach of an agreement pursuant to which securities and assets contained in the account of Defendant Winters were allegedly to be placed in another account for TOMPKINS' benefit. Id. TOMPKINS also sued FIRST UNION for negligence in connection with the transfer of assets in those accounts. Id.

FIRST UNION filed a Motion to Dismiss or for More Definite Statement alleging, among other things, that the cause of action for negligence was barred by the economic loss rule. (ROA, pp. 174-178). The trial court entered an Order dismissing the negligence count with prejudice on February 4, 1997. (ROA, pp. 179-180).

Approximately one year later, on February 5, 1998, TOMPKINS' attorney served an Amended Motion to Withdraw as Counsel (ROA, pp. 183-184), which the trial court granted by Order dated February 9, 1998. (ROA, pp. 185-186). After no record activity occurred in the action for a year after the filing of the Order Granting the Motion to Withdraw as Counsel, FIRST UNION filed a Motion to Dismiss for Failure to Prosecute (ROA, pp. 187-188) which the trial court granted on February 23, 1998. (ROA, pp. 189-190).[1]

Second Lawsuit Dismissed for Lack of Prosecution (1998-2001)

On or about June 16, 1998, TOMPKINS refiled an action against the same parties arising from the same transaction as in the previous lawsuit (the "Second Lawsuit"). (ROA, pp. 1-18). As had occurred in the First Lawsuit, TOMPKINS sued FIRST UNION for breach of contract and negligence. (ROA, pp. 11-18). He also alleged additional theories consisting of conversion, tortious interference with an advantageous business relationship, and breach of fiduciary duty. Id. FIRST

[1] As the Fifth District noted in its opinion, both Winters and Bernardi were served in the First Lawsuit, and a final judgment of $317,601.11 was entered against Winters. Tompkins v. First Union, 833 So.2d 199, 201 n. 1 (Fla. 5th DCA 2002).

UNION filed a Motion to Dismiss seeking sanctions against TOMPKINS for filing a cause of action duplicative of the cause of action for negligence that had been dismissed with prejudice in the First Lawsuit. (ROA, pp. 19-28, 29-37). The trial court entered an Order dismissing with prejudice the causes of action for negligence and conversion and dismissing without prejudice the causes of action for breach of contract, tortious interference with an advantageous business relationship, and breach of fiduciary duty. (ROA, pp. 38-39). After TOMPKINS filed an Amended Complaint, FIRST UNION filed on October 18, 1999 an Answer and Affirmative Defenses to the cause of action for breach of contract and a Motion to Dismiss the causes of action for tortious interference with an advantageous business relationship and breach of fiduciary duty. (ROA, pp. 48-53, 61).

During this time period, TOMPKINS sought an extension of time to serve Defendant Bernardi in connection with causes of action for fraud in the inducement, breach of contract and civil conspiracy to commit fraud in the inducement. (ROA, pp. 64-75; pp. 40-47). On or about October 6, 1999, TOMPKINS filed a Motion for Extension of Time to extend the 120-day limitation for service of process upon Defendant Bernardi by an additional 60 days. (ROA, pp. 43-47).

In his Motion for Extension of Time, TOMPKINS alleged that two of the Defendants, Cecil T. Winters and Capital Trading of North America, Inc., had

previously had default judgments entered against them prior to the First Lawsuit being dismissed for lack of prosecution. (ROA, pp. 43-44; 181-182). TOMPKINS alleged that it was not necessary to serve Winters and Capital Trading with process in the Second Lawsuit because of the default judgments that had been entered against them in the First Lawsuit. Id. TOMPKINS further alleged that he thought he had successfully served the remaining Defendant, Charles Bernardi, on or before September 1, 1999, but that the person who had been served contacted TOMPKINS and advised that he was not the same Charles Bernardi named in the Complaint. (ROA, p. 44). TOMPKINS alleged that he believed he now had a viable address for the correct Charles Bernardi and that he would attempt service as soon as the trial court granted an extension of time in which to do so. Id.

The trial court entered an Order Granting TOMPKINS' Motion for Additional Time to Effectuate Service of Process but providing to TOMPKINS only an additional 45 days within which to effectuate service of process instead of the 60 days requested by TOMPKINS. (ROA, pp. 62-63). That Order was entered on October 26, 1999. (Index to ROA; ROA, pp. 62-63).

On June 16, 2000, the trial court granted FIRST UNION's Motion to Dismiss addressed to the Amended Complaint. (ROA, pp. 111-112). TOMPKINS then filed a Second Amended Complaint dropping the count for tortious interference with an advantageous business relationship and amending the cause of action for breach of fiduciary duty. (ROA, pp. 64-110). On July 6, 2000, FIRST

UNION again filed a Motion to Dismiss seeking to dismiss the cause of action for breach of fiduciary duty. (ROA, pp. 113-119).

TOMPKINS' 45-day extension of time to serve process upon the remaining defendant Bernardi expired on December 9, 1999, but TOMPKINS neither served Bernardi nor sought an additional extension of time within which to do so. The next record activity in the case consisted of the filing of FIRST UNION's Motion to Dismiss Count V of the Second Amended Complaint on July 6, 2000. (ROA, pp. 113-119). Almost one year later, on March 21, 2001, TOMPKINS filed a Motion for Substitution of Counsel (ROA, pp. 119-121), which the trial court granted on April 5, 2001. (ROA, pp. 122-123). No further activity occurred in the case until July 12, 2001 when FIRST UNION filed a Motion to Dismiss for Failure to Prosecute alleging that the last pleading in the case (First Union's Motion to Dismiss) had been filed on July 6, 2000 and that the Second Lawsuit must be dismissed for failure to prosecute. (ROA, pp. 124-125).

TOMPKINS filed a "Verified" Response wherein his counsel asserted that although there was no "record activity" to prevent dismissal for lack of prosecution, good cause existed for not dismissing the case because of efforts by TOMPKINS to locate and serve Winters and Bernardi (the "Verified Response"). (ROA pp. 126-132). On its face, TOMPKINS' Verified Response was not properly verified, it consisted of conclusory allegations and it was based on hearsay. The Verified Response failed to demonstrate excusable conduct or an

occurrence that arose other than through negligence or inattention to pleading deadlines and also failed to demonstrate contact with opposing counsel as required by case law.

There exists no record support for the statement made by TOMPKINS in footnote 15 of his Initial Brief that "the key issue with regard to the case against FIRST UNION was determining what instructions had been given to FIRST UNION by Bernardi or Winters regarding the assigned investment account. These individuals needed to be located for this purpose." TOMPKINS made no reference to anything like this in the "Verified Response" filed with the trial court and improperly includes such reference on his appeal to this Court.

The trial court heard argument on FIRST UNION's July 12, 2001 Motion to Dismiss for Failure to Prosecute on August 16, 2001 (ROA, p. 133). The trial court entered an Order granting the Motion to Dismiss for Failure to Prosecute. (Index to ROA, p. 3; ROA, pp. 133-135). TOMPKINS filed a Motion for Rehearing (ROA, pp. 136-146) which the trial court denied. (ROA, pp. 147-148). TOMPKINS timely filed his Notice of Appeal on November 30, 2001.

SUMMARY OF ARGUMENTS

TOMPKINS waived the first and third issues on this appeal by failing to bring them before the trial court or the district court of appeal.

With respect to TOMPKINS' first issue on appeal, no duty should be placed upon a defendant to call up for hearing a pending motion to dismiss where, as in

this case, a prior lawsuit had already been dismissed once for lack of prosecution and the Second Lawsuit similarly had remained stagnant for another year. The case law cited by TOMPKINS with respect to this issue is distinguishable, and should not be relied upon by this Court to reverse the Fifth District Court of Appeal because the parties were not awaiting the trial court's ruling on a dispositive motion that had been set for hearing and considered by the trial court. TOMPKINS, furthermore, offered no reason to explain why his case against FIRST UNION could not go forward irrespective of the fact that he was trying to locate and serve another defendant in the action. TOMPKINS' interpretation of Rule 2.085, R.J.A., as requiring the court and defendant's attorney to have equal responsibility with the plaintiff to move the case forward would nullify the purposes and effect of Rule 1.420(e), Fla.R.Civ.P., as opposed to harmonizing the two rules. This is especially true in light of the burden of the workload of Florida's trial courts.

With respect to TOMPKINS' second issue on appeal, no basis exists for finding that a conflict exists or that the Fifth District failed to follow any principle of law enunciated by this Court in Metropolitan Dade County v. Hall, 784 So.2d 1087 (Fla. 2001). The Fifth District found that TOMPKINS' alleged non-record activity did not pass muster because it consisted of nothing more than "bare contentions" and did not support TOMPKINS' claim that the case against FIRST UNION could not proceed until they were found. This set of circumstances would

fail to pass muster not only under the criteria set forth in Hall but also the criteria set forth in Jain v. Green Clinic, 830 So.2d 836 (Fla. 2nd DCA 2002).

With respect to the third issue on appeal, the stated objective of Rule 1.420(e), Fla.R.Civ.P. is dismissal of an action for failure to prosecute. Thus, mere passive activity appearing of record that is not designed to prosecute an action does not fall within the ambit of the rule and courts have properly interpreted the rule and its preceding statute in such manner. The purpose of the rules of procedure is to expedite disposition of causes of action with justice to all parties, not just the plaintiff. A defendant has the right not to have cases that are dormant and have been dismissed previously for lack of prosecution hanging over them endlessly and should not be penalized for not doing something not legally required.

ARGUMENT

A. TOMPKINS waived his first and third issues on appeal

TOMPKINS waived his first and third issues on this appeal both before the trial court and the Fifth District and thus has improperly included them as issues in his appeal to this Court. The Fifth District's opinion reflects that TOMPKINS conceded that no record activity had occurred for one year and that the change of counsel pleadings appearing in the record in the year prior to the motion to dismiss for lack of prosecution being filed did not constitute sufficient record activity. Tompkins v. First Union, 833 So.2d 199 (Fla. 5th DCA 2002). See also, TOMPKINS' Verified Motion in Opposition to Motion to Dismiss for Lack of

Prosecution, (R.130), and Page 16 of TOMPKINS' Initial Brief filed with the Fifth District. (Appellant's Initial Brief at Appendix A).

TOMPKINS' sole argument on appeal to the Fifth District was that, although record activity did not exist, good cause to prevent the case from being dismissed existed because of TOMPKINS' non-record activity in seeking to locate Winters and Bernardi. Other than his second issue on appeal in this case regarding the proper standard of review, TOMPKINS did not raise before the Fifth District any of the issues he is now arguing to this Court. Thus, the only argument properly considered by this Court pertains to TOMPKINS' second issue on appeal concerning whether the standard of review applied by the Fifth District conflicts with Jain, supra, and Hall, supra.

B. The decision in *Dye v. Security Pacific Financial Services* is not applicable to the facts of the instant case because First Union's Motion to dismiss was not a dispositive motion.

TOMPKINS' reliance on Dye v. Security Pacific Financial Services, 828 So.2d 1089 (Fla. 1st DCA 2002) as a case in conflict with the instant case is misplaced. In Dye the pending motion to dismiss was a *dispositive* motion relating to the *only* parties involved in the case. In the instant case, as the Fifth District noted in its opinion, the motion to dismiss was *not* dispositive. 833 So.2d at 201. In his Second Amended Complaint, TOMPKINS sued FIRST UNION for breach of contract *and* breach of fiduciary duty. FIRST UNION filed an answer and affirmative defenses to the cause of action for breach of contract and a motion to

dismiss directed only to the count for breach of fiduciary duty. Therefore, FIRST UNION's pending motion to dismiss, even if addressed by the trial court on its own initiative as TOMPKINS argues it should have, would not have disposed of the case. In Dye, furthermore, there had been no prior case against the same parties dismissed by the trial court for failure to prosecute.

Even were the Court to accept TOMPKINS' argument that the pending Motion to Dismiss constituted an excuse under Dye not to be required to move the case forward, that excuse could only be used as an explanation for not moving the case forward with respect to Count V of the Second Amended Complaint for breach of fiduciary duty. FIRST UNION had filed an Answer and Affirmative Defenses to the cause of action for breach of contract contained in the Second Amended Complaint. Furthermore, TOMPKINS in his Verified Response asserted that his efforts to search for Bernardi and Winters prevented him from moving the case forward with record activity but, as pointed out by the Fifth District in its opinion, these efforts (even if they could serve as an excuse with respect to TOMPKINS' cause of action related to Bernardi) served as no excuse for TOMPKINS' failure to prosecute his causes of action against FIRST UNION.

The First District's decision in Dye, moreover, is not consistent with the precedent upon which the First District relied. In Lukowsky v. Hauser & Metsch, P.A., 677 So.2d 1383 (Fla. 3rd DCA 1996), the Third District reversed an order dismissing a complaint for failure to prosecute because the plaintiff was relying

upon "anticipated rulings by the court" on a pending motion for summary judgment which the parties had argued to the court. Id. at 1383. The court noted the establishment of a bright line rule which was "*whenever a dispositive motion is pending before the court, and the parties are awaiting the court's ruling on that motion*, the duty to proceed rests squarely upon the court. *During that period of the court's deliberation*, the cause cannot be dismissed for lack of record activity." Id. at 1384. (*emphasis supplied*) It is obvious that a hearing on the dispositive motion had occurred and the parties were awaiting a ruling, which was not the case in Dye and is not what happened in the instant case.

In Fuster-Escalona v. Wisotsky, 781 So.2d 1063 (Fla. 2000), another case relied upon in Dye, this Court ruled that a case could not be dismissed for failure to prosecute when a court has before it a motion to disqualify the judge. The Court held that "a motion to disqualify constitutes record activity regarding a claim of failure to prosecute," and that the trial court should have promptly ruled on such a motion in accordance with statutory requirements and the Florida Rules of Judicial Administration. Id. at 1066. Section 38.10 provides that when a party files an affidavit that he will not receive a fair trial because of prejudice of the judge, *the judge shall proceed no further*, but another judge shall be designated. Rule of Judicial Administration 2.160 provides that such motions "shall be ruled on *immediately*." (emphasis supplied) As noted by the court in Fuster, moreover, the trial court's failure to promptly dispose of the motion to disqualify in Fuster was

aggravated by its decision to grant the motion to dismiss for failure to prosecute while the motion to disqualify was still pending. Those facts differ substantially from the facts in Dye and from the facts of the instant case.

In Abaddon, Inc. v. Schindler, 826 So.2d 436 (Fla. 4th DCA 2002), which the appellate court in Dye also relied upon, the issue before the Fourth District was whether a motion to appoint a commissioner to take an out-of-state deposition filed *five months* before the motion to dismiss for lack of prosecution constituted affirmative record activity designed to move the case forward. The Fourth District rejected an argument that the motion needed to be scheduled for hearing in order to constitute record activity by stating that a litigant "should not be penalized for not doing something not legally required," citing Fuster; 781 So.2d at 439.

The Fifth District's decision in this case is fully consistent with the First District's holding in Lukowsky, this Court's ruling in Fuster, and with the Fourth District's decision in Abaddon. FIRST UNION's Motion to Dismiss Count V of the Second Amended Complaint was not dispositive and had not been set for hearing by either of the parties. Thus, the parties were not awaiting the trial court's ruling on a dispositive motion and no duty existed for the trial court to issue a ruling, even under the theory proposed in the Dye decision. There was no statute or rule imposing a duty upon the judge to rule immediately on the pending motion and to proceed no further in the case as existed in Fuster. Additionally, the issue in Abaddon was whether a motion had to be scheduled for hearing in order to

constitute record activity, an issue that is not present in the instant case. The motion to dismiss in this case did not constitute record activity as it had been filed more than one year prior to the motion to dismiss for lack of prosecution.

FIRST UNION was under no legal duty or obligation to call up its motion, especially in light of the prior dismissal of the First Lawsuit for lack of prosecution after a year of non-record activity. The trial court had already dismissed the Second Lawsuit twice based on FIRST UNION's Motions to Dismiss. The last "record activity" on the part of TOMPKINS in the Second Lawsuit occurred on June 9, 2000 when TOMPKINS filed his Second Amended Complaint. (ROA 64-110). TOMPKINS' 45-day extension of time to serve process upon the remaining defendant expired on December 9, 1999, but TOMPKINS neither served the remaining defendant nor sought an additional extension of time within which to do so. Then, almost one year later, TOMPKINS filed a Motion for Substitution of Counsel that the trial court granted on April 5, 2001. (ROA, pp. 119-123). This request for substitution of counsel and the granting of that request occurred almost one year after TOMPKINS' last record activity of filing the Second Amended Complaint on June 9, 2000. Between these events and dismissal of the First Lawsuit for lack of prosecution, FIRST UNION was justified in believing that TOMPKINS had no interest in pursing the Second Lawsuit as well. As was stated by the Third District in National Enterprises, Inc. v. Foodtech Hialeah, Inc., 777 So.2d at 1193 (Fla. 3rd DCA 2001), the obvious intent of Rule 1.420(e),

Fla.R.Civ.P., is to make litigants, *particularly plaintiffs*, more vigilant about hastening suits to their just conclusion. As Justice C.J. Wells stated in his dissent in Fuster, moreover, *". . . it is not only a person who files an action who has rights and interests affected by Florida Rule of Civil Procedure 1.420(e). Parties who are sued also have the right to be free of litigation which is dormant and only hanging over them like the proverbial 'black cloud'."* Fuster at 1067.

C. The decision in *Dye v. Security Pacific Financial Services* ignores this Court's prior concerns about the workload of Florida trial judges.

Article V, Section 9 of Florida's Constitution requires this Court each year to determine and certify the need for new judges in Florida's courts. A review of this Court's efforts over the past five years reveals the Court's application of an objective assessment in certifying the need for a significant number of new judges to handle the ever-increasing caseload throughout Florida, including new judges in the circuit from which this appeal arose. In Re: Certification of Need for Additional Judges, 863 So.2d 1191 (Fla. 2003); In Re: Certification of Need for Additional Judges, 842 So.2d 100 (Fla. 2003); In Re: Certification of Need for Additional Judges, 806 So.2d 446 (Fla. 2002); In Re: Certification of Need for Additional Judges, 780 So.2d 906 (Fla. 2001); In Re: Certification of Need for Additional Judges, 755 So.2d 79 (Fla. 2000); In Re: Certification of Need for Additional Judges, 728 So.2d 730 (Fla. 1999). In all of these certifications for new judges, this Court has noted an increase in the overall workload of Florida courts

arising from an assortment of reasons, including the increasing number of cases filed and the labor intensive nature of cases caused by changes in statutes, case law and court procedures. See 842 So. 2d at 104; 806 So. 2d at 451; 786 So. 2d at 909; 755 So. 2d at 83 and 728 So. 2d at 733, 734. Most recently, this Court noted that the workload of the trial courts in Florida "In many instances … is well beyond capacity" and that Florida's circuit courts handle thirty one percent (31%) more filings than the national average. Id. at 1195, 1197. Further, this Court has noted that "this workload demand, if left unaddressed, will jeopardize the Rule of Law" and it will result in delayed justice because it will "slow work down and affect the quality of the judges' work." 863 So. 2d at 1195. While acknowledging the benefits and efficiencies of "case managers" (who, based on the Court's description of duties would perhaps be able to implement the requirement the appellate court in Dye imposes) this Court also noted the elimination of court staff and full time equivalent positions for the State's trial courts. Id. at 192, 1197-1198.

Therefore, the requirements that TOMPKINS urges in his argument be placed upon trial courts are unrealistic and impractical. Such requirements would merely create the need to spend valuable judicial time and resources on cases in which the initiating party clearly lacks interest or initiative to pursue. Such requirements would also have a deleterious effect on trial courts' abilities to effectuate timely justice in this State. Florida's already overburdened judiciary

does not need more responsibility imposed upon it. The requirement set forth by the First District in Dye, moreover, is neither practical nor reasonable in light of the pressures and lack of staff resources faced by Florida's trial courts. The requirement in Dye will do nothing to further the ends of justice, and will instead afford the party who initiated litigation an excuse to avoid its responsibility to prosecute an action.

D. Florida Rule of Judicial Administration Rule 2.085 does not and should not nullify the obligations established by Florida Rule of Civil Procedure 1.420.

TOMPKINS urges that failure to adopt the position enunciated by the First District in Dye would cause any other interpretation of Rule 1.420(e) to be in conflict with Rule 2.085, Florida Rules of Judicial Administration, which requires courts to take control over the docket and requires *all* attorneys, not just plaintiffs, to move causes of action efficiently toward resolution. If this Court were to adopt that reasoning, there would exist no circumstances under which a motion to dismiss for lack of prosecution would be granted because the trial judge and defense counsel would always be required under TOMPKINS' interpretation of Rule 2.085 to monitor and control the pace of litigation and to prevent situations where any case could be dismissed for lack of prosecution. TOMPKINS' interpretation would not harmonize Rule 1.420(e) with Rule 2.085, but would result in supplanting Rule 1.420(e) because the trial court and defendant's counsel would be found to be non-compliant with Rule 2.085 if no record activity existed

within the year because they would have failed to "monitor and control the pace of litigation" and "to conclude litigation as reasonably possible" as required by Rule 2.085.

This Court has already recognized the differing purposes between the two rules by holding in Toney v. Freeman, 600 So.2d 1099 (Fla. 1992) and Moossun v. Orlando Regional Health Care, 826 So.2d 945 (Fla. 2002) that an order setting case management conference or ordering a status report from the parties does not constitute record activity under Rule 1.420(e). Therefore, a trial court's active role in controlling the litigation and its docket, and forcing the parties to address the case, does not replace the requirements imposed by the Rules of Civil Procedure in Rule 1.420(e).

TOMPKINS' interpretation of the alleged conflict between Florida Rule of Civil Procedure 1.420(e) and Florida Rule of Judicial Administration 2.085, and the effect of his interpretation, moreover, run contrary to sixty years of case law applying and interpreting Rule 1.420(e) governing dismissals for lack of prosecution as well as the statute that preceded the adoption of Rule 1.420(e). The purpose of Rule 1.420(e) and the statute that preceded it was to speed decisions of disputes by penalizing those who would allow their litigation to become stagnant or abandoned. See, e.g., Suddeth v. Wright, 55 So.2d 189, 190 (Fla. 1951); May v. Ervin, 96 So.2d 126 (Fla. 1957); Barnett Bank v. Fleming, 508 So.2d 718, 719 (Fla. 1987).

Application of TOMPKINS' interpretation would unfairly place defendants in the position of having to undertake a financial burden to aggressively move cases along when such activities should be the burden of the plaintiff as the party who has initiated the litigation and who has invoked the court's jurisdiction to resolve its dispute. A rule should not be construed as to require unnecessary expense to a litigant. Grace v. Grace, 162 So.2d 314 (Fla. 1st DCA 1967) (construing an appellate rule). The interpretation urged by TOMPKINS puts the trial court and defendants' counsel in the position of being "babysitters" to make sure that the plaintiff does not lose any of its rights by sitting on them or by letting a case become dormant. This is not the purpose of either Rule 1.442(e) or Rule 2.850. Application of such a requirement in the instant case would be particularly egregious in light of Plaintiff's first action having already been dismissed one time before entry of the order on appeal.

The Court should resolve the alleged conflict existing between the First District and the Fifth District by ruling that it is only where a hearing has occurred on a dispositive motion that is pending before the court and the parties are awaiting the court's ruling on that motion, that the duty to proceed rests with the court and that, during the period of the court's deliberation, the case cannot be dismissed for lack of record activity. It should not adopt the interpretation of the rule being urged by TOMPKINS where, as here, TOMPKINS' cause of action against FIRST UNION had already been dismissed once for recalcitrance and TOMPKINS again

failed to prosecute his cause of action in the Second Lawsuit. FIRST UNION was justified in believing that TOMPKINS had no interest in pursuing the Second Lawsuit. FIRST UNION was under no duty to call up for hearing a motion to dismiss that TOMPKINS left pending for over a year.

E. The Fifth District applied the proper standard of review in light of the deficiencies of Tompkins' Verified Petition and lack of contact by and between counsel.

This next point on appeal has to do with the second prong of the test for considering whether a case should be dismissed for lack of prosecution, i.e., when no record activity exists, the court examines whether "good cause" exists for not dismissing the case due to sufficient non-record activity serving to move the case toward resolution. TOMPKINS attempts to create an issue on appeal by claiming the Fifth District applied a test for determining whether good cause existed that was overruled by this court in Hall. This is not what occurred.

In making his argument, TOMPKINS claims that the "compelling reason" standard applied by the Fifth District in Levine v. Kaplan, and by the Second District in Smith v. DeLoach, 556 So.2d 786 (Fla. 2nd DCA 1990), improperly examines whether to dismiss a case for lack of prosecution by asking the question "can you prove to me that you were somehow prevented from taking record activity?" (Initial Brief, p. 18). TOMPKINS argues that in Hall, this Court disapproved of Levine and Smith, both of which had as their foundation the "compelling reason" standard and that after Hall, the question applied by the court

should instead be "can you demonstrate that you took non-record activity that was calculated to move the case toward a conclusion?" These matters are irrelevant to the Fifth District's holding.

The Fifth District held that TOMPKINS' description of non-record activity did not pass muster because (a) the description consisted of nothing more than "bare contentions" and (b) these "bare contentions" failed to support TOMPKINS' claim that the case against FIRST UNION could not proceed until Winters and Bernardi were served. 833 So.2d at 201. In rendering this holding, the Fifth District noted the record suggested that the suit against FIRST UNION could have been advanced in a number of ways. Id. The Fifth District did not ask, as asserted by TOMPKINS, "can you prove to me that you were somehow prevented from taking record activity". The court never got to that question because the purported activities claimed to constitute non-record activity by TOMPKINS constituted nothing more than "bare contentions." Id.

The Fifth District's findings, furthermore, clearly reflect that if it asked any question, it was the question TOMPKINS claims should have been asked after this Court's opinion in Hall, which is whether the plaintiff can demonstrate that it took non-record activity that was calculated to move the case toward a conclusion. TOMPKINS clearly failed to do so since his bare contentions failed to account for TOMPKINS' failure to proceed with his claim against FIRST UNION as required under the Rules of Civil Procedure.

As FIRST UNION argued to the Fifth District below, moreover, the "verified" "facts" allegedly constituting "good cause" in this case were neither properly "verified" nor sufficient to demonstrate good cause. Allegations in an objection to dismissal for lack of prosecution that are not verified or supported by affidavit are not sufficient to avoid dismissal under Rule 1.420(e). Devaughn Smith v. Buffalo's Original Wings and Rings II of Tallahassee, Inc., 765 So.2d 983, 984 (Fla. 1st DCA 2000); see, also, Edgecombe v. American Gen. Corp., 613 So.2d 123, 124-125 (Fla. 1st DCA 1993).

The verification provided by TOMPKINS' attorney was qualified "to the best of my knowledge" and, thus, was insufficient. Section 92.525(2), Florida Statutes, provides that in order to constitute proper *verification*, a written declaration that the facts "are true," or words to that effect, are required. See Muss v. Lennar, Florida Partners I, L.P., 673 So.2d 84 (Fla. 4th DCA 1996) (party's verified pleading insufficient because party swore that facts were "true to the best of his knowledge and belief" rather than "true."); Barton v. Circuit Court of the Nineteenth Judicial Circuit, 659 So.2d 1262, 1263 (Fla. 4th DCA 1995) (verification of name change petition stating information is true to the best of affiant's knowledge is insufficient because it is qualified).

Additionally, the "verified" response filed by TOMPKINS with the trial court asserted the following:

> 4. This case involves a lawsuit against two individuals (Winters and Bernardi), and their businesses under

> allegations that they took investments from the APPELLANT and misappropriated or otherwise lost substantial sums of money. FIRST UNION became a defendant because of certain actions alleged to have been taken by the FIRST UNION entities which assisted Winters and Bernardi in their scheme.
>
> 5. A central issue for APPELLANT in the case has been the unavailability to gain service upon or even locate Bernardi and Winters. This has two implications for the case. *First*, obtaining service on these individuals is an essential ingredient in moving the case forward to trial. *Secondly*, the location of these individuals is important to locate documentary exhibits and other records which may be important to APPELLANT's case.
>
> 6. During the year preceding FIRST UNION's Motion, the non-record activities in this case included numerous efforts by the APPELLANT to locate these men and/or their records. *This has included the hiring of investigators to conduct skip traces in different areas of Florida and phone calls and other investigatory efforts to locate and obtain information from individuals who may know of their whereabouts or have information about the business dealings in question.* Unfortunately, these efforts have not yet reached fruition. (emphasis supplied)

TOMPKINS' assertion in Paragraph 5 that obtaining service of process on defendants Winters and Bernardi was an essential ingredient to moving the case forward to trial (ROA, p. 129) was contradicted by the motion for extension of time filed by TOMPKINS to obtain additional time to serve process. (ROA, pp. 43-44). The motion reflected that TOMPKINS had already obtained entry of a default judgment against Winters prior to the First Lawsuit being dismissed for lack of prosecution. Id. Thus, TOMPKINS only asked for a 60-day period within

which to serve defendant *Bernardi.* (ROA, p. 44). Therefore, TOMPKINS' assertion in his verified response that difficulty in serving *Winters* also justified the lack of record activity and constituted good cause sufficient to withstand dismissal was inaccurate and inappropriate. As has been specifically ruled by the Third District in McPherson v. Scher Rental & Leasing Enterprises, Inc., 541 So.2d 1356, 1357 (Fla. 3rd DCA 1989), moreover, non-record activity consisting of efforts to serve *one* defendant is not sufficient to demonstrate error in the refusal of the trial court to reinstate an action dismissed for lack of prosecution.

With respect to the matters alleged in Paragraph 6 of his "verified" response, TOMPKINS did not identify specific activities undertaken to locate Winters and Bernardi and/or their records but merely alleged in conclusory fashion that his "numerous efforts" included the hiring of investigators to conduct skip traces in different areas of Florida, and phone calls and other investigatory efforts. No affidavit from any of the investigators detailing the activities constituting their efforts and investigation were included. TOMPKINS provided no dates, times, places or specific efforts. Indeed, TOMPKINS provided nothing more than a statement that investigators were "hired". TOMPKINS' Verified Response does not state that, other than hiring the investigators, any skip traces were indeed undertaken, it does not describe what phone calls were indeed placed, and it does not describe what "other investigatory efforts" were indeed made. In the face of

such bare and conclusory allegations, the Fifth District did not abuse its discretion in finding that good cause was not shown.

TOMPKINS contends in his Initial Brief that his investigative efforts constituted good cause because Winters and Bernardi were important witnesses; however, TOMPKINS' Verified Response asserts that location of both defendants was important, not because of their importance as *witnesses*, but because of the need to locate "documentary exhibits and other records which *may* be important to TOMPKINS' case" (emphasis supplied). Because the relative importance of locating the two defendants as *witnesses* was an argument that was not made to the trial court, it may not be presented for the first time on appeal. See, Van Gorder v. Blank (R) Construction Corp., 341 So.2d 1003, 1005 (Fla. 4th DCA 1977) (Rule 1.420(e) requires that the matters constituting "good cause" be made in writing at least five days before the hearing on the motion or they may not be considered).

With respect to the importance of locating these individuals because of exhibits and other records that "*may*" be important to TOMPKINS' case, TOMPKINS also had a duty to describe to the Court what these exhibits and records might consist of, why he was not able to obtain them from other sources, and in what way they were important to his case. The "Verified Response" consisted of conclusory statements without detail concerning efforts made to locate Winters and Bernardi, regardless of whether those "efforts" were for service of process or for their value as witnesses or the source of documents in the case.

The trial court had already provided an extension of time for TOMPKINS to serve Bernardi and it had shortened the 60-day extension sought by TOMPKINS to 45 days. No explanation was provided by TOMPKINS in his Verified Response as to why any time in addition to the original 45-day extension of time for service of process was needed to continue to try to serve Bernardi when he had previously represented to the Court that he believed he was in possession of a current address at the time of filing the Motion for Extension of Time. When a party has permitted a case to languish for one year with no activity of record, it is not unreasonable for the trial court to expect or require some level of detail in that party's affidavit or verified response beyond conclusory statements that the party has been "undertaking numerous efforts."

In Hall, furthermore, this Court addressed a line of cases considering whether discovery taken but not filed of record, or discovery scheduled but not taken during the one-year dismissal period, should constitute good cause to prevent the case from being dismissed. In considering its decision, this Court considered factors from an earlier case it had decided in De Duca v. Anthony, 587 So.2d 1306 (Fla. 1991) wherein the Court held that a discovery request filed of record should not constitute grounds to prevent dismissal where the discovery was undertaken primarily to avoid dismissal and was without any design to move the case forward to a conclusion on its merits. In considering the case before it in Hall, which involved a situation where depositions had been taken but not filed of record in the

one-year dismissal period, the Court considered the same factors from De Duca, i.e., whether the depositions had been taken in good faith with the design to move the case forward as "*components* in evaluating whether good cause exists". 784 So.2d at 1090.

Contrary to TOMPKINS' characterization, the Florida Supreme Court in Hall did not apply a new standard of good cause that would be applicable to this case, and the Court did not overrule Levine or Smith. The Court disapproved Levine and Smith only to the extent that they conflicted with its opinion in Hall, 784 So.2d at 1091. The Court did not overrule or overturn the test for "good cause" articulated by most of the district courts of appeal as requiring something more than mere inadvertence of counsel, and also requiring contact with opposing counsel. See, e.g., Dion v. Bald, 664 So.2d 348, 350 (Fla. 5th DCA 1999); Modellista De Europa v. Redpath Investment Corporation, 714 So.2d 1098, 1100 (Fla. 4th DCA 1998) rev. denied 728 So.2d 203 (Fla. 1998); National Enterprises, Inc. v. Foodtech Hialeah, Inc., 777 So.2d 1191, 1195 (Fla. 3rd DCA 2001); Edgecombe v. American Gen. Corp., 613 So.2d 123, (Fla. 1st DCA 1993). Indeed, the activities at issue before the court in Hall involved more than inadvertence and also involved contact with opposing counsel. In the instant case there is no dispute that there was no contact between counsel during the year preceding the order on appeal.

F. The District Court of Appeal's decision in the instant case does not in any way conflict with *Jain v. Green Clinic* in light of the deficiencies of Tompkins' Verified Petition and lack of contact by and between counsel.

In the instant case, TOMPKINS equates his non-record activities in attempting to locate Winters and Bernardi with the non-record activities in Jain. Thus, TOMPKINS argues that a conflict exists between the standard applied by the Second District in Jain and by the Fifth District in this case. TOMPKINS contends that the Fifth District distinguished Jain as having been decided on an issue of professionalism; however, the plaintiff's professionalism in Jain would not have saved him from the lack of record activity had the Second District not believed that the search for a missing witness was sufficient non-record activity to meet the good cause standard espoused by Hall and other cases.

Again, the Fifth District in this case did not rule that the search for a missing witness is not sufficient non-record activity. It ruled that TOMPKINS' Verified Response was deficient because it consisted of nothing more than "bare contentions" and failed to account for why no record activity was undertaken with respect to the case against FIRST UNION. Therefore, the instant case differs significantly both factually and procedurally from what occurred in Jain.

In the instant case, moreover, it is clear that there was no contact between counsel during the year preceding the filing of the motion to dismiss for lack of prosecution, and issues of courtesy and professionalism are not at issue. Four of the five district courts of appeal in Florida are uniform in holding that good cause

requires "some contact with the opposing party *and* some form of excusable conduct or occurrence which arose other than through negligence or inattention to pleading deadlines." (emphasis supplied) Dion v. Bald, 664 So.2d 348, 350 (Fla. 5th DCA 1999); Modellista De Europa v. Redpath Investment Corporation, 714 So.2d 1098, 1100 (Fla. 4th DCA 1998) rev. denied 728 So.2d 203 (Fla. 1998); National Enterprises, Inc. v. Foodtech Hialeah, Inc., 777 So.2d 1191, 1195 (Fla. 3rd DCA 2001); Edgecombe v. American Gen. Corp., 613 So.2d 123, (Fla. 1st DCA 1993). In the instant case there is no dispute that there was no contact between counsel during the year preceding the order on appeal.

In Jain, the trial court dismissed the case for lack of prosecution because the plaintiff failed to demonstrate contact with the defendants during the relevant one-year period. During the one-year period, Jain's attorney attempted to locate a witness believed to be important to the ultimate resolution of the case. The witness was finally tracked down on January 8, 2001, one day prior to the filing of the motion to dismiss for lack of prosecution.

When Jain's lawyer asked the witness to provide dates for his deposition, the witness replied that he would not do so until after he had conferred with the attorney for the defendant. Defense counsel advised the witness, however, that the witness should not speak with Jain's lawyer and that the witness should require a subpoena for deposition. On January 9, 2001, the same date on which the motion

to dismiss was filed, Jain's attorney contacted opposing counsel to seek available dates to depose the witness.

In reversing the trial court's ruling on appeal, the Second District found as persuasive the fact that it was only because Jain's lawyer had courteously contacted opposing counsel to coordinate calendars instead of immediately filing a notice of deposition that the one-year dismissal period under Rule 1.420(e) had continued to run. The court found that to avoid the possibility that an arbitrarily-chosen deposition date would later be determined to violate the discovery rules, Jain's lawyer contacted opposing counsel in advance, and that contact was made the same date on which the motion to dismiss was filed. Id. at 873. The facts in Jain are not in any way analogous to the facts of the instant case, and the Fifth District correctly acknowledged that it turned on a professionalism issue not present in this case. 833 So.2d at 199-201 n.3.

G. The plain wording of Rule 1.420(e) does not require reversal.

The stated objective of Rule 1.420(e), as indicated in its title, is dismissal of an action for "*failure to prosecute*". Thus, mere *passive* activity, not designed to *prosecute* an action, does not fall within the ambit of the rule, and courts have properly interpreted the rule as such.

Although there are some significant differences, Rule 1.420 in most respects derives from its federal counterpart, Federal Rule 41, which has not materially changed since its adoption in 1938. The federal rule first became Florida's 1950

Common Law Rule 35, and then 1954 Rule of Civil Procedure 1.35, before being adopted as Florida Rule of Civil Procedure 1.420. The provision for dismissal for failure to prosecute located in subdivision (e) of the Rule, however, came not from the federal rule, but from Section 45.19(1), Florida Statutes, which was in effect from October of 1947 until it was repealed in 1967. See, In Re: Florida Rules of Civil Procedure 1967 Revision, 187 So.2d 598, 624 (Fla. 1966) (committee note to adoption of Rule 1.420, referring to Federal Rule 41 and Section 45.19(1), Florida Statutes, which had governed dismissal for lack of prosecution and is addressed in the succeeding footnote and accompanying text); see, also, 30A West F.S. A at 98 (1985) (historical note); Chrysler Leasing Corp. v. Passacantilli, 259 So.2d 1, 3 (Fla. 1972). The Statute provided as follows:

> All actions at law or suits in equity pending in the several courts of the state, and instituted subsequent to 12:00 noon, October 1, 1947, in which there shall not affirmatively appear from some action taken by filing of pleadings, order of court, or otherwise, that the same is being prosecuted, for a period of one year, shall be deemed abated for want of prosecution and the same shall be dismissed by the court having jurisdiction of the cause, upon its own motion or upon motion of any person interested, whether a party to the action or suit or not, with no notice to opposing counsel, provided that actions or suits dismissed under the provisions hereof may be reinstated by petition upon good cause shown to the court filed by any party in interest within one month after such order of dismissal.

Section 45.19(1), Fla. Stat. Section (2) of the same statute was virtually identical to Section (1) but it addressed cases instituted prior to October 1, 1947, it provided a

three-year period for actions and it afforded the party six months after dismissal to seek reinstatement for good cause.

Section 45.19 was repealed in 1967 by Chapter 67-254, Laws of Florida and Rule 1.420 addressing dismissals was adopted because of the requirement at that time that all statutes concerning court procedure be codified as rules. Although Rule 1.420(e) superseded Section 45.19(1) and provided for a slightly different practice upon the presentation of a motion to dismiss for lack of prosecution, adoption of the rule and its subsequent amendment were not intended to change any of the decisions construing what constitutes lack of prosecution, and prior opinions of the courts remained persuasive as to the meaning of the terms employed. Dade County v. Moreno, 227 So.2d 548, 549 (Fla. 3rd DCA 1969). Chrysler Leasing Corporation v. Passacantilli, 259 So.2d 1 (Fla. 1972) citing LaCoe, Florida Pleading, Practice and Legal Forms Annotated, Volume 2, at 641 (2nd Edition 1971).

The purpose of the statute was to speed decision of disputes by penalizing those who would allow their litigation to become stagnant. Suddeth v. Wright, 55 So.2d 189, 190 (Fla. 1951); May v. Ervin, 96 So.2d 126, 127 (Fla. 1957) ("the statute is a declaration that the public policy requires the prompt dispatch of the court's business"). The 1968 amendment to Rule 1.420(e) eliminating a double hearing procedure associated with implementation of the rule similarly was not

designed or intended to change previous court decisions as to what constituted "prosecution." Whitney v. Whitney, 241 So.2d 436, 438 (Fla. 2nd DCA 1970).

This Court, as early as 1951, in construing the now-repealed statute that preceded Rule 1.420(e), held that changing counsel was not to be considered "activity" to constitute prosecution of a cause under the statute sufficient to prevent dismissal. Gulf Appliance Distributors, Inc. v. Long, 53 So.2d 706 (Fla. 1951). In doing so, the Court cited with approval Augusta Sugar Co. v. Haley, 163 La. 814, 112 So. 731 (La. 1927), wherein the Louisiana Supreme Court construed a similar statute and stated as follows: "We think that a step in the prosecution of a suit means something more than a mere passive effort to keep the suit on the docket of the court; *it means some active measure taken by plaintiff, intended and calculated to hasten the suit to judgment.*" (emphasis in the original). Gulf Appliance, 53 So.2d at 707. In the original Louisiana court opinion, the court explained that the purpose of its statute was "to put an end to the prevailing practice of filing suit to interrupt prescription and *then letting the suit hang perpetually over the head of the defendant unless he himself should force the issue; in other words, of putting on the defendant the burden of showing that plaintiff's claim was unfounded*." (emphasis supplied). Haley, 112 So.2d at 732.

This Court has consistently reiterated that purpose of Rule 1.420(e) in decisions from 1951 through the present. In Eastern Elevator v. Page, 263 So.2d 218, 220 (Fla. 1951), the Court stated as follows:

> *We are interested today in moving causes and expediting litigation in the proliferation of increasing lawsuits. The purpose of the rule is best served by recognizing and encouraging a sufficient prosecution 'action on the part of either party which is more than a mere passive effort' when it is an affirmative act directed toward the disposition of the cause.*

In Barnett Bank v. Fleming, 508 So.2d 718, 719 (Fla. 1987), this Court stated that "the purpose of Rule 1.420(e) is to encourage prompt and efficient prosecution of cases and to clear trial dockets of litigation that essentially has been abandoned . . . accordingly, the courts generally have defined 'record activity' as any act reflected in the court file that was designed to move the case forward toward a conclusion on the merits or to hasten the suit to judgment." See, also, Del Duca v. Anthony, 587 So.2d 1306 (Fla. 1991) (dismissal should be granted if the discovery has been undertaken primarily to avoid dismissal and is without any design to move the case forward to a conclusion on its merits); Metropolitan Dade County v. Hall, 784 So.2d 1087 (Fla. 2001) (whether activity was done in good faith and whether the activity was with any design to move the case forward, are components in evaluating whether good cause exists); Moossun v. Orlando Regional Health Care, 826 So.2d 945 (Fla. 2002) (trial court's order setting a case management conference did not constitute sufficient record activity to preclude dismissal for failure to prosecute).

This Court's precedent has similarly been applied by the district courts of appeal. See, e.g., St. Anne Airways Corp. v. Larotonda, 308 So.2d 129 (Fla. 3rd

DCA 1975) (the test is whether an act was intended to hasten the suit to judgment); Dashew v. Marks, 352 So.2d 554 (Fla. 3rd DCA 1977) (plaintiff erred in waiting for defense counsel to draft an order for the court following the court's verbal ruling on motions at a hearing, and court's delay did not excuse non-action; plaintiff must be diligent in its own right); Pierstorff v. Stroud, 454 So.2d 564 (Fla. 2nd DCA 1984) (addition of language "on the face of the record" did not alter the trial court's duty to act after a proper notice for trial was filed); Overseas Development, Inc. v. Amerifirst Federal Savings & Loan Association, 433 So.2d 587 (Fla. 3rd DCA 1983) (to prevent dismissal, the action must be a legal prerequisite to prosecution or must advance the matter toward resolution; record activity during the year which, in the opinion of the trial court, does not constitute adversarial action is insufficient to prevent dismissal for non-prosecution); Wimbley v. Jacksonville Moving & Storage Company, 624 So.2d 323 (Fla. 1st DCA 1993) (record activity must constitute an affirmative act calculated to move the suit toward judgment); Simmons v. Dakal Development Corp., 632 So.2d 717 (Fla. 2nd DCA 1994) (the action necessary to avoid dismissal must be an affirmative act moving the case toward disposition, not passive effort).

Additionally, this Court's long-standing holding that a motion and order approving substitution of counsel is not to be considered "activity" to constitute prosecution of the case sufficient to prevent dismissal in Gulf Appliance, has been confirmed by the district courts of appeal. See, e.g., Nesbitt v. Community Health

of South Dade, Inc., 566 So.2d 1 (Fla. 3rd DCA 1990); (notices of withdrawal and substitution of counsel are a passive and insufficient record activity to avoid dismissal); Philips v. Marshall Berwick Chevrolet, Inc., 467 So.2d 1068 (Fla. 4th DCA 1985) (passive activity, such as name change or substitution of counsel, is not sufficient activity to avoid dismissal).

In Toney v. Freeman, 600 So.2d 1099 (Fla. 1992), this Court addressed a conflict between the Fourth District and Second District concerning what constitutes record activity. The defendants filed an answer to the complaint on November 3, 1998, which constituted the only record activity until February 9, 1990, when the trial court entered an order requiring the parties to advise the court why the case had exceeded established time standards, why the case had not been noticed for trial, and when discovery would be complete. A few weeks later, on March 6, 1990, the court gave the parties notice of its motion to dismiss for lack of prosecution. The court dismissed the action and, on appeal, the district court reversed, holding that the trial court's status order and the defendant's response constituted sufficient record activity to prevent dismissal of the case. This Court reversed the district court of appeal's decision, noting that record activity must be more than a mere passive effort to keep the case on the docket; the activity must constitute an affirmative act calculated to hasten the suit to judgment. 600 So.2d at 1100. The Court stated that:

> We also find this reasoning to be consistent with the spirit and purpose of the rule. *Trial judges should be*

> *encouraged to take an active role in keeping themselves informed of the cases assigned to them. We refuse to construe appropriate case management activities in such a way as to give the parties leave to ignore the case for another year before dismissal is possible. Such a construction would thwart the purpose of case management and the purpose of the rule itself - to encourage prompt and efficient prosecution of cases and to clear court dockets of cases that have essentially been abandoned.* (emphasis added)

Id. The plaintiff in Toney argued that the status order and response constituted record activity because the order asked counsel to respond to questions designed to advance the case towards resolution and because the defendant's response indicating that the plaintiff had died further advanced the case. This Court found that the status order was designed to obtain information about the progress of the case; it did not move the case forward in the sense of a progression towards resolution.

Finally, TOMPKINS cites only two cases in support of the sweeping statement he makes on Pages 21 and 22 of his Initial Brief that "the case law interpreting Florida Rule of Civil Procedure 1.420(e) has been widely criticized." The cases consist of a discussion in the specially concurring opinion of Judge Schwartz in National Enterprises v. Foodtech of Hialeah, 777 So.2d 1191 (Fla. 3rd DCA 2001) and the dissent of Judge Griffin in Levine v. Kaplan, 687 So.2d 863 (Fla. 5th DCA 1997) and Nichols v. Lohr, 776 So.2d 366 (Fla. 5th DCA 2001). The statements of two judges do not constitute "wide criticism."

Judge Schwartz in National Enterprises, furthermore, agreed with the result in the majority opinion that dismissed the case for lack of prosecution where two notices of hearing that were legal nullities (because they were directed to a motion already disposed of by the trial court) were found not to constitute sufficient record activity to prevent dismissal. In Levine, the question was whether a deposition that had been taken during the year preceding dismissal but was not filed with the court constituted record activity. And in Nichols, an amended notice of deposition was filed during the one-year dismissal period, but it was filed in the wrong case. None of those circumstances are applicable to the instant case. It must be noted, moreover, that despite her concerns with Rule 1.420(e) in these dissents, Judge Griffin authored the opinion that is before this Court, and wrote that ". . . this seems the rare case where Rule 1.420(e) should be and has been applied according to its express terms. 833 So.2d at 201.

CONCLUSION

For the foregoing reasons, the Fifth District's decision raises no conflict with the decisions of the First District, the Second District or this Court as argued by TOMPKINS. This case involves different facts and procedural issues not encountered in Dye, Jain, or Hall. The ruling in Dye also imposes a requirement on trial courts that are already overburdened. The Fifth District's holding, moreover, was limited to TOMPKINS' failure to provide an adequate "verified response." TOMPKINS' excuse for there not being record activity consisted

nothing more than bare contentions that did not support any reason showing why his case against FIRST UNION could not have been advanced during the one-year period. The Court also noted in its opinion that the record suggested the case against FIRST UNION could have been advanced in several ways during the one-year time period. TOMPKINS' argument for interpretation of Rule 2.850 would render Rule 1.420(e) a nullity and should not be adopted. This Court should adhere to its long-standing jurisprudence requiring that record activity actively advance the case towards resolution in order to be considered adequate record activity to prevent a case from being dismissed for lack of prosecution.

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to **SCOTT D. CLARK, ESQUIRE**, Scott D. Clark, P.A., 655 W. Morse Boulevard, Suite 212, Winter Park, Florida 32789, this _____ day of September, 2004.

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