IN THE SUPREME COURT OF THE STATE OF FLORIDA

RAYMOND W. TOMPKINS, TRUSTEE

Appellant

v.

FIRST UNION NATIONAL BANK, et. al.

Appellees

CASE NO. SC03-58
APPEAL FROM THE FIFTH DISTRICT COURT OF APPEAL
(CASE NO. 5D01-3624)
(NINTH CIRCUIT CASE No. CI99-CI-0959)

INITIAL BRIEF OF APPELLANT ON THE MERITS

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STATEMENT OF THE CASE AND OF FACTS

Raymond W. Tompkins, Trustee, the Appellant, will be referred to as "Plaintiff," "Tompkins" or "Appellant" for purposes of this Brief. The Appellees, First Union National Bank and First Union Brokerage Services, Inc., will be collectively referred to as "Defendant," "First Union" or "Appellee."

References to the Record refer to the Record of activity at the trial level as the same was transmitted to the Fifth District Court of Appeal.

This is an appeal from the opinion of the Fifth District declining to overturn the trial court's dismissal of Appellant's action under FLA. R. CIV. P. 1.420(e). As discussed below, Appellant contends that the Fifth District's decision conflicts with the decisions of other District Courts of Appeal and of this Court.

A brief discussion of the facts is helpful to this Court's review.

Tompkins became involved with Cecil T. Winters ("Winters"), Charles Bernardi ("Bernardi") and Capital Trading of North America, Inc. in certain investment opportunities in the 1990's. Tompkins was given certain assurances as to the security of his investments, but later became alarmed when it appeared that some of these assurances might not be true. When Tompkins pressed Winters and Bernardi as to his investment, they agreed to set up an escrow account with First Union, in which Tompkins would be given access to the funds or securities on deposit therein.

However, First Union failed to follow written instructions or otherwise hindered Tompkins in his efforts to obtain control over this account.[1]

The underlying action was filed against Winters, Bernardi, their dissolved corporation, and First Union, seeking damages under several theories. First Union was duly served with process, and the parties engaged in vigorous battles over the pleadings.

At the same time, Plaintiff found himself unable to perfect service of process over Bernardi and Winters. A default judgment had been obtained against Winters in an earlier action[2] and service was not critical as to him. However, Plaintiff was unable to locate and serve Bernardi. Plaintiff filed a Motion for Extension of Time to effect such service[3] and argued that it had located and served an individual by the same name who later appeared not to be the same Bernardi. The Motion reflected that Plaintiff was continuing in good faith to locate Bernardi and effect service.[4] An order was entered granting additional time for service on October 26, 1999.[5]

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[1]See Record, Vol. 1, pages 64-70.

[2]Record, Vol. 1, page 134, ¶4.

[3]Record, Vol. 1, page 43.

[4]Record, Vol. 1, page 44, ¶8.

[5]Record, Vol. 1, page 62.

After this Order, Plaintiff filed a Second Amended Complaint on June 9, 2000.[6] Defendant filed a Motion to Dismiss the Second Amended Complaint on July 7, 2000.[7] The Motion was not set for hearing by Defendant.

On March 21, 2001, Plaintiff's prior counsel filed a Motion seeking to withdraw from the case and substituting Counsel,[8] which Motion was granted by Order of the Trial Court on April 6, 2001.[9] Both of these pleadings are apparent on the face of the Record.

On July 12, 2001, one year and five days after filing its Motion to Dismiss Second Amended Complaint, Defendant served its Motion to Dismiss for Failure to Prosecute.[10] Notwithstanding the Motion and Order which were entered into the record in March and April of 2001, the Motion to Dismiss for Failure to Prosecute relied on certain precedent[11] to the effect that, contrary to the plain language of FLA.

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[6]Record, Vol. 1, page 64.

[7]Record, Vol. 1, page 113.

[8]Record, Vol. 1, page 119.

[9]Record, Vol 1, page 122.

[10]Record, Vol. 1, page 124.

[11]Appellee cited Boeing Co. v. Merchant, 397 So.2d 399 (Fla. 5th DCA 1981) and Dion v. Bald, 664 So.2d 348 (Fla. 5th DCA 1995).

R. CIV. P. 1.420(e)[12], the Motion and Order regarding substitution of counsel did not constitute record activity for purposes of the motion to dismiss.

Plaintiff filed a Verified Response to the Motion to Dismiss for Failure to Prosecute.[13] The Response asserted that the location and service of Bernardi and Winters were a critical and essential ingredients of Plaintiff's case[14] and that the location of these individuals was important to locate documents and other records important to Plaintiff's case.[15] The Response further asserted that, during the one-year

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[12] 1.420(e) provides:

> "(e) Failure to Prosecute. All actions in which it appears on the face of the record that no activity by filing of pleadings, order of court, or otherwise has occurred for a period of 1 year shall be dismissed by the court on its own motion or on the motion of any interested person, whether a party to the action or not, after reasonable notice to the parties, unless a stipulation staying the action is approved by the court or a stay order has been filed or a party shows good cause in writing at least 5 days before the hearing on the motion why the action should remain pending. Mere inaction for a period of less than 1 year shall not be sufficient cause for dismissal for failure to prosecute."

[13]Record, Vol. 1, page 126.

[14]Record, Vol 1, page 129, ¶5. The Appellee had already filed an affirmative defense complaining of the absence of Bernardi and Winters' attorney as an indispensable party (Record, Vol. 1, page 59, ¶55), and would have certainly been expected to do the same if Appellant had sought to drop Bernardi.

[15]Id. 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.

period immediately preceding the filing of Defendant's Motion to Dismiss for Failure to Prosecute, Plaintiff had engaged in non-record activity including the hiring of investigators in different areas of Florida, phone calls and other investigatory efforts to locate these individuals.[16] This Response was not challenged at the Trial Court level as being inaccurate and was not met by any contravening evidence. As such, it was the only evidence before the Trial Court as to the issue of the good faith non-record activity of the Appellant.

After a hearing on August 16, 2001, the Trial Court entered its Final Order of Dismissal for Failure to Prosecute.[17] The Order focused on the Plaintiff's failure to serve Bernardi and Winters, and the fact that additional extensions of time were not obtained for serving them. Based on this, the Order found that good cause did not exist as to Plaintiff's non-record activity.[18] A Motion for Rehearing[19] was denied by the Trial Court,[20] after which Plaintiff appealed to the Fifth District.

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[16]Record, Vol 1, page 129, ¶6.

[17]Record, Vol 1. Page 133.

[18]Id. at page 134, ¶¶3,4.

[19]Record, Vol 1, Page 136.

[20]Record, Vol. 1, Page 147.

The Fifth District affirmed the Trial Court.[21] Like the Trial Court, the Fifth District focused on the lack of service of process as being an inadequate reason to avoid dismissal. Although the allegations of the Response were the only evidence before the Trial Court on the issue, the Fifth District dismissed them as being an "excuse" and containing "bare assertions." Finally, the Fifth District found that the standard which was to have been applied to Appellant's assertions was that of whether they rose to the level of a "compelling reason which prevented or excused the prosecuting party from actively pursuing the case in court."[22]

From that decision, Appellant sought, and was granted, review by this Court.

The applicable standard of review is abuse of discretion, as to the second argument. Arguments one and three can be determined by a review of applicable law.

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[21]Tompkins v. First Union Nat. Bank, 833 So.2d 199 (Fla. 5th DCA 2002).

[22]Id., 833 So. 2d at 202. For this proposition, the Fifth District cited its own decision in Weaver v. The Center for Business, 578 So.2d 427 (Fla. 5th DCA 1991), which relied upon American Eastern Corp., v. Henry Blanton, Inc., 382 So.2d 863 (Fla. 2d DCA 1980). American Eastern required a high standard such as estoppel or calamity to show good cause associated with nonrecord activity.

SUMMARY OF ARGUMENTS

A. THE DECISION BELOW CONFLICTS WITH DYE V. SECURITY PACIFIC FINANCIAL SERVICES, 828 SO.2D 1089 (FLA. 1ST DCA 2002) AND IS CONTRARY TO FLA. R. JUD. ADMIN. 2.085.

In Dye, like the instant case, a motion to dismiss the complaint was pending before the trial court at the time of the dismissal for failure to prosecute. Dye held that the pendency of the motion precluded dismissal. The Fifth District's decision in the instant case is in direct conflict with Dye. Dye is consistent with the decision of this Court in Fuster-Escalona v. Wisotsky, 781 So.2d 1063 (Fla. 2000) and requires reversal in the instant case.

The Dye opinion resolves one of the criticisms of Rule 1.420(e) by not rewarding defendants when they bear part of the responsibility for cases not moving forward. It also resolves a conflict between Rule 1.420(e) and Florida Rules of Judicial Administration 2.085, which requires all attorneys, not just plaintiffs' attorneys to move cases forward. Since Rule 2.085 supercedes any conflicting rules, the rule of Dye is a necessary and logical extension of case law under Rule 1.420(e).

B. THE DECISION BELOW CONFLICTS WITH JAIN V. GREEN CLINIC, 830 SO.2D 836 (FLA. 2d DCA, 2002) AND, BY EXTENSION, WITH METROPOLITAN DADE COUNTY V. HALL, 784 SO.2D 1087 (FLA. 2001) BECAUSE IT USES A STANDARD OF REVIEW WHICH IS NO LONGER APPLICABLE.

The Court in Jain found that efforts to locate a missing witness similar to those in the instant case constituted good cause for nonrecord activity to defeat dismissal. In distinguishing Jain, the Court below failed to apply the appropriate tests set forth in the opinions of this Court. The Fifth District decided the instant case on a standard that requires a "compelling reason," which has been defined as some calamity, estoppel, or misconduct, to find good cause. This Court's decision in Hall should be interpreted (and was interpreted in Jain) to lower the standard of review for non-record activity.

The Fifth District's application of the compelling reason standard relies on case law which is no longer good law, since this Court overruled cases applying the "compelling reason" standard when it decided Hall.

C. THE PLAIN WORDING OF FLA. R. CIV. P. 1.420(E) WOULD HAVE FOUND RECORD ACTIVITY TO HAVE EXISTED AND SHOULD HAVE BEEN APPLIED TO PREVENT DISMISSAL.

This Court's language in Hall suggests that record activity should be found to exist whenever a review of the face of the record discloses pleadings or orders of the

court which constitute record activity. This idea runs contrary to years of case law which have spawned confusing and inconsistent decisions about what constitutes record activity. Accordingly, the Second District has certified two cases to this Court asking it to determine whether, after Hall, record activity can be interpreted according to its plain meaning. Such an interpretation would require reversal in the instant case.

A proper construction of Rule 1.420(e) applies a rule of strict scrutiny, since the rule infringes upon access to the courts, an important common law and constitutional right. Nevertheless, this rule of strict scrutiny has not always been applied to applications of the Rule. Strict scrutiny requires that the Courts read the language of the Rule in accordance with its plain and common meaning. If this Court intends certain record activity not to constitute record activity for purposes of the Rule, it must do so explicitly, rather than through judicial interpretation.

ARGUMENT

A. THE DECISION BELOW CONFLICTS WITH DYE V. SECURITY PACIFIC FINANCIAL SERVICES, 828 SO.2D 1089 (FLA. 1ST DCA 2002) AND IS CONTRARY TO FLA. R. JUD. ADMIN. 2.085.

One of the criticisms of FLA. R. CIV. P. 1.420(e)[23] is that, while being adopted to "secure the just, speedy and inexpensive determination of every action"[24] it sometimes does the opposite. It has been noted that the Rule sometimes has an opposite effect from that intended when defendants merely wait to see if the one-year time period will pass rather than prosecuting a defense.[25] It is a fact of modern litigation that defendants are equally guilty many times for the lengthy process by filing repetitive motions to dismiss or otherwise resisting the progress of the case. The Rule, as applied in case law, has been criticized as being extremely harsh on plaintiffs while other portions of the Rules of Civil Procedure are lenient on the defendant who is not diligent.[26]

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[23]The writer will sometimes refer to this as the "Rule" in order to avoid repetitive citation where it is clear what rule is being referred to.

[24]FLA. R. CIV. P. 1.010.

[25]*The Misinterpretation of the Dismissal for Failure to Prosecute Rule*, 75 FLA. B. J. 16 (October, 2001) at page 22.

[26]Id.

In the instant case, the Appellant filed a second amended complaint on June 9, 2000. Appellee filed a motion to dismiss that complaint on July 7, 2000. Rather than set that motion for a hearing, Appellee sat idle until July 12, 2001, filed a motion to dismiss for failure to prosecute and then set that motion for a hearing.

In Dye, the Defendant similarly filed a motion to dismiss the Plaintiff's complaint, failed to set the motion for hearing, and then moved to dismiss for failure to prosecute after one year had elapsed. The Dye Court found that the duty to proceed on the motion to dismiss rested with the trial court, and that it was improper to dismiss the case while the motion to dismiss the complaint was pending. Thus the complaint was reinstated.

In reaching its decision, the Dye Court relied upon this Court's decision in Fuster-Escalona v. Wisotsky, 781 So.2d 1063 (Fla. 2000). In Fuster-Escalona, this Court held that, while a motion to recuse the trial judge was pending, the trial court improperly dismissed the action for failure to prosecute, even though the party having moved for the recusal had never called its motion up for hearing. The Plaintiff in Fuster-Escalona was an inmate who had filed a malpractice action and been at the wrong end of a dismissal with prejudice. The Plaintiff filed a motion for rehearing, then filed a motion to recuse the trial judge, and then did nothing for a year. The Fourth District upheld the trial court's decision of dismissal for failure to prosecute

on the basis that Plaintiff had done nothing to call its own motion for hearing. This Court reversed that decision, finding that it was up to the trial court to call up the motion for hearing and properly dispose of it.

Although the opinion in Fuster-Escalona dealt with a specific rule regarding recusal of judges, the concurring opinion of Justice Harding also dealt with the broader question of docket management:

> "Trial judges have a duty to periodically review their dockets and bring up matters which the attorneys have not set for hearing. Moreover, my experience as a trial judge has convinced me that it is the judge's, not the attorneys', responsibility to ensure that cases move through the system appropriately . . . . ***No motion should be left unheard for a year***." 781 So.2d at 1066. (Emphasis added).

While the Dye Court noted that the decision in Fuster-Escalona involved an interpretation of FLA. STAT. §38.10, it declined to limit the decision of this Court to that circumstance. That decision was based on two factors. First, it noted that the language of this Court's opinion in Fuster-Escalona was more broad than the application of a single statute.[27] Second, the Dye Court noted that the Fourth District had followed Fuster-Escalona and applied it to a pending motion to appoint a

[27]"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." Fuster-Escalona, 781 So.2d at 1065.

commissioner to take an out-of-state deposition, even though that motion had not been called up for hearing.[28] Thus, Dye found that this Court's language in Fuster-Escalona was more encompassing that the particular statute before it. The instant case and Dye raise a more compelling argument than Abaddon and Fuster-Escalona because they involve the failure of a defendant, the party seeking dismissal for non-prosecution, to call up its own motion, as opposed to the failure of a plaintiff to call up a motion. Dye takes this Court's decision in Fuster-Escalona to its logical extension by declining to reward the defendant who does not call up his own motion to dismiss.

The decision of the Fifth District below is directly in conflict with the decision in Dye, and by extension is in conflict with the decision of the Fourth District in Abaddon and with this Court's decision in Fuster-Escalona. It is also arguably in conflict with Lukowsky v. Hauser & Metsch, P.A., 677 So.2d 1383 (Fla. 3d DCA 1996), which this Court quoted with favor in Fuster-Escalona to establish the rule[29] upon which the Dye Court relied. Thus, the decision below is not only in direct conflict with Dye, but creates an arguable conflict with the Third and Fourth District Courts and this Court.

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[28]Abaddon, Inc. v. Schindler, 826 So.2d 436 (Fla. 4th DCA 2002). This Court declined to review Abaddon: Schindler v. Abaddon, Inc., 851 So.2d 729.

[29]See Note 2, supra..

FLA. R. CIV. P. 1.420(e) has been widely criticized both because of court interpretations which contradict the express language of the rule, and because its application in some instances encourages rather than discourages delay. The Dye Court deals with one of these issues by placing more responsibility on the trial court to take action on undisposed motions and by refusing to reward a defendant who purposely delays setting his own motion for hearing so that he can have the trial court later punish the plaintiff for not setting that motion for hearing. The Dye holding is not only consistent with Fuster-Escalona, but is in accord with Rule 2.085 of the Rules of Judicial Administration.[30] Any other interpretation of Rule 1.420(e) is in conflict with Rule 2.085, which requires courts to take control over the docket and requires all attorneys, not just plaintiffs, to move causes of action efficiently toward resolution. An interpretation of Rule 1.420(e) that punishes plaintiffs for lack of record activity, while rewarding a defendant who sits on his own motion, is contrary to Rule 2.085. Since FLA. R. JUD. ADMIN. 2.010 provides, in part, that "these rules shall supersede all conflicting rules and statutes," the Dye Court took the only action which properly reconciles these two Rules and does not violate Rule 2.085.

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[30]See, *The Misinterpretation of the Dismissal for Failure to Prosecute Rule*, 75 FLA. B. J. 16 (October, 2001). The author therein suggests that FLA. R. JUD. ADM. 2.085 should supercede FLA. R. CIV. P. 1.420(e) in a case like the instant case, where a pending motion remains unresolved for more than a year. This interpretation is consistent with Dye.

This Court should reverse the Fifth District, approving of Dye and upholding its decision in Fuster-Escalona.

B. THE DECISION BELOW CONFLICTS WITH JAIN V. GREEN CLINIC, 830 SO.2D 836 (FLA. 2d DCA, 2002) AND, BY EXTENSION, WITH METROPOLITAN DADE COUNTY V. HALL, 784 SO.2D 1087 (FLA. 2001) BECAUSE IT USES A STANDARD OF REVIEW WHICH IS NO LONGER APPLICABLE.

The Fifth District's opinion is in conflict with Jain v. Green Clinic, 830 So.2d 836 (Fla. 2d DCA 2002). In Jain, relying on this Court's decision in Metropolitan Dade County v. Hall, 784 So.2d 1087 (Fla. 2001), the Second District found that efforts of the plaintiff in finding essential witnesses were the type of good cause which, after Hall, should be sufficient to avoid dismissal, even where those efforts did not result in record activity within the relevant time period. The Fifth District failed to be persuaded by Jain, perhaps in part because the Jain decision had not become final at the time of the opinion below.[31] It also distinguished Jain as having been decided "on an issue of professionalism."[32] This distinction sidesteps the holding in Jain. Notwithstanding the Jain plaintiff's admirable show of professionalism, that professionalism would not have saved him from the lack of record activity if the

[31]See footnote 3 of the opinion.

[32]Id. This was based on counsel's decision to contact opposing counsel instead of just setting a deposition and sending a notice.

Second District had not believed that the search for a missing witness was sufficient nonrecord activity to meet the good cause standard espoused by Hall and other cases. This Court has held that the proper exercise of judicial discretion requires similar outcomes under similar fact situations.[33] In rejecting Jain, Appellant also believes that the Fifth District applied the wrong standard of review. The opinion below held that the conduct of the Appellant in searching for essential witnesses failed to establish a "compelling reason" to avoid dismissal.[34] Appellant submits that the "compelling reason" standard is not the proper test for nonrecord activity after Hall.

The decision below, in holding that the appropriate standard of review for non-record activity is the "compelling reason" test, cites the case of Weaver v. The Center for Business, 578 So.2d 427 (Fla. 5th DCA 1991). Weaver was a case Appellant relied upon before the Trial Court and the Fifth District. In Weaver, the Fifth District held that the plaintiff's non-record activity in seeking an essential witness was sufficient cause to avoid dismissal. Notwithstanding the attempt of the opinion below to distinguish it, Appellant maintains that the facts of the instant case are remarkably similar to it. Weaver held that the test of non-record activity was whether it presented a compelling reason to avoid dismissal. In support of this, Weaver cited American

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[33]Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980).

[34]This language is found in the last paragraph of the opinion.

Eastern Corporation v. Henry Blanton, Inc., 382 So.2d 863 (Fla. 2d DCA 1980). Analyzing a then relatively new Fla. R. Civ. P. 1.420(e), the American Eastern Court found that the standard for good cause from non-record activity "must be set high" and gave as examples a showing of estoppel or some type of calamity.[35] This standard was further adopted by the Fifth District in Levine v. Kaplan.[36] Levine noted that a motion to quash a notice of deposition was not to be considered a record activity and then went on to set out a standard of "compelling reason" to uphold a non-record activity. The opinion notes that a compelling reason might include a calamity or wrongful activity of another party or attorney which prevented prosecution of the case.[37]

The American Eastern "compelling reason" standard was also the basis of the ruling in Smith v. DeLoach, 556 So.2d 786 (Fla. 2d DCA 1990), which held that the taking and filing of depositions was a nonrecord activity that did not prevent the plaintiff from otherwise moving the case forward.

Thus, the focus of Levine and Smith, in addition to finding certain discovery-related activities as being non-record, was the belief that non-record activity was not

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[35]382 So.2d at 865.

[36]687 So.2d 863 (Fla. 5th DCA 1997).

[37]Id. at page 865.

sufficient cause to avoid dismissal absent a calamity, an estoppel, misconduct of an adverse party or some other circumstance in which it would not be possible to proceed with the prosecution of the action.

In Hall, this Court disapproved of Levine and Smith, both of which had as their foundation the "compelling reason" standard of American Eastern.[38] The Hall decision adopted a different standard for non-record activity where that activity is made in good faith and calculated to move the case to conclusion. This represents a fundamental shift from the analysis called for in these earlier cases. The standard in Levine, Smith and American Eastern posed the question, "Can you prove to me that you were somehow prevented from taking record activity?" If the answer was no, then the quality of the non-record activity did not matter. In Hall, the question can be stated as, "Can you demonstrate that you took non-record activity that was calculated to move the case toward a conclusion?"

The Jain Court extended this principle to the search for a witness who was "believed to be important to the ultimate resolution of the case." In light of Hall's holding that a deposition taken in good faith moved a case toward conclusion, it was logical to extend this principle to the search for an essential witness so that the deposition could be taken. The Court found that this met the test espoused in Hall.

[38]Hall, 784 So.2d at 1091.

Had Jain been decided under the "compelling reason" standard, the search for the missing witness would have been inadequate to avoid dismissal, because there was no evidence that the plaintiff was unable to otherwise take some type of record activity within the year.

The "compelling reason" test fails to meet the goals and objectives espoused in FLA. R. CIV. P. 1.010. Under the "compelling reason" standard, the focus is not on finding the missing element that moves the case forward, but on generating some type of meaningless activity which meets the record activity test, even if it does not move the case forward. Such a standard encourages the slow, expensive and unjust determination of litigation rather than the converse.

A review of the opinion of the Fifth District below shows that the instant case was clearly decided on the "compelling reason" standard of Levine, Smith and American Eastern, both in name and in result. In upholding the dismissal, the Fifth District stated that it failed to "find the existence of a compelling reason which prevented or excused the prosecuting party from actively pursuing the case in court."[39] The District Court also found that, "the record suggests that the suit against First Union could have been advanced in a variety of ways."[40] In fact, the record contains

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[39]833 So.2d at 202.

[40]833 So.2d at 201.

only the Response of Plaintiff in which it asserted that the location of the missing witness and the documents he possessed were essential to the progress of the case. This assertion is not materially different from those found acceptable in Weaver and Jain, and, under Weaver, the District Court was bound to accept the uncontested evidence that was before the trial court.

The problem is that the District Court then asked the wrong question. To the question, "Can you prove you were prevented from prosecuting the case?," the District Court answered no, because it believed that some record activity could have been taken. Applying this standard, non-record activity will almost never be acceptable in the Fifth District because a litigant almost always could have filed something of record. The question is, do judges want litigants creating paperwork which buys another year of delay, or do they want them to take the actions needed to move cases along?

In deciding Hall, this Court relied upon Del Duca v. Anthony, 587 So.2d 1306 (Fla. 1991). In Del Duca, this Court had the task of determining the standard to use in finding a good faith effort to advance the litigation in question. In doing so, it rejected a test which "seems to give the trial judge considerable discretion to subjectively determine the quality of an attorney's efforts to litigate his or her client's

case."[41] The Del Duca Court found that discovery activity outside the record should avoid dismissal unless it was made in bad faith and without any design to move the case forward. The Court noted that the discovery in question included the search for "important witnesses."

This qualitative analysis is precisely the mistake that the Fifth District made in the opinion below. By rejecting as a "bare assertion" the sworn statement of the Appellant's efforts and need to locate missing witnesses, even in the face of a record which lacked any assertion to the contrary, the Fifth District qualitatively rejected the types of good faith efforts which were found sufficient in Jain. This type of qualitative review has been criticized.[42] This criticism is valid because this Court has held that the proper exercise of judicial discretion requires that similar cases be decided the same. Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980).

It is clear from a review of the opinion below that the District Court applied the wrong legal standard. Appellant submits that the "compelling reason" standard has no vitality after Hall and does not correctly apply the law concerning FLA. R. CIV. P. 1.420(e). This Court should reverse the opinion below and should overrule

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[41]Del Duca v. Anthony, 587 So.2d 1306, 1309 (Fla. 1991).

[42]Anthony v. Schmitt, 557 So.2d 656 (Fla. 2d DCA 1990), which was approved in Del Duca.

American Eastern.[43]

This Court once said that "The dismissal of a suit is a drastic remedy which should be ordered only under the most compelling of circumstances."[44] American Eastern and the cases decided after it have turned this principle on its ear, so that a plaintiff under Rule 1.420(e) is required to show a compelling circumstance for *not* dismissing the case. Hall took the right step in changing this contradiction, and this Court further advanced that step by declining to review Jain.[45] This Court should now reverse the decision below and clarify the standard for review of non-record activity.

C. THE PLAIN WORDING OF FLA. R. CIV. P. 1420(E) WOULD HAVE FOUND RECORD ACTIVITY TO HAVE EXISTED AND SHOULD HAVE BEEN APPLIED TO PREVENT DISMISSAL.

The case law interpreting Fla. R. Civ. P. 1.420(e) has been widely criticized.[46] The criticism results from the fact that the plain language of the Rule is not followed.

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[43]Though not yet expressly overruled, a search of the Westlaw "Keycites" for American Eastern shows a number of caution flags attaching to the cases that cited or followed it, Smith and Levine being only two of them.

[44]Houston v. Caldwell, 359 So.2d 858 (Fla. 1978).

[45]29 Fla. L. Weekly S204 (Fla. April 29, 2004).

[46]See National Enterprises v. Foodtech Hialeah, 777 So.2d 1191 (Fla. 3d DCA 2001) (Schwartz, CJ specially concurring); Levine v. Kaplan, 687 So.2d 863 (Fla. 5th DCA 1997) (Griffin, J. dissenting); See also *The Misinterpretation of the Dismissal for Failure to Prosecute Rule*, Fla. Bar J., October, 2001 at page 16.

If the Rule were followed according to its plain language, this appeal would not be happening, because there appears on the record below "activity by filing of pleadings, order of court or otherwise."[47] However, notwithstanding the plain language of the Rule, a number of types of pleadings or orders are not really pleadings or orders for purposes of the Rule. Thus, case management orders,[48] orders regarding substitution of counsel[49] and motions regarding mediation[50] may not be considered in spite of the plain wording of the Rule.

In the wake of Hall, two cases from the Second District have certified to this Court as questions of great public importance whether record activities which have previously been treated by FLA. R. CIV. P. 1.420(e) as not creating record activity should now be treated differently. In Wilson v. Salamon, 864 So. 2d 1172 (Fla. 2d DCA 2003) the Second District held that a court order permitting a foreign attorney to appear as counsel did not constitute record activity. The Second District suggested that the holding in Hall and certain language in Hall may have intended to change

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[47]FLA. R. CIV. P. 1.420(e) and see Record, Vol. 1, page 119, 122.

[48]Moossun v. Orlando Regional Health Care, 760 So.2d 193 (Fla. 5th DCA 2000).

[49]Touron v. Metropolitan Dade County, 690 So.2d 649 (Fla. 3d DCA 1997).

[50]Heinz v. Watson, 615 So.2d 750 (Fla. 5th DCA 1993).

existing case law on this issue, but felt bound by that case law absent a more specific pronouncement. In Moransais v. Jordan, 870 So.2d 177 (Fla. 2d DCA 2004), the Second District extended this same inquiry to motions and orders regarding substitution of counsel. The instant case would not have been dismissed if such matters constitute record activity. The relevant language in Hall stated:

> "There is either activity on the face of the record or there is not. If a party shows that there is no activity on the face of the record, then the burden moves to the non-moving party to demonstrate within the five-day time requirement that one of the three bases that would preclude dismissal exists. The factors from Del Duca,[51] whether any 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. We also note that when there is record activity occurring during the preceding year, such as a notice for trial which has not been acted on by the trial court, good cause always exists." Hall, 784 So.2d 1087, 1090.

This language in Hall was applied by the Fourth District in Abaddon, Inc. v. Schindler, 826 So. 2d 436 (Fla. 4th DCA 2002), in which the Court held that the plaintiff's motion to appoint an out-of-state commissioner to take a deposition was sufficient activity to avoid dismissal, and noted that under Hall the question was answered by a simple review of the record.

This Court should take the opportunity offered by Salamon and Moransais to clarify that "record activity" should be defined in accordance with the plain language

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[51]Del Duca v. Anthony, 587 So.2d 1306 (Fla. 1991)

of the Rule rather than the patchwork of interpretations and rulings, which, over decades, has resulted in the Rule not meaning what it clearly states.

This Court noted recently in Tortura & Company, Inc. v. Williams, 754 So.2d 671, 677-78 (Fla. 2000) that:

> "[A]ll too often rules and technicalities consume the very substance for which our system of justice exists. Rules just seem to spawn more rules to coordinate the original and subsequent rules .... [courts should have] a greater latitude to deal with cases ... where technical defenses become the centerpieces of the litigation and the merits are obscured, if not totally overshadowed. As our courts have consistently admonished, that is not the purpose of the rules of civil procedure (citation omitted) as they have been contemplated by this Court and other appellate courts."

Such wandering from the plain language of the Rule is curious, in light of the concept that rules of procedure which are in derogation of a previously existing right must be strictly construed. In Crump v. Gold House Restaurants, 96 So.2d 215 (Fla. 1957), this Court held that the "two dismissal rule" codified in Fla. R. Civ. P. 1.420(a)[52] must be strictly construed since it contravened the right of access to the courts. The same logic would apply to FLA. R. CIV. P. 1.420(e). In practice, however, the rule of strict construction has hardly ever been applied to FLA. R. CIV. P. 1.420(e). Under a rule of strict construction, a court order regarding substitution of counsel, along with a myriad of other court orders which have been held not to

[52]The Court analyzed its predecessor, FLA. R. CIV. P. 1.35(a).

constitute record activity, should be plainly defined as record activity under the Rule. There is nothing ambiguous about the term "order of the court," nor does the Rule contain any qualifying language which makes some pleadings or orders different from others.

Thus, in decisions which construe the Rule, and particularly those which ignore its plain language, the courts must follow a rule of strict construction which favors access to the courts and the decision of cases on the merits. This Court must also be guided by the mandate of FLA. R. CIV. P. 1.010 that, "These rules shall be construed to secure the just, speedy and inexpensive determination of every action." This means that, "if a rule needs interpretation, the stated objective is the guide."[53] It further means that "each rule shall be applied with that objective in mind, especially where the court may exercise a judicial discretion."[54]

Does the application of the Rule and its myriad interpretations accomplish any of these objectives in the instant case?

The Supreme Court has held in applying procedural rules of dismissal that form should not be elevated over substance when it violates "the policy of allowing cases

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[53]See FLA. R. CIV. P. 1.010, "Author's comment"

[54]Id.

to be decided on the merits whenever possible."[55] If the policy of the Rule is to encourage prosecution of cases, and the Appellant was taking the actions most immediately necessary to prove his case (and there is no evidence in the record to contravene this), then the lower Court's application of the Rule does not promote a "just" result, does not result in a speedy determination and does not yield inexpensive litigation, since it requires the filing of paperwork which may have nothing to do with the key issues in the case .

Prior to Hall, the application of the Rule became a harsh remedy akin to a statute of limitations, rather than a case management tool designed to weed out cases which had been abandoned.

The petitioner in Wilson v. Salamon[56] has suggested that this Court's language in Hall effectively set aside its ruling in Gulf Appliance Distributors v. Long, 53 So.2d 706 (Fla. 1951) (holding that an order substituting counsel *by a defendant* was a passive activity that had nothing to do with *a plaintiff's* pursuing its case.) That petitioner also notes that Gulf Appliance was decided on a different statute and that the current rule is substantially different. The text and committee notes associated with the current Rule showed no intent to disregard any form of record activity and in fact

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[55]Torrey v. Leesburg Regional Medical Center, 769 So.2d 1040, (Fla. 2000).

[56]Case No. SC04-140 before this Court.

prevented dismissal when there was record activity.[57] Accordingly, the language in Hall which is cited above represents a correct statement of the law which should be applied, since there is no basis in the Rule for ignoring record activity, and since a departure from its plain language does not comport with the strict scrutiny required by Crump.

It is clear that this Court should apply Rule 1.420(e) according to its plain meaning, should reverse the opinion below in the instant case, and should reverse the holdings in Salamon and Moransais. In the event that the Court wants to define certain record activities as being inadequate to avoid a dismissal, the Rule should be amended to clearly so state.

[57]This discussion can be found in Petitioner's Initial Brief on the Merits, Case No. SC04-140, starting at page 24. Appellant joins this Petitioner in arguing for an interpretation of Fla. R. Civ. P. 1.420(e) in accordance with its plain wording.

CONCLUSION

This Court should overturn the Fifth District's opinion below because of its express conflict with Dye v. Security Pacific Financial Services, 828 So.2d 1089 (Fla. 1st DCA 2002) and because of the conflict among four District Courts which have dealt with the issue of the unheard motion and its effect on dismissal for failure to prosecute.

Further, this Court should find conflict with Jain v. Green Clinic, 830 So.2d 836 (Fla. 2d DCA 2002), which further creates confusion about the proper application of this Court's holding in Metropolitan Dade County v. Hall, 784 So.2d 1087 (Fla. 2001) and other opinions of this Court. In so holding, the Court should declare that the "compelling reason" standard of review for non-record activity has been replaced by the analysis set forth in Hall and Del Duca.

Lastly, this Court should hold that, after Hall, record activity consisting of pleadings and court orders should be defined according to the plain wording of FLA. R. CIV. P. 1.420(e), and it should reverse the District Court holdings in the instant case, Salamon and Moransais.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Matthew G. Brenner, Esq. and Janet M. Courtney, Esq., P.O. Box 2809, Orlando, Florida 32802, by U.S. Mail, this 29th day of June, 2004.

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