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)

REPLY BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND OF FACTS

The Statement of the Case proffered by Appellee contains a legal inaccuracy when it describes the case. Appellee states that "The history of this case ... involves ... *two* separate lawsuits."[1] Although it makes an appealing argument, this statement is not procedurally or substantively correct. The error would not be worth commenting on except for the fact that, in several sections of the Answer Brief, Appellee argues the point, as if to suggest that a different standard applies to the instant case since an earlier case was dismissed.[2]

In fact, the instant case – the case that was decided by the Trial Court and Fifth District and is represented by the Record– has nothing to do with the prior litigation. Its "history" begins when the Complaint was filed in 1998 and ends when this appeal and any subsequent remand are completed.

It is clear that a dismissal for failure to prosecute is "without prejudice" and does not determine any matter with regard to the merits of the case.[3] The action or inaction of Appellant in a prior case, in which it obtained a judgment against another

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[1]Answer Brief, Page 1.

[2]Argument that the Court should consider the "First Litigation" as a factor appears on pages 10, 13 (twice), 18 (twice) and 19.

[3]Fantasy & Faux, Inc. v. Webb, 834 So.2d 338 (Fla. 5th DCA 2003).

party and declined to proceed after the withdrawal of counsel[4] has no legal effect in the instant case. Despite this, Appellee argues extensively that the prior dismissal controls and alters the legal theories that might otherwise prevail in the instant case.[5] This argument is legally incorrect. The "First Litigation" is a legal nullity for purposes of the instant case, and any argument that it should have a bearing on the Court's decision is improper.

ARGUMENT

A. THE FIRST AND THIRD ISSUES ON APPEAL ARE NOT WAIVED.

Appellee initially argues that two issues raised in the Initial Brief were waived by not being raised below. The first issue relates to Dye v. Security Pacific Financial Services, 828 So.2d 1089 (Fla. 1st DCA 2002), which barred dismissal of an action while a motion to dismiss was pending. The third issue is based on the notion that, after Metropolitan Dade County v. Hall, 784 So.2d 1087 (Fla. 2001), courts should follow the plain wording of Rule 1.420(e) in matters relating to pleadings or orders which address the admission of foreign counsel or the substitution of counsel. These issues have become relevant because of the opinions in Wilson v. Salamon,

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[4]These facts are taken from Appellee's Answer Brief, on page 2.

[5]See the citations at footnote 2.

864 So. 2d 1172 (Fla. 2d DCA 2003), and Moransais v. Jordan, 870 So.2d 177 (Fla. 2d DCA 2004), both of which are presently being reviewed by this Court. All of these opinions were rendered after filing of the briefs with the Fifth District in the instant case. Appellant is entitled to argue the issues raised by these cases under the well recognized rule that a matter on appeal is to be decided on the decisional law in effect at the time of the appeal. The concepts in these opinions are fair game to Appellant, even if they were not available for citation before the Fifth District. Further, these opinions relate to issues discussed before the Fifth District.

It is well established that, where there is a change in the law, the law in effect at the time of its decision is to be applied by the appellate court. Cantor v. Davis, 489 So.2d 18 (Fla. 1986); Florida Patient's Compensation Fund v. Stetina, 474 So.2d 783 (Fla. 1985). This is true even if the issue was not raised before the trial court. Christiani v. Popovich, 363 So.2d 2 (Fla. 1st DCA 1978).

Since this action was filed, the Fifth District has disagreed with the First District's decision in Dye[6], making the issue ripe for determination of which view of the law is correct. If the Court believes Dye is correct, then the law of Dye is required to be applied to this Appeal.

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[6]Sewall Masonry Company v. DCC Construction, Inc., 862 So.2d 893 (Fla. 5th DCA 2003).

In a similar fashion, after the Fifth District's opinion in the instant case, the Second District in Salamon and Moransais suggested that this Court's language in Hall may require a change in the law, including the law in the Fifth District, as to whether a motion and order regarding change of counsel constitute record activity. Again, if this Court determines that such a motion does constitute record activity, Appellant is entitled to have the instant case decided on that basis.

In addition to these concepts, Appellant argues that it adequately raised before the Fifth District the issues addressed in these cases. In argument C. of the Initial Brief, starting at page 21, Appellant argued extensively that the cases which interpreted Rule 1.420(e) to ignore its plain language (as in its application to motions and orders for change of counsel), or interpreted it so as to reward a defendant who files a motion to dismiss and does not call it for hearing, were contrary to the rules of construction which govern interpretation of Rule 1.420(e).

Any language in the opinion below to the effect that the parties "conceded" the absence of record activity related only to the reality that the law prevailing in the Fifth District at the time it heard the case[7] required treatment of certain record activity as

[7]Dion v. Bald, 664 So.2d 348 (Fla. 5th DCA 1995).

non-record activity. To the extent that this Court determines that such law has been changed by its decision in Hall, this appeal will be governed by that determination.

B. THERE IS NO MEANINGFUL DISTINCTION BETWEEN THE INSTANT CASE AND DYE WHICH PRECLUDES ITS APPLICATION.

Appellee's attempts to distinguish Dye v. Security Pacific Financial Services, 828 So.2d 1089 (Fla. 1st DCA 2002) from the instant case are not persuasive.

Appellee attempts a procedural distinction which is not apparent from the face of the opinion in Dye. Appellee says that Dye does not control because the motion to dismiss in the instant case involved less than all counts of the complaint, while the motion in Dye involved all of the counts. There is nothing in the Dye opinion that gives support to this statement. While Dye refers to the motion as being a "dispositive motion" there is no support for the distinction Appellee attempts to draw.

A "dispositive motion" has been described as including "motions for summary judgment, for judgment on the pleadings and to dismiss." *See* Air Line Pilots Association v. Schneemilch, 674 So.2d 782, 783 at footnote 1. Under this definition, the motion to dismiss pending before the Trial Court in the instant case is a dispositive motion. Moreover, the use of the term "dispositive motion" must be considered in light of this Court's holding in Fuster-Escalona v. Wisotsky, 781 So.2d 1063 (Fla. 2000), in which the argument that a motion seeking to disqualify a judge was not a

"dispositive motion" was found not to control the question of dismissal. Nevertheless, the motion in the instant case would meet the Air Line Pilots definition of "dispositive motion."

Appellee suggests that, because Appellant could have taken some record action on the count of the complaint which had been allowed to stand, the Court should distinguish the instant case from Dye. This is also not a meaningful distinction in light of Fuster-Escalona. The desire to disqualify a judge certainly did not prevent the plaintiff there from taking discovery or performing some other actions in the case. That distinction was not determinative in Fuster-Escalona, nor should it be in the instant case.

At this point in its argument, Appellee then attempts to insert the issue of the "First Litigation" as another distinction which permitted Appellee to sit idly without calling its motion to dismiss up for hearing. As discussed above, this distinction is of no legal consequence, and the prior dismissal without prejudice cannot have any bearing on this Court's determination of the instant case.

Quigley v. Johnson, 707 So.2d 895 (Fla. 2nd DCA 1998) is another case which is instructive in this regard. In Quigley, a complaint was met with two motions to strike and seven motions to dismiss. The trial court granted a motion to strike, which required the filing of an amended complaint and effectively mooted the other motions.

The plaintiff filed a verification of the complaint, which addressed the issue which led to the motion to strike. After that, fifteen months passed in which no further pleadings were filed and neither party sought to schedule a further hearing or obtain the trial court's ruling on the remaining motions. The defendant filed a motion to dismiss for failure to prosecute, which the trial court granted. This dismissal was reversed on appeal, because the duty to resolve the pending motions was found to rest with the court. As the Appellee argues in the instant case, one could certainly criticize the plaintiff and find some record action which could have been taken in fifteen months to avoid a dismissal. However, the pending motions made a dismissal improper.

A more compelling case is made when the delay in having the motion to dismiss resolved is accompanied by the need to obtain additional discovery, which may be useful to address the issues or deficiencies which give rise to the motion to dismiss. This was an ingredient in Air Line Pilots Association v. Schneemilch, 674 So.2d 782 (Fla. 3rd DCA 1996). This situation is not unlike the instant case, where it was uncontradicted before the trial court that Appellant needed to locate missing witnesses and obtain discovery from them.

C. THE PROPOSED APPLICATION OF DYE AND THE INSTANT CASE HAS NO BEARING ON ISSUES OF WORKLOAD OF TRIAL JUDGES.

D. THE PROPOSED APPLICATION OF DYE AND OF THE INSTANT CASE APPROPRIATELY HARMONIZES THE APPLICATION OF RULE 1.420(E) AND RULE 2.085 WITHOUT NULLIFYING EITHER RULE.

The Appellee next points out that there are serious issues of judicial workload that should be considered by this Court. Certainly, this is a concern for the Court, as evidenced by the citation in the Answer Brief. However, the effect of the rule in Dye and in the instant case has nothing to do with workload concerns.

As stated by Chief Judge Schwartz in National Enterprises, Inc. v. Foodtech Hialeah, Inc., 777 So.2d 1191 (Fla. 3rd DCA 2001):

> "Personally, I cannot see that the mere existence of even completely dormant open files has any effect on judicial workload or harms anyone in any other meaningful way. I believe therefore that the object of reducing their numbers by means such as Rule 1.420(e) (and Rule 1.070[j]) cannot justify the dismissal of cases plaintiffs wish to maintain, on grounds unrelated either to their merits, to prejudice sustained by the defendants, or indeed to any cognizable judicial concern . . . . What is worse, the perceived desirability of 'getting rid' of cases that 'shouldn't be there' tends to place the courts on the side of one party, the defendant, whose interests alone are served by dismissals, and against the other, the plaintiff, who is only disserved by them." Foodtech, 777 So.2d 1191, 1195 (C.J. Schwartz, specially concurring)(Footnote 7).

The holding in Dye and the position advanced by Appellant in the instant case do not require any affirmative act on the part of the trial court. On the other hand, it

does not prevent the trial court from managing its own docket, through appropriate means, and dismissing cases which have been abandoned.

What this position would do, however, is to prevent a defendant, who himself violates the dictates of Rule 2.085 by sitting on its own motion, from being rewarded for that action.

Appellee argues that this rule would effectively do away with Rule 1.420(e). This is simply not the case. A plaintiff could still be subject to dismissal where there is no pending motion, or where he fails to call his own motion up for hearing. There are any number of circumstances in which Rule 1.420(e) could still apply. However, this Court should not allow the defendant to use it as a weapon where he is a participant in the delay. To do so would allow the defendant to violate Rule 2.085 while punishing the plaintiff for violating Rule 1.420(e). This is exactly the kind of miscarriage of justice that Chief Judge Schwartz was concerned about in Foodtech.

Appellee complains that this interpretation will require defendant's counsel to become a case "babysitter" and to incur expense monitoring the case. This is exactly the opposite of what really happens in cases like this. In fact, Appellee already volunteered to incur the expense and trouble of monitoring the case. Appellee obviously took enough concern to carefully docket and monitor the dismissal period

and to file the appropriate motion on almost the first day it was available. The rule of Dye, then, does not require the defendant to do something he is not already doing. Rather, the rule takes away the incentive for the defendant to spend his focus on lying in wait. That only encourages him to delay his defensive actions in the case, instead of using the same energies to try and dispose of the case on the merits. The Dye rule actually will have the effect of encouraging cases to be actively litigated on the merits rather than being disposed of procedurally.

E. APPELLEE'S ANSWER BRIEF DOES NOTHING TO REBUT THE ARGUMENT THAT THE FIFTH DISTRICT APPLIED THE WRONG STANDARD, BUT INSTEAD ARGUES MATTERS WHICH WERE NOT ARGUED OR PRESERVED BELOW.

In response to the Appellant's second point on appeal, Appellee does not argue that the "compelling reason" standard found in cases such as Levine v. Kaplan, 687 So.2d 863 (Fla. 5th DCA 1997) and Smith v. DeLoach, 556 So.2d 786 (Fla. 2nd DCA 1990) is inconsistent with this Court's ruling in Metropolitan Dade County v. Hall, 784 So.2d 1087 (Fla. 2001). Appellee does not even take issue with the clear language in the Fifth District's opinion in the instant case indicating that the "compelling reason" standard was the one used. Instead, remarkably, Appellee argues that the instant case

turned on defects in the Verified Response filed by Appellant in the trial court and in the trial court's determination that there was no contact between the parties.

Unfortunately for the Appellee, these arguments cannot prevail, because they were not presented to the trial court, in the case of the alleged weaknesses in the Verified Response, or were not supported by a proffer of any evidence, in the case of the contact issue.

In the instant case, the motion to dismiss for failure to prosecute was filed by Appellee and set for hearing. As required by Rule 1.420(e) a Verified Response was filed by Appellant's attorney[8], detailing the difficulty with locating two individuals in order to serve them and obtain evidence they had which would be important to the case.

Appellee does not argue that the search for a missing witness is inadequate to establish good cause to avoid dismissal for failure to prosecute under Hall. Instead, Appellee argues evidentiary issues not raised at the trial court and attempts to parse words instead of the substance of the Verified Response.

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[8]This type of response was consistent with the type of response accepted as true in Weaver v. The Center for Business, 578 So.2d 427 (Fla. 5th DCA 1991).

The first attack relates to the verification of the Verified Response. It asserts that the existence of qualifying words rendered the verification improper. However, the Record reveals that this argument was first made on appeal, and there was no objection interposed to the Verified Response before the trial court. This omission is fatal to Appellee's argument.

In Vining v. Martyn, 858 So.2d 365 (Fla. 3rd DCA 2003), a writ of garnishment was filed by a judgment creditor and was accompanied by an affidavit intended to negate a claim of exemption to the garnishment. On appeal, the judgment debtor argued that the oath on the affidavit opposing the exemption was insufficient. The Third District ruled that this issue was improperly raised on appeal, where there was no record that the issue had been argued before the trial court. This is exactly the situation in the instant case. No argument can be heard that the Verified Response was improper.

The next series of arguments advanced by the Appellee relates to the sufficiency of the Verified Response. Appellee argues that the Fifth District did not accept it as sufficient evidence of nonrecord activity. A closer review of the opinion demonstrates that the Fifth District required evidence of some reason that Appellant was prevented from proceeding with other portions of the case, not whether the nonrecord activity

was sufficient. Appellee's argument about the Verified Response parses words and argues that the Response should have said Appellant was looking for "witnesses" instead of "documents." It further criticizes the level of detail and suggests that other items, such as statements from investigators[9], should have been filed. All of this discussion ignores a fundamental fact: these issues and arguments were not made before the trial court. No evidence of any type was submitted by Appellee at the trial court to contest the assertions of the Verified Response. The statements contained therein constitute the only evidence before the trial court as to the good cause for delay in prosecuting the case.

In this light, since it was the only evidence before the trial court as to good cause, and because it was uncontroverted there, the trial court should have accepted the assertions of the Verified Response as true, and should have found them to demonstrate good cause under the controlling precedent of Weaver. Even a minimal, but sufficient, assertion of good cause which is not attacked before the trial court as insufficient should be adequate to avoid dismissal for failure to prosecute. Warner & Swasey Co. v. Insurance Co. of North America, 292 So.2d 45 (Fla. 2nd DCA 1974). *See also*, Air Line Pilots Association v. Schneemilch, 674 So.2d 782 (Fla. 3rd DCA

[9]Although such items were not required in the Weaver decision.

1996) (sworn testimony that nonrecord activity to complete discovery which was uncontradicted at the trial court was sufficient to avoid dismissal).

F. THE FIFTH DISTRICT OPINION CONFLICTS WITH JAIN V. GREEN CLINIC; THERE WAS NO EVIDENCE NOR DID THE TRIAL COURT DETERMINE THAT NO CONTACT OCCURRED.

There is little difference between the arguments in Sections E and F of the Answer Brief. Section F does little to distinguish Jain other than to repeat arguments as to the sufficiency of the Verified Response. However, Appellee also asserts that "it is clear" or "there is no dispute" that there was no contact between counsel to the extent that such contact may have been required. This argument also fails because no evidence was proffered at trial by Appellee on this issue. Neither the trial court's decision nor the Fifth District's opinion is based on the lack of content. This, combined with the utter lack of record evidence on the issue, is again fatal to Appellee's efforts to argue this point on appeal.

G. RULE 1.420(E) SHOULD BE APPLIED ACCORDING TO ITS PLAIN LANGUAGE.

Appellant will not further belabor this issue. Appellee's response to the third argument in the Initial Brief is a random discussion of historical cases on the failure to

prosecute rule. The discussion is not at all responsive to the points raised in the Initial Brief.

CONCLUSION

This Court should take the opportunity presented by Dye and the instant case to harmonize the consistent goals, but inconsistent wording, of FLA. R. CIV. P. 1.420(e) and FLA. R. JUD. ADMIN. 2.085 by establishing a position that does not permit defendants to benefit from motions they do not call up for hearing. Doing this does not adversely affect any party except the defendant who is not living up to his Rule 2.085 obligations. This action will also serve to insulate Rule 1.420(e) from the attack that it has been interpreted to the favor of defendants and against the interest of plaintiffs.

The Court should further take the opportunity to clarify the standards for good cause which exist after its holding in Hall. In doing so, it should hold that actions to find missing witnesses or evidence – situations constantly faced in litigation – can constitute good cause to avoid dismissal for failure to prosecute.

Finally, the Court needs to rid Rule 1.420(e) of the "traps for the unwary" which exist when the plain wording of the rule is not followed. As a dismissal rule which prevents access to the courts, Rule 1.420(e) must be interpreted with this strict scrutiny, or should be amended. To this end, the language in Hall suggesting that any

record activity is sufficient to avoid dismissal[10] should be clarified to mean exactly what that language says.

[10]Hall, 784 So.2d at 1090: "This requires only a review of the record. There is either activity on the face of the record or there is not.

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 12th day of October, 2004.

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CERTIFICATE OF COMPLIANCE

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