IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC04-140
Lower Tribunal No.: 2D02-5773

GLORIANN WILSON.
PAMELA WILSON her mother and
PAMELA WILSON, INDIVIDUALLY,
Petitioners,

vs.

EVA J. SALAMON, M.D., and
BOND CLINIC, P.A.,
Respondents,
_____/

RESPONDENTS' ANSWER BRIEF

ROBERT A. HANNAH #0127577
ROBIN D. BLACK #0329990
HANNAH, ESTES & INGRAM, P.A.
Post Office Box 4974
Orlando, FL 32802-4974
(407) 481-9449
Attorneys for Respondents

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STATEMENT OF THE CASE AND FACTS

The instant matter is derived from the trial court order dismissing Respondents from the case based on Petitioners' failure to prosecute. Due to the nature of this appeal, the key facts relate to the dates of activity by the parties in this matter.

The medical malpractice lawsuit was originally filed with the Circuit Court on March 15, 2001 on behalf of Petitioners by their Florida counsel, Wayne Johnson. (Vol. 1, pp. 3-7). Respondents' answer was timely filed on March 25, 2001. (Vol. 1, pp. 8-9). Shortly thereafter, the first Motion for the pro hac vice admittance of Ken Levine was filed with the court on June 25, 2001. (Vol. 1, pp. 10-13). No order was ever entered on Ken Levine's request for pro hac vice admittance, nor was a hearing ever set to progress the matter toward conclusion.

Interrogatories were served by Petitioners on October 1, 2001, and Respondents' filed objections in response to those interrogatories on October 29, 2001. (Vol. 1, pp. 38-39). No hearing was ever set by Petitioners to resolve the objections made by Respondents. The only activity not demonstrated by the record occurred on October 23, 2001 when Respondents took the depositions of Pamela Wilson, Brenda David, and Terry Wilson. (Vol. 1, pp. 40-42).

Eventually, Petitioners served a second Motion for Pro Hac Vice Admittance on behalf of Vivian Sparicio on March 26, 2002. (Vol. 1, pp. 14-17). An order

granting admittance was entered without the necessity of a hearing on April 3, 2002. (Vol. 1, pp. 18-19).

No further pleadings were filed with the court, nor was any discovery continued by either party until Respondents filed a Motion to Dismiss on November 4, 2002. (Vol. 1, pp. 20-52). The basis for the motion was Petitioners' failure to prosecute under rule 1.420(e), Florida Rules of Civil Procedure. (Vol. 1, pp. 20-23). The motion was properly noticed for hearing on November 18, 2002 before the Honorable Dennis P. Maloney.

Petitioners failed to file good cause in writing with the trial court five days before the hearing. (Vol. 1, pp. 53-56). Instead Petitioners' response was served six days before the hearing and had not been received by the court or Respondents until the written response was handed to Judge Maloney and opposing counsel at the hearing on the underlying motion. (Vol. 1, p. 74).

After hearing argument from both parties, Judge Maloney granted Respondents' Motion to Dismiss finding that pleadings related to pro hac vice admittance did not constitute record activity under rule 1.420(e) and the existing case law. (Vol. 1, pp. 73-75). Petitioners subsequently filed an appeal with the Second District Court of Appeal, which affirmed the trial court's decision, but certified a question as a matter of great public importance. This appeal follows.

SUMMARY OF THE ARGUMENT

Dismissal under Florida Rule of Civil Procedure 1.420(e) was appropriate because no record activity existed during the one-year period preceding the Motion to Dismiss, and Petitioners failed to show good cause as required by the rule to prevent dismissal. The record contained only pleadings related to Petitioners' Motion for Pro Hac Vice Admittance which equated to nothing more than the addition of counsel, because Petitioners' Florida counsel never withdrew from representation in this matter. Pleadings related to the change of counsel have consistently been deemed passive, and therefore insufficient to preclude dismissal under rule 1.420(e). Gulf Appliance Ditributors, Inc. v. Long, 53 So.2d 706, 707 (Fla. 1951).

The Del Duca and Hall decisions can be reconciled as each case deals with a separate part of the two-step analysis established to evaluate failure to prosecute claims. Del Duca v. Anthony, 587 So.2d 1306, 1308-09 (Fla. 1991); Metropolitan Dade County v. Hall, 784 So.2d 1087, 1090 (Fla. 2001). Both cases limit the showing of good faith to preclude to dismissal to cases where non-record discovery was completed which furthered the progress of the case. Id. As the instant matter does not rely on discovery in its grounds for the failure to prosecute claim or to show good cause, neither Del Duca or Hall provide Petitioners with a refuge to preclude dismissal.

Finally, Petitioners reliance on the language of Hall and the evolution of rule 1.420(e) regarding activity on the face of the record oversimplifies the existing case law and fails to further the intent of the rule, which is to is to "encourage prompt and efficient prosecution of cases and to clear trial dockets of litigation that essentially has been abandoned." Barnett Bank v. Fleming, 508 So.2d 718, 720 (Fla. 1987).

Respondents urge this Court to affirm the dismissal finding that pleadings related to pro hac vice admittance are insufficient to preclude dismissal and no good cause existed for Petitioners to reinstate the case.

ARGUMENT

I. DISMISSAL WAS APPROPRIATE UNDER RULE 1.420(e), AND NEITHER THE TRIAL COURT NOR THE SECOND DISTRICT COURT OF APPEAL ERRED IN GRANTING OR AFFIRMING THE DISMISSAL.

The instant matter is a case which supports the reasons underlying the creation of Florida Rule of Civil Procedure 1.420(e) and the existing case law interpreting failure to prosecute cases. Rule 1.420(e) was created in order "to encourage prompt and efficient prosecution of cases and to clear trial dockets of litigation that essentially has been abandoned." Barnett Bank v. Fleming, 508 So.2d 718, 720 (Fla. 1987). In an effort to define record activity in a way which promotes the purpose of Rule 1.420(e), record activity has consistently been interpreted to include only that activity which by design moves the case forward towards a conclusion on the merits or otherwise hastens the suit towards a judgment. Id.

In certifying a question as a matter of great public importance, the Second District Court of Appeal sought guidance from this Court asking:

> After the decision in Metropolitan Dade County v. Hall, 784 So.2d 1087 (Fla. 2001), are trial court orders that are entered and filed to resolve motions that have been properly filed in good faith under the rules of procedure automatically treated as activity, or must the trial court continue to determine whether they are passive entries in the court record?

Respondent would respectfully urge this Court to affirm the reasoning found in the existing case law and find that in order to promote the intent of Florida Rule of Civil Procedure 1.420(e) record activity must be assessed by the trial court to determine if the activity progresses the case towards a determination based on the merits.

A. Record activity requires a determination by the trial court in order to further the intent of Rule 1.420(e).

The Florida Rules of Civil Procedure specifically provide a means for dismissal when a party has failed to prosecute a case during a one year period. The interpretation of rule 1.420(e) by Florida's courts provides a framework necessary to guarantee that a case is actively pursued in a timely fashion and protects both the courts and defendants by clearing dockets of abandoned litigation. In entirety Florida Rule of Civil Procedure 1.420(e) reads:

> **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.

In interpreting the rule, Florida courts have consistently endorsed an evaluation of the record activity, which involves more than a superficial review of

the face of the record. A two-step process was adopted in Del Duca v. Anthony, 587 So.2d 1306 (Fla. 1991). Initially, the defendant must show "there has been no record activity for the year preceding the motion." Id. at 1308. Then, if no record activity is shown, the plaintiff may preclude the dismissal by establishing good cause as to why the matter should not be dismissed. Id. at 1308-09.

Del Duca focuses on discovery requests which were filed with the court and adopts the test laid out by the Second District which permits a judge to dismiss a case when the discovery was propounded in bad faith and is also "without any design 'to move the case forward toward a conclusion on the merits.'" Id. at 1309 (quoting Barnett Bank v. Fleming, 508 So.2d 718, 720 (Fla. 1987)). Beyond enumerating the two-step process used for evaluating failure to prosecute claims, Del Duca delineates the requirements to for a showing of good cause founded on discovery. Id. However, this provides no refuge for Petitioners in the instant matter, because the good cause analysis under the second step is irrelevant to this appeal as Petitioners failed to **file**, not serve, good cause in writing five days prior to the hearing. The outcome of this appeal rests solely on the interpretation of the first step only.

Like Del Duca, the Metropolitan Dade County v. Hall decision involves discovery matters and a determination on the second step – good cause. Hall, 784 So.2d 1087, 1090 (Fla. 2001) (holding that depositions and an offer of judgment

which were not filed with the court constituted good cause). However, Petitioners attempt to rely on language from the Hall decision indicating that "[t]here is either activity on the face of the record or there is not." Id. at 1090. This oversimplifies the language from the opinion. After stating that rule 1.420(e) requires a review of the record to determine whether or not activity exists on the face of the record, Hall provides guidance on the good cause analysis only. The opinion does not contain guidance as to what evaluations must be made by the trial court when there is activity on the face of the record. Sheen v. Time Inc. Magazine Co., 817 So.2d 974, 977 (Fla. 3d DCA 2002).

Just as a showing of good cause requires evaluation by the court, the first step regarding record activity requires a determination by the court. In cases where there is some activity on the face of the record,

> the trial court is left with the task of determining whether the activity in question constitutes sufficient record activity to preclude dismissal under rule 1.420(e). Del Duca, 587 So.2d at 1309.

Sheen, 817 So.2d at 977. Similar to the instant matter, the plaintiff in Sheen attempted to rely on Hall for the proposition that any filing with the court would constitute record activity sufficient to preclude dismissal. However, the Third District found the plaintiff's reliance on Hall to be misplaced. Id. Not every item found in a court's file is considered to be record activity under Rule 1.420(e). Toney v. Freeman, 600 So.2d 1099, 1100 (Fla. 1992) (finding this interpretation to be

consistent with the "spirit and purpose" of the rule). The definition of record activity has been interpreted to recognize only those filings that advance the case towards resolution . Id. This Court's opinion in Toney directly contradicts the unsupported statement made in Petitioners' Initial Brief defining activity as "the filing of pleadings or an order of the court." (Pet. Brief, p. 9). A trial court's own status order and counsels' filed responses do not constitute record activity because they only relate to information about the status of the case and do not actually progress the case towards resolution. Id. at 1101. In 1992, this Court endorsed the opinion in Norflor Construction finding that the opinion was consistent with the principle that record activity must advance a case toward resolution. Id. at 1100 (approving Norflor Construction Corp. v. Gainesville, 512 So.2d 266 (Fla. 1st DCA 1987). Under Norflor Construction the First DCA found insufficient record activity to preclude dismissal, where the record contained a court order requiring plaintiffs to advise the court of the cases' status, the plaintiff's response to the court order and a notice of change of counsel's address. Norflor Construction, 512 So.2d at 267. Dismissal was based simply on the effect of the record material in progressing the case towards resolution. No finding of good faith was ever utilized by the court to evaluate the materials in the record.

The intent behind rule 1.420(e) is supported by the interpretation that affirmative record activity is required to defeat a motion to dismiss for lack of

prosecution. Toney, 600 So.2d at 1100; Overseas Dev., Inc. v. Amerifirst Fed. Sav. and Loan Ass'n, 433 So.2d 587, 588 (Fla. 3d DCA 1983). Record activity has consistently been found to require that the pleading or order was reasonably calculated to advance the case toward resolution. Furthermore, not all pleadings or orders constitute record activity sufficient to defeat an otherwise well-taken motion to dismiss. Overseas Dev., Inc., 433 So.2d at 589.

B. **Pleadings related to Pro Hac Vice admittance are no different than any other pleadings related to the withdrawal or change of counsel which do not constitute record activity under Rule 1.420(e).**

A pleading must be a legal prerequisite which is necessary to continue the successful prosecution of the matter in order to avoid being a passive step which does not constitute record activity under Rule 1.420(e). Overseas Dev., Inc., 433 So.2d at 589. Where a plaintiff pointed to a motion dealing with the defendant's name change, the court declared the motion a passive step indicating it was "much akin to a motion and court order substituting counsel in the cause, which in no way hastened the lawsuit to final resolution." Id. The technical name change was not a legal prerequisite to the continued prosecution of the case and could not defeat a motion to dismiss. Id.

The Overseas decision above bases its reasoning in part on the comparison of the motion at issue to the passive pleadings regarding substitution of counsel.

Notices, pleadings and orders involving the withdrawal and substitution of counsel

do not constitute record activity sufficient to preclude dismissal. Nat'l Enters, Inc.v Foodtech Hialeah, Inc., 777 So.2d 1191, 1192, n2 (Fla. 3d DCA 2001). The law has consistently found pleadings dealing with the change of counsel to be passive and not calculated to advance the case. Id. (quoting Nesbitt v. Cmty. Health of S. Dade, Inc., 566 So.2d 1 (Fla. 3d DCA 1989)); Touron v. Metropolitan Dade County, 690 So.2d 649, 649 (Fla. 3d DCA 1997); Norflor Constr. Corp. v. City of Gainesville, 512 So.2d 266, 268 (Fla. 1st DCA 1987); Dion v. Bald, 664 So.2d 348, 349 (Fla. 5th DCA 1995). Change of attorneys even when necessitated by misfortune does not even constitute good cause sufficient to preclude dismissal under the second step of the lack of prosecution evaluation, much less record activity.

While no case specifically addresses pleadings regarding pro hac vice admittance, in the instant matter pro hac vice admittance amounts to nothing more than substitution of counsel, despite Petitioners' arguments to the contrary. Petitioners were never without counsel as Wayne Johnson never withdrew from their representation. Furthermore, even after Vivian Sparacio was admitted pro hac vice on April 4, 2002, approximately seven months passed where neither of Petitioners' attorneys advanced the litigation of this matter. This inaction further

exemplifies why Appellants Motion for and the Order granting Pro Hac Vice admittance should be treated as nothing more than passive activity.

The justification for finding that pro hac vice admittance should not constitute record activity and is no different than any other pleadings regarding change of counsel is illustrated by the following hypothetical. For purposes of this example, Respondents would ask the Court to assume facts similar to this case, including that Petitioners' local counsel sought assistance from an out-of-state attorney with legal expertise specific to the merits of the underlying cause of action, and that Petitioners' were never without counsel at any time. Only in the hypothetical, assume that Petitioners continue to seek assistance from out-of-state counsel. In theory Petitioners could file one motion for pro hac vice admittance a year for a period of ten years. At the conclusion of the decade, no actual progress on the merits of the case would have been accomplished. Yet Respondents would be prevented from dismissing the action if this Court adopts an interpretation of record activity finding that pro hac vice is somehow distinguishable from other pleadings regarding change of counsel. Respondents would be left without the protections provided by Rule 1.420(e) guaranteeing that a case be actively prosecuted; despite the fact that Petitioners' case had been ongoing for at least ten years with no action to hasten the case toward judgment.

Petitioners' argument that pro hac vice requires a court order and the attorneys are held to a "higher standard and closer scrutiny" is misleading. While it is true that an out-of-state attorney may only appear after the proper motion has been filed and an order entered, that is no different than many other change of counsel situations. For example, an in-state attorney would have to move the court for leave to withdraw from a case; however, neither the motion nor an order granting leave to withdraw constitutes record activity to preclude a motion to dismiss for failure to prosecute. Nat'l Enters., 777 So.2d at 1192, n2. Similarly substitution of counsel for an in-state attorney would also require a motion and order, but would not constitute record activity. Id.

Dismissals involving change of counsel have been upheld even in situations where a plaintiff is left without counsel, which is even more severe than the instant matter where Petitioners were never without counsel. Not only does change of counsel fail to constitute record activity, but the courts have also found that change of counsel does not constitute good cause in the second part of the analysis, even when caused by a disabled attorney's inability to represent her client. Florida Power & Light Co. v. Gilman, 280 So.2d 15, 16 (Fla. 3d DCA 1973); Public Health Trust of Dade County v. Diaz, 529 So.2d 682,684 (Fla. 1988). The analysis of good cause is not required for the instant matter, but lends additional support to the strict interpretation of the courts requiring that a plaintiff continue to actively prosecute his

cause of action regardless of changes in counsel once the case has been filed. The Trial Court properly granted the dismissal as Petitioners are wholly without record activity which progresses the case towards a determination on the merits for a one year period.

The Abaddon decision cited by Petitioners is also inapplicable to this appeal. In that decision a motion to appoint an out-of-state commissioner to take out-of-state depositions was found to be a necessary prerequisite sufficient to preclude dismissal. Abaddon, Inc. v Schindler, 826 So.2d 436, 439 (Fla. 4th DCA 2002). This is easily distinguishable from the instant matter in that the depositions in Abaddon could not have taken place without the appointment of a commissioner. In contrast, Appellants had an attorney capable of proceeding with the timely litigation of this matter regardless of the pro hac vice admittance of an out-of-state attorney. While appellants may have preferred the duties of lead counsel be performed by Vivian Sparacio, preference is not the same as a necessary prerequisite. The pleadings regarding pro hac vice admittance are more comparable to substitution of counsel than the appointment of an out-of-state commissioner.

C. **Petitioners confuse the distinction between passive activities and bad faith.**

Throughout the litigation of this matter in both the trial and appellate courts, Petitioners have mistakenly associated the designation of certain activities as active or passive with a finding that an action was taken in good or bad faith. This

confusion seems to be found by blurring the lines between the first and second steps required to analyze a motion to dismiss for failure to prosecute. The passive nature of an activity is relevant to the first step in the evaluation which determines the presence of record activity and does not require an analysis of bad faith. In contrast the finding of bad faith is relevant to the good cause analysis in the second step. The good cause analysis also requires a finding that the action moves the case forward.

Both Del Duca and Hall identify the general test for dismissals under Rule 1.420(e). Del Duca 587 So.2d at 1308-09; Hall, 784 So.2d at 1090. However, Del Duca was written to establish a standard for cases only involving discovery issues under Rule 1.420(e) by settling the existing conflict between the District Courts of Appeal, and Hall only deals with the good cause analysis of the Del Duca test. Neither completely resolves the issues in the instant matter, but reasoning for both opinions can be reconciled.

Del Duca deals strictly with discovery related activity and does not apply to other types of activity. However, the decision both by the Supreme Court and in the underlying opinion by the Second District adopts the test that record activity under the first step of analysis must be more than just a passive effort. Del Duca, 587 So.2d at 1309; Anthony v. Schmitt, 557 So.2d 656, 657 (Fla. 2d DCA 1990). In Anthony, the Second District reiterated that the case involved only analysis of the

first step, which favors the plaintiff as long as plaintiff's efforts can be shown to be more than passive efforts to keep the suit on the court's docket. Id. at 659. And while courts have had difficulty distinguishing marginally active prosecution from passive activity, motions for substitution of counsel and orders allowing counsel to withdraw are regarded as insufficient to pass the "mere passive" test. Id. In contrast to the change of counsel pleadings, documents filed of record regarding discovery matters such as interrogatories may constitute record activity for purposes of rule 1.420(e). Id. In rejecting a "facially sufficient" test adopted in the Fourth District to address discovery questions, Anthony held that dismissal was appropriate when the only activity within the preceding year was discovery activity taken in bad faith to avoid application of rule 1.420(e) and without any design to move the case forward toward resolution on the merits. Id. at 661-62. The analysis of bad faith in conjunction with the intent to move a case forward are part of the good cause analysis in the second step. The bad faith analysis was not applied to reach a result in Del Duca because the record contained a request to produce and notice of service of interrogatories which required analysis only as record activity, not as good cause. The Second District specifically stated that the plaintiff would have failed the second step of the analysis had that been required. The bad faith requirement was not relevant to the outcome of Del Duca and is not relevant to the instant matter, because this case does not involve a discovery issue. Like Del Duca, this matter is limited to

the first step requiring evaluation of the record activity standard, which has clearly regarded motions on change of counsel to be passive and insufficient to preclude dismissal.

Similarly, the Hall decision provides general guidance as to the two-step test for evaluating a failure to prosecute claim, but it focuses on the second step of analysis – good cause. Hall required analysis of depositions and an offer of judgment which were not filed on the face of the record and were offered by plaintiff as good cause to avoid dismissal, which was not necessary in Del Duca. Hall, 784 So.2d at 1090-91. The opinion in the Hall decision further clarifies that the bad faith portion of the Del Duca opinion is part of the analysis for good cause. Hall, 784 So.2d at 1090. The discovery materials presented as good cause by the plaintiff in Hall were found to sufficiently progress the case toward conclusion on the merits and to be in good faith. Id. at 1091.

These two opinions are consistent with each other and the test for evaluating a failure to prosecute claim. Both cases address the general outline of a two-step test. And while Del Duca is a decision which addresses only the first step of the analysis to resolve the underlying dismissal, the Second District went beyond its obligations and laid out a test for discovery matters under the good cause step,

which this Court then adopted to resolve conflict between the circuits in how to deal with discovery issues under rule 1.420(e).

Petitioners' Initial Brief on page twelve alleges that there is conflict between Del Duca and Hall which would make it more advantageous to have a stipulation as non-record activity than a pleading of record is repeatedly flawed. First Petitioners argue that they simply should have reached a stipulation with Respondents on the pro hac vice issue, which was not filed with the court. (Pet. Brief, p. 13). This is inherently flawed because, as Petitioners' point out in their own brief, Florida Rule of Judicial Administration 2.061 "makes it abundantly clear that admitting a foreign attorney is up to the discretion of a trial court. Huff v. State, 569 So.2d 1247 (Fla. 1990)." While Respondent does not concede that this makes the motion for pro hac vice record activity, it certainly eliminates the possibility that Petitioners own efforts have subjected him to a tougher standard. Petitioners filed a motion for pro hac vice admittance, because that was the only means for an out-of-state attorney to gain access to the Florida court system without being a member of the Florida Bar.

Secondly, Petitioners' hypothetical ignores that the burden shifts during the analysis of good cause. In moving for a dismissal under rule 1.420(e), Respondents bore the initial burden to show that no record activity existed. This first step favors the plaintiff in any case. Anthony, 557 So.2d at 658. Only after Respondents demonstrated that the activity of record was passive did the burden shift to

Petitioners to show good cause. In the instant matter good cause should not be permitted, as Petitioners failed to comply which requires that good cause be filed in writing five days prior to the hearing and counsel may not simply show up at the hearing an argue good cause without have filed the same five days prior. Heinz v. Watson, 615 So.2d 750 (Fla. 5th DCA 1993); Lowen Air Conditioning, Inc. v. Small, 397 So.2d 414 (Fla. 4th DCA 1981); State v. Williams, 222 So.2d 477 (Fla. 3d DCA 1969). However, for purposes of this argument, Petitioners would have had to bear the burden, not Respondents, to show good cause. Good cause would not necessarily require a finding of bad faith. Petitioners would only have to demonstrate good faith if they used non-record discovery which furthered the progress of the case to demonstrate good cause. The good faith analysis would not apply to pleadings or orders of the court, which had already been deemed by passive during the first step of analysis.

Petitioners' problem throughout this appeal is in the misunderstanding and use of the good faith element of Del Duca. Petitioners' rely on the pleadings related to the request for pro hac vice admittance to establish record activity. However, as pleadings related to the change of counsel have consistently been deemed passive, Petitioners simply continue to rely on those same pleadings under the Del Duca analysis for discovery matters not filed in the record to show good cause. This applies a discovery test to non-discovery matters and allows Petitioners to make an

irrelevant claim that there was no bad faith in filing the Motion for Pro Hac Vice Admittance. Petitioners cannot rely on the passive activity which forces the showing of good cause to generate the grounds for good cause. They simply failed to argue anything which constituted good cause in a timely manner. Because they failed to file good cause in writing five days before the hearing during the proceedings below, Petitioners are now limited to an appeal of whether or not pleadings regarding pro hac vice constitute record activity. No other grounds should be accepted by this Court, as Petitioners have waived all rights to show good cause.

II. PETITIONERS' INTERPRETATION OF RULE 1.420(e) CONTRADICTS ITS PURPOSE AND IGNORES THE CONTINUED ADOPTION OF THE PASSIVE EXCEPTION TO RECORD ACTIVITY BY FLORIDA'S COURTS.

Central to the review of this appeal is the language of Hall regarding the first step in the analysis. In its opinion affirming the underlying dismissal, the Second District questioned whether this Court was receding from its prior opinions requiring a determination that the record activity is not passive. Acknowledging that this Court does not overrule itself by implication, the Second District sought guidance from this Court on the effect of the Hall decision. F.B. v. State, 852 So.2d 226, 228-29 (Fla. 2003); Puryear v. State, 810 So.2d 901, 905 (Fla. 2002). The Second District limited its certified question as follows:

> After the decision in Metropolitan Dade County v. Hall, 784 So.2d 1087 (Fa. 2001), are trial court orders that are entered and filed to resolve motions that have been properly filed in good faith under the rules of procedure automatically treated as activity, or must the trial court continue to assess its own orders to determine whether they are

passive entries in the court record?

Respondents would respectfully suggest that even under Hall trial courts must continue to assess all activity, including court orders, to determine if they are passive in nature.

The question arises out of the statement that "[t]here is either activity on the face of the record or there is not." Hall, 784 So.2d at 1090. Like most opinions, it is important to view the language within the context of the case and its entire opinion. In this matter there are two key observations, which lend guidance to the interpretation that passive activity is still insufficient to preclude dismissal. First, the primary analysis in Hall relates to the analysis under the second step related to a showing of good cause. Because there was no activity on the face of the record, the court never had to assess the nature of the record activity as passive or non-passive. Secondly, the opinion contains a footnote adopting the 1965 opinion in Little v. Sullivan which requires dismissal where no action towards prosecution has been taken. Hall, 784 So.2d at 1090, n.4. The placement of that footnote furthers the interpretation that this Court intended to continue requiring a determination that the activity was not passive in order to preclude dismissal. The footnote is placed after the sentence restating rule 1.420(e), but before the language indicating that this only requires a facial review of the record. Id. In other words, the complete reading of this portion of the opinion demonstrates that dismissal is appropriate where no action

towards prosecution of the matter has occurred during the preceding year, which requires a review of the record. The opinion then indicates that there is either activity or the face of the record or not, but only provides guidance as to what must happen when there is no activity on the face of the record, i.e. a showing of good cause must be made by the plaintiff. Sheen, 817 So.2d at 977.

References to Del Duca within the Hall opinion also further the interpretation that not all documents in the court's record constitute activity. Hall explicitly reiterates that the test laid out in Del Duca to evaluate showings of good cause is still good law. Hall, 784 So.2d at 1090. Early in the opinion, this Court indicates that it founded the Del Duca opinion on its earlier opinion in Eastern Elevator v. Page, 236 So.2d 218 (Fla. 1972). Under Eastern Elevator, this Court held that:

> We are interested today in moving causes and in expediting litigation in the proliferation of increasing law suits. **The purpose of the rule is best served by recognizing and encouraging as 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.

Eastern Elevator, 263 So.2d at 220 (emphasis added, citations omitted). These references within the Hall opinion seem to imply that this Court intended to continue the historical interpretation requiring that actions promote the actual prosecution of the case that is not achieved by certain passive activities. Additionally, Eastern Elevator, adopts the opinion of Gulf Appliance as it relates to substitution of counsel. Id. (referring to Gulf Appliance Distributors, Inc. v. Long, 53 So.2d 706 (Fla. 1951)

and distinguishing passive substitution of counsel activities from specific discovery which can further the prosecution of a case.)

Petitioners delineate the origination of and amendments to rule 1.420(e) in their brief. In particular, they reference the amendment to the rule in 1976 to include the language that in "all actions in which it appears on the face of the record . . . ." as well as the gradual evolution of the word prosecuted from the repealed section 45.19, Florida Statute to the current requirement of record activity. (Pet. Brief, p. 18). Respondents agree with both the Second District and Petitioners that the wording of the rule which is currently in effect is technically distinguishable from original rule. However, continued reference by Florida Courts to the caselaw pre-dating the 1976 amendment which identifies the intent behind the rule to further the prosecution of cases and indicates that not all record activity is sufficient to preclude dismissal under rule 1.420(e) has effectively adopted the requirement that activity is not passive. In 1992, this Court reiterated that record activity sufficient to preclude dismissal for failure to prosecute requires the activity to be more than passive in nature. Toney, 600 So.2d at 1100 (citing to Eastern Elevator, Inc. v. Page, 769 So.2d 218 (Fla. 1972)). Both Toney and Norflor Construction, which is endorsed by Toney require more than mere passive activity, even after the 1976 amendment to rule 1.420(e) adding the "face of the record" language.

This Court's adoption of the Second District's underlying opinion in Del Duca

specifically rejects a "facially sufficient" test as proposed by the Fourth District. Anthony, 557 So.2d at 661 (adopted in Del Duca). Anthony delineates the two-step analysis later adopted by this Court after rejecting the bright line approach used by the Fourth District as severely limiting the trial court's ability to dismiss plaintiffs who flagrantly abuse discovery to avoid dismissal. Id. at 661. While the case is speaking about discovery specifically, it stands to reason that a bright line test regarding only facial sufficiency regarding record activity would similarly prevent trial court judges from dismissing plaintiffs who rely on record activity which fails to further the progress of the case, as well as the intent of the rule.

The certified question specifically addresses their concern toward orders of the court. Not all record activity, whether by pleading or order, is reasonably calculated to advance the case towards resolution. Overseas Devel. 433 So.2d at 589. It stands to reason that regardless of a plaintiff's good faith in filing a motion, if that motion does not further the cause towards a resolution on the merits, the order adjudging that motion cannot further the prosecution. This does not mean that either the order or underlying motion are in bad faith. It simply implies that certain activity can further the prosecution of the case, while other activity is more appropriately characterized as "housekeeping." Rejection of a court's status order as sufficient to preclude dismissal in Toney would be an example of orders and pleadings which may be requested by the trial judge to clarify the status of the

case, but do nothing to effect the meritorious resolution of the case. Toney, 600 So.2d at 1100. Respondents are not asking this Court to consider whether passive pleadings and orders were filed in good or bad faith. In fact, Respondents do not believe that an order of the court could be entered in bad faith. However, Respondents are asking this Court to acknowledge that while some pleadings and orders may be necessary for clarification or maintenance of the court's file, those materials do not always further the progress of a case towards a determination on the merits.

Without a means for trial courts to evaluate the record activity, the intent of rule 1.420(e) cannot be guaranteed. The determination of activity as passive provides trial courts the means necessary to further the intent of the rule.

CONCLUSION

Respondents urge this Court to affirm the decisions of both the trial court and the Second District Court of Appeal finding that dismissal was appropriate as no record activity occurred during the year preceding the Motion to Dismiss. Pleadings regarding pro hac vice admittance should not be distinguished from any other pleadings related to the change or withdrawal of counsel, which have consistently been found insufficient to prevent a motion to dismiss for failure to prosecute. The instant matter fails to provide sufficient grounds to change the existing interpretation of Rule 1.420(e) which requires that pleadings and orders further the progress of the case in order to be deemed record activity sufficient to preclude a motion to dismiss. An interpretation which does not require that record activity further the progress of the case would not promote the purpose of the Rule 1.420(e) and would potentially allow abandoned cases to clutter the dockets of the already busy trial courts while forcing defendants to wait for an indefinite period of time for conclusion of lawsuits initiated against them.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of the foregoing was sent, by U.S. Mail, to the addressees listed below, this ___ day of _____, 2004.

WAYNE JOHNSON
652 West Morse Boulevard
Winter Park, Florida 32789

KENNETH M. LEVINE
370 Washington Street
Brookline Village, MA 02446

_____

ROBERT A. HANNAH #0127577
ROBIN D. BLACK #0329990
HANNAH, ESTES & INGRAM, P.A.
Post Office Box 4974
Orlando, FL 32802-4974
(407) 481-9449
Attorneys for Respondents

CERTIFICATE OF COMPLIANCE

I hereby certify that the contents of this brief are in compliance with the requirements of Rule 9.100(l), Florida Rules of Appellate Procedure (2004).

_____

ROBERT A. HANNAH #0127577
ROBIN D. BLACK #0329990
HANNAH, ESTES & INGRAM, P.A.
Post Office Box 4974
Orlando, FL 32802-4974
(407) 481-9449
Attorneys for Respondents