IN THE SUPREME COURT OF FLORIDA

DCA Case No. : 2D02-5773
L. T. No. : GC-G01-1023

GLORIANN WILSON and
PAMELA WILSON,

Petitioners,

v.

EVA J. SALAMON, M.D. and
BOND CLNIC, P.A.,

Respondents.
_____/

PETITIONER'S INITIAL BRIEF ON THE MERITS

On Review from the District Court
Of Appeal, Second District
State of Florida

_____

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1) Whether the lower courts erred in dismissing the lawsuit when there had been a proper motion and court order in the record in the one-year period prior to dismissal?

2) Whether Gulf Appliance Distributors, Inc. v. Long, 53 So. 2d 706 (Fla. 1951), is controlling precedent in the case at hand when the Statute on which it is based has been repealed and replaced by Rule 1.420(e) which is different in wording?

STATEMENT OF THE CASE AND FACTS

Appellants filed a medical malpractice lawsuit on March 15, 2001. (R. Vol. I, p. 3-7.) Appellees filed an answer to the complaint on March 26, 2001. (R. Vol. I, p. 8-9.)

The lawsuit was filed by the undersigned who is a Florida attorney. (R. Vol. I, p. 7.) A Motion for Pro Hac Vice was served on June 21, 2001 to allow Ken Levine to represent Appellants in the Florida lawsuit. (R. Vol. I, p. 10-12.) Mr. Levine specializes in lawsuits of this type, shoulder dystocia cases, and was retained by Appellants for that purpose. (R. Vol. I, p. 12-13.)

Appellants served interrogatories on Appellees on October 1, 2001. (R. Vol. I, p. 38.) Appellees filed objection to the interrogatories on October 23, 2001. (R. Vol. I, p. 38-39.) Depositions of Appellants were conducted on October 23, 2001. (R. Vol. I, p. 18-19.)

On March 26, 2002, Appellants served a Motion for Pro Hac Vice admittance for Vivian Sparacio. (R. Vol. I, p. 14-17.) Ms. Sparacio is an associate in Mr. Levine's law office. (R. Vol. I, p. 14-17.) Appellees had no objection to the motion. (R. Vol. I, p. 14-17.) An order approving the motion was entered on April 3, 2002. (R. Vol. I, p. 18-19.)

On November 1, 2002, Appellees served a Motion to Dismiss for Lack of Prosecution. (R. Vol. I, p. 20-23.) Appellees stated that there had been no record activity since October 29, 2001 when Appellees responded to Appellants request to produce and interrogatories. (R. Vol. I, p. 20-23.) Appellees acknowledged that Appellants had served the Motion for Pro Hac Vice admittance in the applicable time period. (R. Vol. I, p. 20-23.) It was Appellees position that this did not constitute sufficient record activity however. (R. Vol. I, p. 20-23.)

Appellants filed a response dated November 12, 2002. (R. Vol. I, p. 53-57.) It was Appellants' position that there was sufficient record activity based on the Motion for Pro Hac Vice admittance. (R. Vol. I, p. 53-57.)

A hearing on the motion for dismissal was held on November 18, 2002. (R. Vol. I, p. 73-75.) Appellants' response was in the court file at the time of the hearing. (R. Vol. I, p. 73-75.) The trial judge was able to review the response presented by Appellants' counsel. The response was later entered into the court file. (R. Vol. I, p. 73-75.)

The trial court agreed with position of Appellees and dismissed the matter by order dated November 27, 2002. (R. Vol. I, p. 73-75.) Appellants timely filed an appeal on December 23, 2002.

The Second District Court of Appeal affirmed the trial court's order by opinion dated December 31, 2003. The Second District stated that the pro hac vice motion and court order were "passive" activities that did not preclude dismissal. The Second District went on to discuss the fact however that there is no workable distinction between "active" activity and "passive" activity. The Second District stated that under the decision of Metropolitan Dade County v. Hall, 784 So. 2d 1087 (Fla. 2001),

> [I]t is arguable that any action taken in good faith by attorneys in a trial court that necessitates a court order should be treated as record activity sufficient to preclude dismissal for failure to prosecute.

The Second District therefore felt it was appropriate to certify the following question as a matter of great public importance

> 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 ASSESS ITS OWN ORDERS TO DETERMINE WHETHER THEY ARE PASSIVE ENTRIES IN THE COURT RECORD?

Following certification of the matter, Petitioners filed a notice to invoke the Supreme Court's discretionary jurisdiction. Petitioners then served a jurisdictional brief. The Court issued an order dated February 10, 2004 requiring Petitioners to serve an initial

brief on the merits on or before March 8, 2004 before the Court determined whether it would accept jurisdiction.

SUMMARY OF ARGUMENT

The Second District certified this matter because of the current uncertainty regarding application of Florida Rule of Civil Procedure 1.420(e). The Second District recognized that different decisions are reached in this matter under the two Florida Supreme Court decisions of Gulf Appliance Distributors., Inc. v. Long, 53 So. 2d 706 (Fla. 1951), and Metropolitan Dade County v. Hall, 784 So. 2d 1087 (Fla. 2001). The decision in Gulf Appliance Distributors., Inc. v. Long, 53 So. 2d 706 (Fla. 1951), was based on a Statute that has been repealed. The correct precedent for deciding this matter is therefore Metropolitan Dade County v. Hall, 784 So. 2d 1087 (Fla. 2001), and its interpretation of Florida Rule of Civil Procedure 1.420(e). Under that precedent it is clear that this matter should not have been dismissed as there was activity on the face of the record. Petitioners respectfully request that this Court REVERSE the order of the trial court and reinstate the lawsuit.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of the district court of appeal where the district court has certified a matter as involving a question of great public importance. Art. V, § 3(b)(4) Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(v).

ARGUMENT

I. THE TRIAL COURT AND THE SECOND DISTRICT ERRED IN DISMISSING THE LAWSUIT BECAUSE UNDER FLORIDA RULE OF CIVIL PROCEDURE 1.420(e) AND METROPOLITAN DADE COUNTY V. HALL, 784 SO. 2D 1087 (FLA. 2001), THERE WAS CLEAR ACTIVITY ON THE FACE OF THE RECORD.

The Second District Court of Appeal in certifying this matter to the Florida Supreme Court stated that there was still uncertainty regarding the application of Florida Rule of Civil Procedure 1.420. This Court has established several tests for interpreting Rule 1.420. This Court should now proceed one step further and implement bright-line tests to clarify its earlier rulings to avoid any further uncertainty in this area.

Florida Rule of Civil Procedure 1.420(e) states

> 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. . . . Mere inaction for a period of less than 1 year shall not be sufficient cause for dismissal for failure to prosecute.

In interpreting this Rule, the Court in Metropolitan Dade County v. Hall, 784 So. 2d 1087, 1090 (Fla. 2001), stated

> Rule 1.420(e) plainly states that actions "shall" be dismissed if it appears on the face of the record that there was no activity within the past year. This requires only a review of the record. 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 departure point as the Rule and Hall make clear is a review of the record to determine if there is activity. If there is activity then there is no dismissal. Activity is the filing of pleadings or an order of the court. Various lower courts have misconstrued the statements of Hall and Rule 1.420(e) and attempted to determine whether the activity is passive or active. Such a determination is not warranted under the clear precedent. Only when there is non-record activity should a court then look to see if the non-record activity is "active" or "passive." The court at that point should use the test laid out in Del Duca v. Anthony, 587 So. 2d 1306 (Fla. 1991), to determine if dismissal is warranted.

It is important to note that the Rule states that the activity is either a "pleading" or an "order of the court."[1] In this regard, it is axiomatic to state that a motion is not a pleading. Cf. Fla. R. Civ. P. 1.100(a) (defining pleadings) and 1.100(b) (defining motions); Green v. Sun Harbor Homeowners Assn., Inc., 730 So. 2d 1261 (Fla.

[1] The rule states "filing of pleadings, order of court, or otherwise," but does not define what is meant by otherwise. It is presumed that if "otherwise" meant motions or discovery items then those terms would have been used in the Rule.

1998). Likewise, discovery items such as interrogatories and depositions are not pleadings. Thus, when a court looks at the face of the record the only items that should preclude dismissal are pleadings and court orders. This is the clear import of Rule 1.420(e) and Hall. Only when there are no pleadings or court orders in a one-year period does the court look to see if there is active activity to preclude dismissal. At that point, the test enunciated in Del Duca v. Anthony, 587 So. 2d 1306 (Fla. 1991), is used to see if the activity is moving the case forward.

A. The court order approving the pro hac vice motion was record activity that should have prevented dismissal.

There is no dispute that the motion for pro hac vice and the court order granting it fell within the one-year period. A strict application of Rule 1.420(e) and Metropolitan Dade County v. Hall, 784 So. 2d 1087 (Fla. 2001), mandates that the lower courts erred in dismissing the lawsuit.

The words of Rule 1.420(e) could not be more clear: Dismissal should be granted only when it appears on the face of the record that there has been no activity by filing of pleadings or order of court. Likewise, the words of Hall could not be more lucid: There is either activity on the face of the record or there is not. If there

is, then dismissal should be denied. The court order here is activity on the face of the record and thus dismissal was improper.

B.
The Second District Court of Appeal's interpretation of *Del Duca v. Anthony*, 587 So. 2d 1306 (Fla. 1991) cannot be reconciled with *Metropolitan Dade County v. Hall*, 784 So. 2d 1087 (Fla. 2001).

In Del Duca v. Anthony, 587 So. 2d 1306 (Fla. 1991), the Florida Supreme Court outlined a two-step process in determining whether dismissal is appropriate under Rule 1.420(e).

> First, the defendant is required to show there has been no record activity for the year preceding the motion. Second, if there has been no record activity, the plaintiff has an opportunity to establish good cause why the action should not be dismissed.

Del Duca v. Anthony, 587 So. 2d 1306, 1308-09 (Fla. 1991). If there has been legal action in the preceding year then the rule allows the

> [T]rial judge to dismiss the cause if the discovery is in bad faith **and** is also "without any design 'to move the case forward toward a conclusion on the merits.'"

The Second District Court of Appeal in its opinion stated that Del Duca does not apply to this case because Del Duca is only utilized under step two. In other words, the Second District is stating that Del Duca is only utilized if there has been no record activity. If there was record activity then the trial court must determine if the activity was in bad faith and not designed to move the case forward, i.e. was it passive

activity. To adopt the Second District's reasoning would however create a legal morass that the Second District was stating it wanted to avoid.

The Second District here stated that Del Duca was never triggered in this case because there was activity on the face the record. The Second District then stated that the activity was passive and therefore dismissal was warranted. The Second District did note that if Del Duca did apply then this case should not have been dismissed because "an order entered in good faith by the trial court to resolve a proper motion would clearly be 'active' record activity." Slip op. at 4; Metropolitan Dade County v. Hall, 784 So. 2d 1087, 1090 (Fla. 2001) ("We also note that when there is record activity occurring during the preceding year . . . good cause always exists.").

The first problem with Second District's analysis, as it clearly acknowledged, is that its interpretation of Del Duca v. Anthony, 587 So. 2d 1306 (Fla. 1991), cannot be reconciled with Metropolitan Dade County v. Hall, 784 So. 2d 1087 (Fla. 2001). As previously discussed, the only test under Hall is to look at the face of record. It there is activity then dismissal should be denied.

The second problem with the Second District's analysis is that in order to avoid dismissal it would be more advantageous to have non-record than record activity. If there is record activity (as there was here) then the only test utilized by the trial court

is determining whether the activity was active or passive. If however there is non-record activity then the test is whether the activity was active or passive **and** whether it was done in bad faith. Thus, Petitioners here would have been better off to have reached a stipulation with Respondents on the pro hac vice issue and not filed it with the court because then Respondents would have had to show that the stipulation was passive **and** in bad faith. This type of illogical result could not have been the intended result by the Court in its decisions in Del Duca and Hall. This Court should reconcile these two decisions and hold that if on the face of the record there is either a pleading or a court order to a properly filed motion then dismissal should be denied. If there is no such record activity in a one-year period then the test laid out in Del Duca should be utilized to determine if dismissal is appropriate.

The first part of the certified question presented to this Court is whether "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?" This Court should answer this portion of the certified question in the affirmative.

C.

The trial court erred and Second District Court of Appeal erred in finding that the motion for pro hac vice status and the court order approving it were passive activities.

The Second District Court of Appeal in dismissing this matter stated that it did not see any difference between an order substituting counsel which the Florida Supreme Court had previously determined to be a passive document and the pro hac vice order in this matter. In Gulf Appliance Distributors v. Long, 53 So. 2d 706 (Fla. 1951), the Florida Supreme Court affirmed a dismissal of a lawsuit even though there had been an order substituting counsel for the defendant. The Court stated that the fact that the **defendant** changed attorneys did not hasten the case towards judgment. The fact that it was the defendant that secured the order on counsel in Gulf Appliance makes that case distinguishable from this one where it was the **Plaintiffs-Petitioners** that wanted to add an attorney more skilled in medical malpractice to pursue the claim.

The Motion for pro hac vice admittance was essential for moving this case forward. The motion is governed by Florida Rule of Judicial Administration 2.061. That rule 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). A foreign attorney cannot appear before a court to argue on her client's behalf without having been admitted. In fact, a foreign attorney could not have filed the lawsuit. A Florida

attorney filed this lawsuit, but it was the foreign attorneys that would in fact be the lead counsel on the case. (R. Vol. I, 12-13, 16-17.) That makes the pro hac vice motion and order materially different from a substitution of counsel which the courts have held are not sufficient record activity to prevent dismissal. See Nesbitt v. Community Health of South Dade, Inc., 566 So. 2d 1 (Fla. 3d DCA 1989).

The appearance of pro hac vice counsel is substantial different from that of a Florida attorney appearing in a case. A Florida attorney does not need the permission of the court to make an appearance. In State Industries v. Jernigan, 751 So. 2d 680 (Fla. 5th DCA 2000), the court basically stated that a foreign attorney will be held to a higher standard and closer scrutiny. This is because

> A Florida lawyer in good standing has a "right" to appear in court. No special permission is required. Although the Florida lawyer's right to so appear is not absolute … such right to appear is rarely denied and rightfully so. The out-of-state lawyer, on the other hand, has no absolute right to appear as counsel in Florida. When consent to such appearance is given, the only control over such counsel's conduct is in the hands of the trial judge.

Jernigan, 751 So. 2d at 682. It should therefore be clear that if an out-of-state lawyer has no absolute right to appear as counsel then only upon proper motion and court order can she appear. Thus any motion and court order allowing such appearance is significant legal activity that will move a case forward. If the attorney is not allowed

to appear then a client will be denied its choice of counsel. The court retains jurisdiction over the attorney to revoke the privilege after the foreign attorney has been admitted. Kalmonson v. Kalmonson, 823 So. 2d 304 (Fla. 5th DCA 2002); see also State Industries v. Jernigan, 751 So. 2d 680 (Fla. 5th DCA 2000) (privilege revoked for unprofessional conduct during deposition).

The case of Abaddon, Inc. v. Schindler, 826 So. 2d 436 (Fla. 4th DCA 2002), is instructive to the matter at hand. There, the only record activity was a motion to appoint a commissioner for conducting an out of state deposition. Because such a motion was needed to conduct an out-of-state record activity the appellate court found it was sufficient activity to preclude dismissal. Here, a motion and an order were needed for Attorney Sparacio to appear before this court. Attorney Sparacio would be the one prosecuting Appellants' action. Without her admittance the case could not move forward.

II.

THE STATUTE RELIED ON IN GULF APPLIANCE DISTRIBUTORS, INC. V. LONG, 53 SO. 2D 706 (FLA. 1951) IS DIFFERENT IN WORDING FROM RULE 1.420(E) AND THUS DISTINGUISHABLE.

In Gulf Appliance Distributors, Inc. v. Long, 53 So. 2d 706 (Fla. 1951), the Florida Supreme Court interpreted the following statute:

> All actions at law or suits in equity . . . in which there shall not affirmatively appear from some action taken by the filing of pleadings, order of court, or otherwise, that the same is being prosecuted, for a period of one year, shall be deemed abated for want of prosecution and the same shall be dismissed by the court having jurisdiction of the cause.

Sect. 45.19(1), Fla. Stat. (1949). As the Second District discussed, this is different from Rule 1.420(e) where there is no requirement that it be shown that a matter is being affirmatively prosecuted. Slip op. at 3.

Florida Rule of Civil Procedure 1.420(e) was created in 1968 by the Florida Supreme Court. In re Florida Rules of Civil Procedure, 211 So. 2d 206 (Fla. 1968). The original Rule was nearly identical to Florida Statute Section 45.19(1) which was repealed in 1968. It was therefore held that case law interpreting Florida Statute Section 45.19 was applicable in interpreting Rule 1.420(e). Musselman Steel Fabricators v. Radziwon, 263 So. 2d 221 (Fla. 1972). The active/passive distinction had been adopted by the Florida Supreme Court in Gulf Appliance based on a similar

statute from Louisiana and the interpretation of that statute. Id. at 707. The Rule however underwent substantial changes that calls into question the current applicability of the case law interpreting Section 45.19 and later held to be applicable to Rule 1.420(e).

The original Rule 1.420(e) stated

> All actions in which it affirmatively appears that no action has been taken by filing of pleadings, order of court or otherwise for a period of one year shall be dismissed by the court on its own motion or on the motion of any interested person.

In re Florida Rules of Civil Procedure, 211 So. 2d 206, 207 (Fla. 1968).

The original version of the Rule did not contain the word "prosecuted" as the Statute did, but it did have the requirement that if it affirmatively appears that no action is being taken then dismissal is warranted. The Rule was then amended in 1976 to state the following:

> 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 one year shall be dismissed by the court on its own motion or on the motion of any interested person. . . . Mere inaction for a period of less than one year shall not be sufficient cause for dismissal for failure to prosecute.

In re The Florida Bar, Rules of Civil Procedure, 339 So. 2d 626, 629 (Fla. 1976). The Committee note which was added with the amendment stated:

> Subdivision (e) has been amended to prevent the dismissal of an action for inactivity alone unless one year has elapsed since the occurrence of activity **of record**. Non-record activity will not toll the one year time period.

The amended Rule is substantively different from the prior Statute and Rule. The current 1.420(e) does not require that a party affirmatively show it was prosecuting a matter. Instead, all that is looked at is whether it appears on the face of the record that there is no activity. Metropolitan Dade County v. Hall, 784 So. 2d 1087 (Fla. 2001). Thus, Gulf Appliance and its progeny are not controlling in this matter.

The Committee note to the Rule is also instructive and further reason to deny dismissal in the case at bar. The note states that the Rule was being amended to prevent dismissal unless there had been no record activity for one year. It appears clear that the intent of the amendment was to view the face of the record as the court stated in Metropolitan Dade County v. Hall, 784 So. 2d 1087 (Fla. 2001), and deny dismissal if on the face of the record there was activity. The Rule and the Committee note make no mention of active or passive activity. That distinction while part of the interpretation of the Statute is not applicable to Rule 1.420(e) when there is activity on the face of the record.

CONCLUSION

WHEREFORE, Petitioners respectfully request that this Court answer the first portion of the certified question in the affirmative and **REVERSE** the order and opinion on appeal and reinstate Petitioners' complaint.

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Attorneys for Petitioners

By_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 8th day of March, 2004 to ***Robin Black,*** Hannah, Estes & Ingram, P.A., Post Office Box 4974, Orlando, Florida 32802; and ***Ken Levine, Esquire,*** 370 Washington St., Brookline Village, Massachusetts 02446.

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I HEREBY CERTIFY that the above brief has been prepared in accordance with the font requirements of Fla. R. App. P. 9.210(a)(2) as amended January 1, 2001. The font utilized was Times New Roman 14-point.

_____
WAYNE JOHNSON, ESQUIRE