IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC05-868
Fifth District Court of Appeal Case No. 5D03–2857

AMERICAN WALL SYSTEMS, INC., a Florida corporation,

Petitioner,

vs.

MADISON INTERNATIONAL GROUP, INC., a Florida corporation; **WINDERMERE DEVELOPMENT, GROUP**, a dissolved Florida **corporation; S.K. FINANCIAL SERVICE AND DEVELOPMENT INC.**; and, **FIRST UNION NATIONAL BANK,**

Respondents.

APPEAL FROM THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENTS MADISON INTERNATIONAL GROUP, INC.'S and WINDERMERE DEVELOPMENT, GROUP'S ANSWER BRIEF ON THE MERITS.

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PRELIMINARY STATEMENT - ABBREVIATIONS

Respondents MADISON INTERNATIONAL GROUP, INC. and WINDERMERE DEVELOPMENT, GROUP, will collectively be referred to in this answer brief as “Respondents” or "MADISON”. Petitioner AMERICAN WALL SYSTEMS, INC. is referred to in this brief as “Petitioner” or “AMERICAN WALL”. Respondents were Defendants and Petitioner was Plaintiff in the trial court below, Case No. CI-098-4505, Div. 34, in the Circuit Court for the Ninth Judicial Circuit in and for Orange County, Florida. Respondents were Appellees and Petitioner was Appellant in the Fifth Circuit Court of Appeals, Case No. 5D03–2857, with the decision reported as American Wall Systems, Inc. v. Madison International Group, Inc., et al., 898 So. 2d 111 (Fla. 5th DCA 2005). The record on appeal in this case is cited as “R: _____”, according to page number and the supplemental record transcript of the motion to dismiss hearing before trial court Judge Grincewicz on May 29, 2003 (note that the transcript erroneously references “2004” rather than “200 ” as the year of the hearing), is cited as “T: _____”, according to transcript page number.

STATEMENT OF THE CASE AND FACTS

MADISON will not restate the entirety of the facts in the interest of brevity. However, the following corrections to AMERICAN WALL’s erroneous Statement of Facts is provided:

> On March 17, 2003, Respondent First Union/Wachovia filed its Motion to Dismiss for Failure to Prosecute. (R:

420A-420D).

On March 21, 2003, Appellant filed Notice of Service of Interrogatories to Windermere and Madison. The Certificate of Service on the Notice of Service of Interrogatories states a service date of March 12, 2003. (R. 480) The envelope addressed to Respondent First Union/Wachovia's counsel containing the Notice of Service of Interrogatories had a metered postmark of March 12, 2003, a stamped postmark of March 18, 2003 (R. 481) and was stamped as received by Respondent First Union/Wachovia's counsel on March 20, 2003. (R: 482).

While the two listed actions were filed subsequent to this action, neither the case of Republic Bank v. Madison International Group, Inc., a Florida corporation, Savitri Singh, Mohan Singh, et. al. , Case # CI-98-1048, Division 35 nor First Union National Bank n/k/a Wachovia v. Totarum Singh, individually and as trustee of S. K. Financial Services and Development, Inc., a dissolved Florida corporation; Madison International Group, a Florida corporation, et. al., Case # CI-00-5232, Division 33 had any pending motions that could have in any manner impacted the case *sub judice*, save for the motion to consolidate the Totarum Singh case with the present case which was vigorously opposed by AMERICAN WALL. Additionally, the Republic Bank case foreclosed AMERICAN WALL's interests in the property at issue in this

litigation through Final Orders of Default and Foreclosure in January and March of 2000. (R: 483,488-491, T: 11-12).

Although this Honorable Court did Order the Petitioner to serve its Initial Brief on the Merits on or before December 28, 2005, undersigned counsel has not, to date, been lawfully and properly served by counsel for AMERICAN WALL, Loreen I. Kreizinger, Attorney-At-Law, with said brief, despite being notified by the undersigned of this failure of service in writing on December 30, 2005. Reference to AMERICAN WALL's Certificate of Service discloses that AMERICAN WALL chose to ignore the docketed timely Notice of Appearance by the undersigned on December 15, 2005, and instead served MADISON's principle directly in Switzerland. While counsel for AMERICAN WALL's failure may be partially excused by undersigned counsel's use of Ms. Kreizinger's prior record address for the Fifth District Court of Appeals proceeding, which apparently is not being forwarded to her offices, it is respectfully submitted that AMERICAN WALL's failure to check with this Honorable Court's docket to determine an appearance was made in substitution of previous counsel for MADISON and Ms. Kreizinger's refusal to provide valid service when requested should not be condoned. Undersigned counsel obtained a copy of AMERICAN WALL's Initial Brief from co-

counsel Steven Chumbris, Esquire of Holland & Knight and presents this Answer Brief in a timely manner out of an abundance of caution, despite not being afforded the full time period as a result of the actions of AMERICAN WALL.

SUMMARY OF THE ARGUMENT

This Honorable Court is without jurisdiction to hear this case because a review of the four corners of the Fifth District Court of Appeals decision, reported at American Wall Systems, Inc. v. Madison International Group, Inc., et al., 898 So. 2d 111 (Fla. 5th DCA 2005), discloses that there is no conflict with any other decision of this Honorable Court or District Court of Appeal.

A good faith clarification or exception to this Honorable Court's dramatic change in the jurisprudential approach to Fla. R. Civ. P. Rule 1.420(e) dismissals for lack of prosecution is warranted to recognize that the very purpose and *raison d'entre* of the Rule is to require plaintiffs to shoulder the burden of moving cases forward and not cause ministerial or perfunctory motions filed by defendants to extend cases that have been abandoned or neglected by plaintiffs, as here.

AMERICAN WALL's arguments that the trial court and the Fifth District Court of Appeal refused to hear evidence of non-record activity in determining good cause under Rule 1.420(e) is incorrect. Both courts considered the arguments and properly rejected them, finding AMERICAN WALL's assertions

of good cause and the evidence presented in support thereof to be unpersuasive.

Likewise, both the trial court and the Fifth District Court of Appeal properly rejected AMERICAN WALL's spurious claims and found the evidence presented in support thereof that there were two pending cases that prevented activity on the case to be unpersuasive.

Finally, both the trial court and the Fifth District Court of Appeal were unpersuaded and properly rejected AMERICAN WALL's claims that it had mailed its discovery requests prior to the motion to dismiss for lack of prosecution, based on the fact that of record is an envelope containing a Fort Lauderdale (the location of Ms. Kreizinger's offices) postmark dated six (6) days after the date referenced on the certificate of service and four (4) days after the date of service of the motion to dismiss. As such, the discovery requests obviously cannot be considered as record activity or non-record activity for the purposes of good cause for lack of activity prior to the motion to dismiss.

ARGUMENT

I. THERE IS NO DIRECT FACIAL CONFLICT BETWEEN THE 5TH DCA DECISION IN AMERICAN WALL SYSTEMS, INC. v. MADISON INTERNATIONAL GROUP, INC., ET AL., 898 SO. 2D 111 (5TH DCA 2005)AND THE SALAMON DECISION OR THE DEL DUCA OR DELUCA DECISIONS OR ANY OTHER DISTRICT COURT OR SUPREME COURT DECISION, THEREFORE THERE IS NO JURISDICTION TO HEAR THIS APPEAL.

It has long since been established in Florida, albeit perhaps contrary to popular opinion, that the District Courts

of Appeal are not intermediary courts, but rather primarily courts of final appellate jurisdiction that is in most instances final and absolute. Jenkins v. State of Florida, 385 So. 2d 1356, 1358 (Fla. 1980). As such, the supervisory jurisdiction of this Honorable Court has been strictly proscribed and indeed limited by the Constitution of the State of Florida in Article V, §3. The present appeal ostensibly arises under Fla. Const. Art. V, §3(b)(3), this Honorable Court's conflict jurisdiction. It is respectfully submitted that notwithstanding this Honorable Court's acceptance of jurisdiction, a review of the "four corners" of the Fifth District Court of Appeal's decision at issue *sub judice* - American Wall Systems, Inc. v. Madison International Group, Inc., et al., 898 So. 2d 111 (Fla. 5th DCA 2005), which is at issue in this appeal, plainly discloses that there is no facial conflict.

To invoke this Court's conflict jurisdiction, it is well settled that the "conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision." Reaves v. State of Florida, 485 So. 2d 829, 830 (Fla. 1986). Neither the appellate record itself nor the facts contained therein can be used to establish jurisdiction under Fla. Const. Art. V, §3(b)(3). Id. It must be determined that the allegedly conflicting cases are "'on all fours' factually in all material respects". Florida Power & Light Co. v. Bell, 113 So. 2d 697, 698 (Fla. 1959).

Disagreement with the conclusions of a District Court of Appeal do not provide the basis for conflict jurisdiction in the absence of facial conflict contained in the four corners of the majority opinion. Reaves, 485 So. 2d at 830; Bell, 113 So. 2d at 698. In short, it is conflict of decisions, rather than a difference of opinions or reasons that supplies this Court's conflict jurisdiction under Fla. Const. Art. V, §3(b)(3). Jenkins, 385 So. 2d at 1359. Even if this Honorable Court considers the American Wall Systems, Inc. in error, it does not have jurisdiction to hear the present appeal absent clear inter-district conflict or conflict with this Court and has no power to routinely review decisions of the District Courts of Appeal, even if the perceived erroneous decisions are deemed important. State v. Barnum, 2005 Fla. LEXIS 1780, *27, 30 Fla. Law Weekly, s637 (Fla. Sept.22, 2005).

Turning to the decision at issue, nowhere does the Fifth District Court of Appeal ever rule or decide that the record activity is insufficient to overcome a motion to dismiss for failure to prosecute. American Wall Systems, Inc., 898 So. 2d at 111 – 112. What the Fifth District Court of Appeals did rule is as follows:

1. That AMERICAN WALL's service of interrogatories was "subsequent in time" to the motion to dismiss;
2. That AMERICAN WALL's "principal argument" on appeal that the withdrawal of defense attorney and the filing of appearance by substitute counsel prevented AMERICAN

WALL from prosecuting the case was not sufficient to prevent dismissal";

3. That AMERICAN WALL's inaction was not justified because it "was awaiting the results of two related pending actions" without either stay or joinder being sought by AMERICAN WALL;
4. That AMERICAN WALL's argument that the trial court's order allowing withdrawal of defense counsel "somehow abated or stayed the action below until counsel was substituted" was rejected; and,
5. That AMERICAN WALL's arguments relating to **non-record activity** and clerical error were "unpersuasive". (emphasis added).

Thus, there is no conflict with the recent decision in Wilson v. Salamon, 2005 Fla. LEXIS 2050, 30 Fla. L. Weekly S701 (Fla. Oct. 20, 2005), because the Fifth District Court of Appeal never directly ruled on the issue of the record activity and certainly provided no decision that the activity in this matter was either "affirmative" or "passive" or any of the other terms and concepts used by the courts in Florida for over fifty (50) years in Fla. R. Civ. P. Rule 1.420(e) motions that were conclusively swept away by the Salamon decision. Additionally, there is no conflict with any of the other decisions AMERICAN WALL cites because the issues presented in those cases were likewise not addressed in the American Wall Systems American Wall Systems, Inc., Inc., 898 So. 2d at 111 –

112 decision.

Equally certain is the fact that AMERICAN WALL's allegations of conflict with the Fourth District Court of Appeals decision in Curtin v. Deluca, 886 So. 2d 298 (Fla. 4th DCA 2004), are likewise obviated by a review of the four corners of the decision in American Wall Systems, Inc., 898 So. 2d 111 (Fla. 5th DCA 2005). In fact, the Fifth District Court of Appeals expressly found that AMERICAN WALL failed to prove that it in fact served its discovery requests on the date referenced in the certificate of service and otherwise prior to the date of the motion to dismiss, thereby rendering the Deluca decision of no moment and certainly not in conflict. American Wall Systems, Inc., 898 So. 2d at 112.

Despite AMERICAN WALL's statements to the contrary, there is likewise no facial conflict with American Wall Systems, Inc., 898 So. 2d at 111 – 112 decision and this Court's decision in Del Duca v. Anthony, 587 So. 2d 1306, 1308-09 (Fla. 1991), because the Del Duca decision has been overruled by the Salamon decision and because there was no ruling that the Del Duca two step process did not apply. American Wall Systems, Inc., 898 So. 2d at 111 – 112.

Thus, in the absence of clear conflict on the face of the American Wall Systems, Inc., 898 So. 2d at 111 – 112 decision, this Honorable Court is without jurisdiction to hear the present appeal and the petition for review should be denied and this appeal dismissed. Reaves, 485 So. 2d at 830.

II. THE TRIAL COURT AND THE DISTRICT COURT OF APPEALS' ORDERS DISMISSING THIS ACTION FOR LACK OF PROSECUTION ARE CORRECT AND SHOULD BE AFFIRMED.

The issues in this appeal, albeit inadvertently, concern the interplay between the actions of defense counsel in rightfully withdrawing from a matter due to a conflict and the potential harm to the client resulting from the exercise of that right. Thus, this case concerns the competing requirements of Rule 4-1.16(b) of the Rules of Professional Conduct for the Florida Bar that permit an attorney to withdraw from representation if a conflict develops, but not if the withdrawal will have an adverse material impact on the client. In this appeal, the issue arises whereby the attorney's exercise of his right or obligation to withdraw created the alleged "record activity" that perpetuated AMERICAN WALL's case, with no independent action or effort of any sort or nature by AMERICAN WALL to move its case forward to a trial[1] distinctly personal and indeed privileged

[1] It bears noting that a review of the record in this case discloses a less than diligent approach to this litigation, given that the interests sought by AMERICAN WALL's lien have been previously foreclosed by default in one of the cases AMERICAN WALL claims it was awaiting the outcome, although as will be addressed below, the final judgment of foreclosure of AMERICAN WALL's interest was in fact three (3) years prior to the alleged "waiting period". Certainly the undersigned's experience in this case has been that this matter has always featured extensive periods of Plaintiff's inaction and use of dilatory motions, including the second motion to amend, consisting of a single page motion without preparation of the amendment in an obvious attempt to delay and avoid trial in January 2001 (R: 283). The second motion to amend was never supplemented and was accordingly denied by the trial court on April 6, 2001 (R: 284). AMERICAN WALL again moved to amend October 1, 2001, in what was then taken to be an effort to

relationship between counsel and client should not provide the basis for continuation of a somnolent action. In fact, as here, the withdrawal of defense counsel because of a conflict with his/her client should not be the "responsible" act for perpetuating a lawsuit that has been essentially abandoned by plaintiff's counsel. In the future, any counsel for defendant(s) in a civil matter must be very wary of withdrawing from representing his/her client in an action wherein the plaintiff has failed or refused to move its case forward, else the act of withdrawal alone will preserve plaintiff's rights and serve plaintiff's ends rather than those of counsel's former client. Surely this result is not what was intended.

The need to revisit the purposes and policies behind the Wilson v. Salamon decision and the problems created thereby compel this good faith request for a modification of that decision and the creation of an exception warranted by this appeal. There must be consideration given to the distinction between activity generated, caused or created by the litigants for the purposes of the litigation and activities that are purely administrative and perfunctory in nature. Examples of the latter would be, *inter alia*, notices of vacation, notices

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avoid summary judgment. (R:289-323). This third motion to amend, although complete with a draft of an amended complaint, has never been presented to the trial court for ruling. Perhaps an explanation for the lack of diligent pursuit of this matter by AMERICAN WALL lies in the fact that AMERICAN WALL's lead counsel, Loreen Kreizinger, is the spouse of the owner of AMERICAN WALL.

of absence from the jurisdiction, motions to compel payment for agreed discovery fees and notices or motions to withdraw as counsel.

In fact, it can be gainsaid that Fla. R. Civ. P. Rule 1.420(e) exists solely to keep plaintiffs from filing actions and then sleeping at the switch, thereby clogging the court's dockets and inconveniencing burdening and harassing defendants and the court system. If there is no distinction to be drawn from activities that move cases along and those that do not, then one must ask the rhetorical question of "why does Fla. R. Civ. P. Rule 1.420(e) exist?" As such, it is respectfully submitted that the obligation to move a case along and avoid dismissal for lack of prosecution under Rule 1.420(e), in reality and practice, lies squarely with the plaintiff.

Fla. R. Civ. P. Rule 1.420(e) can thus be seen as the "price of admission" to the court system, indeed a tariff of action and activity that must be paid by plaintiff to keep the action valid and alive. Certainly most defendants do not enjoy being sued and want the matter to go away by whatever means are lawfully, ethically and strategically available; either through dynamic action in the nature of a motion to dismiss or summary judgment, or through the case dying on the vine because of lack of attention by plaintiff. Of course, trial of the matter is another option, but although there are exceptions, you will seldom find notices of trial filed by defendant's counsel as that act does not often serve the

defense of an action, which is by nature static and defensive. Either way, the dismissal or conclusion of an action through the only two pretrial methods, motion to dismiss and summary judgment, are the real world goal of defendants and their counsel.

There is nothing earth shattering about the principle that Rule 1.420(e) exists because of a recognition of the need to keep plaintiffs rather than defendants active and moving forward in the conduct of litigation. It is therefore no coincidence that Rule 1.420(e) provides for dismissal based on a lack of diligence, much like Rule 1.420(b) dismissals, which are the common, garden variety motions to dismiss under Fla. R. Civ. P. Rule 1.420(b) and otherwise. Just as a Fla. R. Civ. P. Rule 1.420(b) motion to dismiss often hinges upon the lack of diligent pleading by plaintiff in its success or failure, in a parallel manner it is respectfully submitted that a Rule 1.420(e) motion to dismiss also exclusively concerns the diligence of plaintiff in the conduct and maintenance of the filed action. Proof of this concept is amply illustrated by the fact that the diligence, or lack thereof, of defendant in a motion to dismiss is of no moment simply because the defendant, being in defensive posture has nothing to dismiss.

Further evidence that it is the plaintiff’s obligation and sole burden to provide the basis for activity to maintain an action, and not that of defendant, can be seen in the amended Rule 1.420(e). The 2005 amendment to Rule 1.420(e)

substantially overhauls the rule by reducing the time period for inactivity to ten (10) months, but requires a notice or warning to plaintiff of the possibility of the action being dismissed if there is no activity for an additional sixty (60) days. As such, the sleeping plaintiff must be awakened by the trial court or by defendant and only after inactivity persists following the notice/warning will the action be dismissed. As such, this Honorable Court's concern for balancing the interests of plaintiffs in having their day in court in light of Fla. Const. Art. I, §21 and the interests of defendants and the orderly administration of an overtaxed court system in not being burdened by actions that are filed and not pursued, has been admirably addressed. In Re Amendments to Florida Rules of Civil Procedure, 2005 Fla. LEXIS 2549, 30 Fla. L. Weekly s848 (Fla. Oct. 20, 2005).

In the interim and for those actions in the hopper prior to the effective date of the 2005 amendment TO Fla. R. Civ. P. Rule 1.420(e), it is respectfully submitted that this honorable court uphold the ruling of the Fifth District Court of Appeal in this case and thereby clarify or modify its sea change decision in Wilson v. Salamon, 2005 Fla. LEXIS 2050, 30 Fla. L. Weekly S701 (Fla. Oct. 20, 2005), to reflect that the administrative, perfunctory or purely ministerial court filings of defendants shall not provide the basis for "record activity" under former Rule 1.420(e).

III. THE REMAINING GROUNDS FOR AMERICAN WALL'S APPEAL SHOULD BE DISREGARDED.

A. American Wall's Argument That The Fifth Circuit Court of Appeals and the Trial Court Erred As Regards Non-Record Activity And Good Cause Are Erroneous And Unsupported by the Record In This Case.

AMERICAN WALL'S description of the trial court's statements concerning non-record activity and Rule 1.420(e) and the Fifth District Court of Appeals statements relating to AMERICAN WALL's failure to carry its burden of good cause under Rule 1.420(e) are incorrect and unavailing to overrule the lower courts' rulings. Both the trial court and the Fifth District Court of Appeals agree with this Honorable Court that once it is determined that there is no record activity for a one year period, the burden shifts to plaintiff to establish good cause why the action should remain pending. Wilson v. Salamon, 2005 Fla. LEXIS 2050 *11, 30 Fla. L. Weekly S701 (Fla. Oct. 20, 2005); *quoting* Del Duca v. Anthony, 587 So. 2d 1306, 1308-09 (Fla. 1991). Non-record activity could still be utilized to present good cause for failure to prosecute but, as stated in Salamon, the plaintiff "has a high burden to establish good cause". Id. Thus, the trial court and the Fifth District Court of Appeal did not refuse to consider non-record activity despite AMERICAN WALL's unsupported claims to the contrary, therefore there is no "conflict" between the trial court's ruling and the Fifth District Court of Appeals decision in American Wall Systems, Inc. v. Madison International Group, Inc., et al., 898 So. 2d 111 (Fla. 5th DCA 2005) and the rulings of this Honorable Court on the issue of good cause under Rule 1.420(e). Instead, both the trial court

and the Fifth District Court of Appeals simply found that AMERICAN WALL's arguments relating to non-record activity and other "good cause" were unpersuasive and insufficient to withstand the motion to dismiss pursuant to Fla. R. Civ. P. Rule 1.420(e).

B. The Argument That Other Pending Actions Prevented AMERICAN WALL From Action In This Case Is Unsupported By The Record.

AMERICAN WALL's make weight argument that the pendency of two similar cases prohibited activity on this case is without moment and misleading in nature. This argument is simply not supported by the facts and is frankly misleading and arguably improper.

One case cited by AMERICAN WALL as pending and therefore good cause for Petitioner's inaction was Republic Bank v. Madison International Group, Inc., a Florida corporation, Savitri Singh, Mohan Singh, et. al. , Case # CI-98-1048, Division 35. (hereinafter "Republic"). AMERICAN WALL was a named defendant in the Republic case, which was a foreclosure by Republic Bank on the property at issue in this litigation. The Republic case went to final foreclosure judgment in January and March of 2000. (R. 488-491, T. 11-12). All interests were foreclosed in January 2000 and March 2000, including those of AMERICAN WALL, who failed and refused to appear and defend in that case. There is no possible merit in AMERICAN WALL's excuse for its extended inactivity that it was waiting on the outcome of the Republic case in 2002. This

argument should be ignored as being of no moment, save for the continued misleading and false nature of the allegations contained therein.

The other concurrent action AMERICAN WALL presents as providing good cause for its inactivity is the case of First Union National Bank n/k/a Wachovia v. Totarum Singh, individually and as trustee of S. K. Financial Services and Development, Inc., a dissolved Florida corporation; Madison International Group, a Florida corporation, et. al., Case # CI-00-5232, Division 33. (hereinafter "Singh"). As with the Republic case, there is no legitimate basis for the assertion that the pendency of the Singh case prevented AMERICAN WALL from pursuing the case at bar. In fact, AMERICAN WALL resisted First Union's efforts to consolidate that action with the present case. Further and most telling is the fact that First Union/Wachovia filed a motion for partial summary judgment in the Singh action against all defendants except AMERICAN WALL. (R. 483, T. 12), a fact that deflates AMERICAN WALL's argument that the summary judgment motion filed in the pending Singh case somehow excused AMERICAN WALL's protracted inaction in the studiously ignored case *sub judice*. Thus, Appellant's assertions at the hearing in the trial court below, before the Fifth District Court of Appeal and in its brief to this Honorable Court that it was waiting for the outcome of the Singh matter is also unsupported and without moment.

A showing that the other pending litigation justifiably

prevented the prosecution of a case being considered for dismissal under Rule 1.420(e) must be shown. Cox v. WIOD, Inc., 764 So.2d 671 (Fla. 4th DCA 2000); Palokonis v. ERG Enterprises, Inc., 652 So.2d 482, 483-84 (Fla. 5th DCA 1995). AMERICAN WALL has fallen far short of bearing its burden in this regard. The Fifth Circuit Court of Appeals decision should accordingly be affirmed.

C. AMERICAN WALL'S Argument That Its Request For Written Discovery Was Not Properly Considered As Constituting Good Cause To Avoid Dismissal Is Incorrect and Unsupported By The Record.

AMERICAN WALL's final argument seems to state that the trial court and the Fifth District Court of Appeals refusal to ignore evidence that AMERICAN WALL served and filed its discovery requests after the date of service and docketing of the motion to dismiss for failure to prosecute somehow runs afoul of the decision in Curtin v. Deluca, 886 So. 2d 298 (Fla. 4th DCA 2004) and thereby creates conflict and confusion. Nothing could be further from the truth. In fact, both the trial court and the Fifth District Court of Appeals considered AMERICAN WALL's arguments that it had served the discovery requests prior to the motion to dismiss and rejected same. The Fifth District Court of Appeals plainly and succinctly stated that "the trial court determined that a notice of service of interrogatories by American [Wall] was subsequent in time to March 17, 2003". American Wall Systems, Inc. v. Madison International Group, Inc., et al., 898 So. 2d at 112. This finding in no manner conflicts with the holding in Deluca, 886

So. 2d at 301, because the prerequisite act of mailing the discovery requests prior to the date the motion to dismiss was filed has not been established. In fact, there was unrefuted evidence that the discovery requests were not actually mailed until March 18, 2003, based on a postmark bearing that date from the post office in AMERICAN WALL's counsel's locale, being Fort Lauderdale, Florida.(T. 4). Thus, AMERICAN WALL failed to prove that it in fact served the discovery requests on the date referenced in the certificate of service and otherwise prior to the date of the motion to dismiss, thereby rendering the Deluca decision of no moment or applicability in this appeal.

Further, there is no dispute that AMERICAN WALL's Notice of Service of Interrogatories was filed on March 21, 2003 (R. 480), four days after the motion to dismiss was docketed on March 17, 2003. (R. 420A-420D) As such, it is beyond cavil that AMERICAN WALL's Notice of Filing Interrogatories was too late to constitute record activity within one year prior to the motion to dismiss under Rule 1.420(e).

At no point in AMERICAN WALL's Briefs, here and below, does AMERICAN WALL admit or state the indisputable fact that it filed its Notice of Service of Interrogatories on March 21, 2003. Instead, AMERICAN WALL ignores the obvious fact that in determining record activity, the "activity" must be on the record, e.g., filed. As such, service dates do not matter. It has been uniformly and repeatedly held that the filing date of

court papers that determines record activity under Rule 1.420(e). Government Employees Insurance Co. v. Wheelus, 382 So.2d 124 (Fla. 5th DCA 1980; Fund Insurance Companies v. Preskitt, 231 So.2d 866 (Fla. 4th DCA 1970); Ace Delivery Service, Inc. v. Pickett, 274 So.2d 15 (Fla. 2d DCA 1973); Carter v. DeCarion, 400 So.2d 521 (Fla. 3d DCA 1981); Artime v. Brotman, 838 So.2d 691 (Fla. 3d DCA 2003); and Konstand v. Bivens Center, Inc., 512 So.2d 1148 (Fla. 1st DCA 1987).

Clearly this principle holds true in light of the monumental change occasioned by this Court's decision in Salamon, which, if nothing else exalts the sanctity of the face of the trial court's record/docket sheet as being the singular polestar for determining whether a dismissal for lack of prosecution is proper. Salamon, at *16, *quoting* Justice Wells in Metropolitan Dade County v. Hall, 784 So. 2d 1087, 1090 (Fla. 2001). The Fifth District Court of Appeals decision in American Wall Systems, Inc. v. Madison International Group, Inc., et al., 898 So. 2d 111 (Fla. 5th DCA 2005), must be accordingly affirmed.

CONCLUSION

For the foregoing reasons, this Honorable Court should uphold the Order of the Trial Court and the Fifth Circuit Court of Appeal's affirmance of same.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Respondents Answer Brief has been furnished by U.S. Mail this _____ day of January, 2006, to: Loreen Kreizinger, Attorney-At-Law and Justine S. Anagnos, Attorney-At-Law, LOREEN KREIZINGER, P.A., Northern Trust Centre, Suite 403, 2601 E. Oakland Park Boulevard, Ft. Lauderdale, Florida 33306; and Gerald Douglas Davis, Esquire and Stephen C. Chumbris, Esquire, HOLLAND & KNIGHT, L.L.P., 200 Central Avenue, Suite 1600, St. Petersburg, Florida 33701.

_____
W. Bruce DelValle
Florida Bar No. 0779962

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Fla. R. App. P. 9.210(a)(2), e.g., Courier New 12-point type.

_____
W. Bruce DelValle
Florida Bar No. 0779962