

THE SUPREME COURT OF FLORIDA

FLORIDA PATIENT'S COMPENSATION FUND,
Petitioner,

vs.

BARBARA JEAN GANT, ET VIR.,
Respondents.

* * * * *

TALLAHASSEE MEMORIAL REGIONAL
MEDICAL CENTER, INC., ET.AL.,
Petitioners,

vs.

BARBARA JEAN GANT, ET VIR.,
Respondents.

FILED

CASE NO. 69,062

SEP 29 1986

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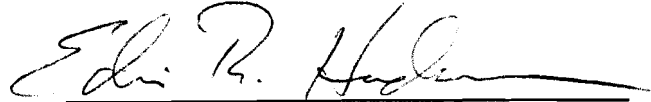
CLERK, SUPREME COURT OF FLORIDA

By

DCA CASE NO. VBI-182

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PETITIONER, TALLAHASSEE MEMORIAL REGIONAL MEDICAL CENTER
REPLY BRIEF



JOHN D. BUCHANAN, JR.
EDWIN R. HUDSON

Henry, Buchanan, Mick
& English, P.A.
Post Office Drawer 1049
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September 29, 1986

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ARGUMENT

THE PREMATURE FILING OF A MOTION
TO DISMISS FOR FAILURE TO PROSECUTE
DOES NOT CONSTITUTE ACTIVITY OF RECORD
AS CONTEMPLATED BY RULE 1.420(e),
FLORIDA RULES OF CIVIL PROCEDURE

The respondents have argued that a Rule 1.420(e) Fla. R. Civ. P. Motion to Dismiss for Failure to Prosecute constitutes record activity sufficient to preclude dismissal but have provided little rationale for this position other than the assertion that such a motion by a Defendant "advances or furthers a cause to conclusion, resolution or disposition."

As indicated in the Petitioners' initial briefs, the activity to which the rule speaks is activity which goes to the merits of the case. The burden of prosecution of the cause is upon the plaintiff and only the plaintiff may prosecute its cause; thus, it is absolutely untenable that a defendant's Motion to Dismiss for Failure to Prosecute should toll the running of time of the plaintiff's inaction.

The respondents go on to suggest that their interpretation is needed to protect "unsuspecting plaintiffs." This argument conveniently meets the need of the respondents but has no basis in law. The courts have made it clear:

... mere inadvertence or misimpressions and erroneous assumptions of plaintiff's counsel in not prosecuting a cause for a period of one year does not constitute good cause why the action should remain pending. Industrial Trucks of Florida vs. Gonzalez, 351 So 2d 744 (Fla. 3 DCA 1977)

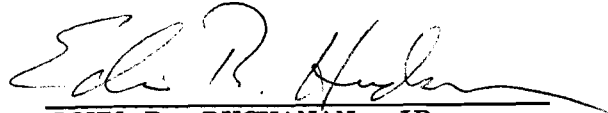
In Industrial Trucks, the Court held that the filing of a Notice of Substitution of Counsel did not constitute affirmative case activity sufficient to preclude dismissal.

CONCLUSION

This court should adopt the clear and logical interpretation of Rule 1.420(e) set forth by the Second and Third Districts, an interpretation clearly supported by dicta in many First District decisions. To adopt the position advanced by the respondents would frustrate the clear purpose and intent of the rule to expedite litigation and preclude the clogging of court dockets.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Craig A. Dennis, Collins, Dennis & Williams, Post Office Box 550, Tallahassee, Florida 32302, and Harold Regan, 309 East College Avenue, Tallahassee, Florida 32301, this 29th day of September, 1986.



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