

## **DISMISSAL FOR LACK OF PROSECUTION – THE FINAL CHAPTER**

In all the years this writer served on the Rules of Civil Procedure Committee of the Florida Bar, the one rule that never seemed to make sense was Fla. R. Civ. P. 1.420(e) which provided for dismissal of a suit based on lack of prosecution. All of the many cases interpreting that rule involved actions where the prosecuting party clearly wanted the case to go forward. Were that not the case, an appeal would not have followed the order of dismissal. Dismissing a case a party wants to pursue after the statute of limitations has passed simply created new causes of action for legal malpractice and did nothing to clear dockets.

Prior to January 1, 2006, rule 1.420(e) provided that if there was no record activity during the preceding 12 months the suit would be dismissed absent a stay order in place or a finding of good cause. Numerous cases interpreted what the term “record activity” meant and a whole line of cases tried to separate active and passive record activity under the theory that only actions designed to move the case forward would constitute sufficient record activity within the meaning of the rule.

That issue came to rest in Wilson v. Salamon, 923 So. 2d 363, 368 (Fla. 2005) when the Supreme Court created a bright-line test for record activity concluding that any document filed in the record was sufficient. After January 1, 2006, the amendment to rule 1.420(e) shortened the period for lack of record

activity to ten months but created a sixty day grace period during which the prosecuting party could avoid dismissal. The Second and Third Districts in Pagan v. Facilicorp, Inc., 989 So. 2d 21 (Fla. 2d DCA 2008), Edwards v. City of St. Petersburg, 961 So. 2d 1048 (Fla. 2d DCA 2007) and Padron v. Alonso, 970 So. 2d 399 (Fla. 3<sup>rd</sup> DCA 2007) concluded that the Supreme Court's edict in Wilson, supra, applied to the type of record activity necessary to avoid dismissal within the sixty day grace period. The First District in Chemrock Corporation v. Tampa Electric Co., 23 So. 3d 759 (Fla. 1<sup>st</sup> DCA 2009) disagreed reverting to the question of whether the actions of the nonmoving party during the grace period were an attempt to move the case forward to and, if not, that such actions were insufficient to avoid dismissal.

The conflict between these cases was decided by the Supreme Court in Chemrock Corporation v. Tampa Electric Co., 36 Fla. L. Weekly S318 (Fla. June 30, 2011).

It is interesting to note that the underlying facts of Chemrock are that the case was initially set for trial and then continued on joint motion. During the next three and a half years while no one moved to reset the case for trial, discovery was ongoing and trial preparation was being undertaken and there were numerous disagreements concerning discovery which did not result in any motions before the Court. This scenario is a perfect example of why the rule itself makes no sense. While record activity may not have occurred during this period of time, nonrecord activity was ample and the case was clearly moving towards conclusion despite the fact that the parties had not required the Court to

intervene in their discovery disputes. Dismissing a case on that basis seems to make no sense.

At 320, the Supreme Court makes clear that the bright-line edict enunciated in Wilson, supra, with regard to the period of nonrecord activity also applies to the sixty day grace period in the revised rule.

Our plain meaning interpretation of the rule in *Wilson* remains applicable to the current rule. Less than two months after issuance of our decision in *Wilson*, we amended rule 1.420(e) to shorten the twelve-month period of record inactivity stated in the rule to ten months in order to trigger the filing of a notice of lack of prosecution. See *In re Amendments*, 917 So. 2d at 181-82. The amended rule then added a notice requirement followed by a sixty-day grace period during which the party could engage in record activity in order to avoid dismissal for lack of prosecution. The other provisions in the rule remained virtually the same. *Id.* at 181. Both rules require record activity, defined as the “filing of pleadings, order of court or otherwise.” Under both rules, dismissal is precluded if a stay order is entered or a party shows good cause in writing more than five days before a hearing on the motion to dismiss.

Our intent in amending the rule in 2005 was simply to alleviate the harshness of the rule by providing notice to a party that the action was at risk of being dismissed for lack of prosecution, and affording the party a reasonable time thereafter in which to engage in record activity in order to preclude dismissal. By creation of the sixty-day grace period, it was not our intention to create a situation in which the plaintiff or the trial court must again guess at what type of record activity will be required during the sixty-day grace period to preclude dismissal for lack

of prosecution. Just as we held in *Wilson*, the bright-line interpretation of rule 1.420(e), under which any filing of record is sufficient to preclude dismissal, applies to both time periods set forth in the amended rule.

In *Wilson*, *supra*, at 367-68, the Supreme Court dismissed what they concluded were two conflicting policies. The courts desire for complete resolution of a case on its merits and, the elimination of cases which are not being prosecuted and which clog the system. The Court concludes that as to rule 1.420(e) “a secondary concern is to see that the resolution of cases on the merits is not impaired by the processing of cases without merit or cases that are filed and then abandoned in the system.”

The problem with that purported goal of the rule is that it ignores the reality that the cases involuntarily dismissed under that rule have continually clogged the appellate courts because the appealing parties indeed want their cases concluded on the merits and not dismissed for lack of prosecution. If that, indeed, is the goal of the rule, a simple rule providing that the Clerk notify parties after a period of nonactivity and if no response is received within a reasonable period of time dismissal ensues, would solve the problem without dismissing perfectly valid ongoing litigation simply because the parties have not filed something “in the record.”

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