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**FAILURE TO PROSECUTE – THE TRAP IS REMOVED
by Ted Babbitt**

Fla.R.Civ.P. 1.420(e) Florida's dismissal for failure to prosecute rule is one of the harshest rules of its kind in the nation. In my opinion it has caused more unnecessary litigation and appellate review than any other rule in our state. Until recently it provided that if no record activity occurred within twelve months, absent a showing of good cause, a lawsuit would be dismissed. If the statute of limitations had run, the only recourse the plaintiff would have would be to sue the plaintiff's lawyer for legal malpractice.

When I left the Civil Rules Committee after serving for over twenty years, as my last official act, I asked the Committee to consider the abolition of the rule. I am sure my plea had little to do with it but recently the Supreme Court passed an amendment which takes the sting out of the rule.

The amended rule can be found at 30 Fla. L. Weekly S848 (Fla. Dec. 15, 2005). The amended rule reads as follows:

1.420(e) Failure to Prosecute. In aAll 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 ~~4-year~~ 10 months, and no order staying the action has been issued nor stipulation for stay approved by the court, any interested person, whether a party to the action or not, the court, or the clerk of the court may serve notice to all parties that no such activity has occurred. If no such record activity has occurred within the 10 months immediately preceding the service of such notice, and no record activity occurs within the 60 days immediately following the service of such notice, and if no stay

was issued or approved prior to the expiration of such 60-day period, the action 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.

This amendment makes good sense. This “open ended” type of a failure to prosecute rule allows the plaintiff to prosecute the claim if the lack of activity was inadvertent. As I have argued for years, the existence of all of the appellate decisions on this subject is proof positive that the former rule was dismissing cases where the plaintiff wanted to go forward with the case. Why else would there be an objection and a subsequent appeal?

The problem with the old rule was that the Courts’ conception of “record activity” did not include many acts that were legitimately calculated to move a case forward. For example, record activity has been found by our courts to not include such things as notices of hearing, pleadings, orders, and notices related to withdrawal and substitution of counsel (Nesbitt v. Community Health of S. Dade, Inc., 566 So. 2d 1 (Fla. 3rd DCA 1989), offers of judgment and notices of depositions (Metro Dade County v. Hall, 784 So. 2d 1087 (Fla. 2001), actual depositions (Smith v. DeLoach, 556 So. 2d 786 (Fla. 2d DCA 1990) (two depositions that were taken during the year preceding the 1.420(e) motion and filed did not constitute record activity)), notices of trial (Brennan v. Ryter, 339 So.

2d 661 (Fla. 1st DCA 1976), cert den. 348 So. 2d 944), certain court orders and plaintiff's responses (Norflor Const. Corp. v City of Gainesville, 512 So. 2d 266 (Fla. 1st DCA 1987), rev. den. 520 So. 2d 585), case management conference orders (Moossun v. Orlando Regional Health Care, 760 So. 2d 193 (Fla. 5th DCA 2000), and plaintiffs' replies to defendants' answers (Buss Aluminum Products, Inc. v Crown Window Co., 651 So. 2d 694 (Fla. 2d DCA 1995).

Nobody really knows why Florida ever adopted Fla.R.Civ.P. 1.420(e). There are no committee notes or explanations. The rule was preceded by a statute, Fla. Stat. §45.19 which was repealed by the Legislature. Florida alone has a rule this harsh a rule interpreted this harshly. Twenty-five other states, the District of Columbia and the Federal Courts have adopted a discretionary diligent prosecution rule which tracks Fed.R.Civ.P. 41(b). A discretionary rule allows the Judge to weigh the conflicting interests of the Court's need to manage its docket with the desire to dispose of cases on their merits rather than by technicality.

Those states that have a "dead end" diligent prosecution rule which, like Florida's, dismisses the case automatically without a showing of good cause have periods far greater than one year, some extending as far as five years. The few states, like Florida, that have a one year dead end rule uniformly interpret it much more liberally than Florida to allow discretion on the part of the trial judge. Florida's rule, on the other hand, had been interpreted by our Supreme Court to give the trial judge no discretion. Metro Dade County v. Hall, 784 So. 2d 1087, 1090 n. 4 (Fla. 2001). Since its adoption in 1967, the Courts of Florida have consistently tightened the definition of "record activity" resulting in more and more

involuntary dismissals. The Supreme Court has defined record activity to mean that which is “designed to move the case forward toward a conclusion on the merits. Del Duca v. Anthony, 587 So. 2d 1306, 1309 (Fla. 1991). Record activity according to the Supreme Court constitutes an act “that is greater than a passive effort to keep the case pending; it must be an affirmative action calculated to move the suit to judgment.” Fuster-Escalona v. Wisotsky, 781 So. 2d 1063, 1065 (Fla. 2000).

All of this seems inconsistent with the public policy of Florida that dismissal is an extraordinary penalty which Courts may resort to only in the most extreme of circumstances. In Kozel v. Ostendorf, 629 So. 2d 817 (Fla. 1993) the Supreme Court held that dismissal was not warranted when it was the lawyers, not their clients, who were truly at fault and when the imposition of less severe penalties could accomplish the same objective. There the Supreme Court set forth guidelines which limit the circumstances under which dismissal is appropriate. At Page 818 in Kozel, supra, the Court held:

“This Court is vitally concerned with the swift administration of justice at both the trial and appellate levels. In the interest of an efficient judicial system and in the interest of clients, it is essential that attorneys adhere to filing deadlines and other procedural requirements. However, a fine, public reprimand, or contempt order may often be the appropriate sanction to impose on an attorney in those situations where the attorney, and not the client, is responsible for the error.”

See also Torrey v. Leesburg Regional Medical Center, 769 So. 2d 1040, 1042 (Fla. 2000) (with few exceptions, Florida courts do not dismiss actions on

account of a simple mistake by a lawyer or litigant so long as there is no prejudice to the opposing party); Commonwealth Federal Savings and Loan Ass'n. v. Tubero, 569 So. 2d 1271, 1273 (Fla. 1990) (dismissal for failure to comply with discovery order permissible only if violation was willful); North Shore Hospital, Inc. v. Barber, 143 So. 2d 849, 852 (Fla. 1962) (default is to be set aside in cases of excusable neglect; all doubt is to be resolved in favor of adjudication on the merits).

Florida now joins Delaware, Mississippi, California, Michigan, New Hampshire, Oregon and Washington in having a savings period in its diligent prosecution rule. Prior to the amendment of this rule, there existed a vicious trap that has resulted in tremendous injustice. The Supreme Court has finally done away with that trap.

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