# THE FLORIDA SUPREME COURT DULLS THE EDGE OF RULE 1.420(E)

**Vol. 80, No. 10 November 2006 Pg 39** **Marc J. Randazza** **Misc**

The Florida Supreme Court recently reinforced its position that the primary policy of the courts should be to see that cases are decided on their merits and not dismissed due to "mere technicalities."[1] In making this strong statement, the court significantly dulled the sharp edge of Motions to Dismiss for Failure to Prosecute, as provided for by Florida Rule of Civil Procedure 1.420(e).

A motion to dismiss for failure to prosecute under 1.420(e) is one of those "gotcha" motions that, when granted, leaves a defense attorney smiling, and a plaintiff's attorney turning six shades of red.[2] Rule 1.420(e) provided an avenue to easily dispose of a case if the nonmoving party failed to file any record activity for more than 12 months, and that "record activity" had to be something that was calculated to affirmatively move the case toward resolution.[3]

**Florida Supreme Court Changes Course: "Record Activity" Is No Longer Open to Interpretation**

In October 2005, in the case of *Wilson v. Salamon*, 923 So. 2d 363 (Fla. 2005), the Florida Supreme Court significantly reexamined its jurisprudence surrounding Rule 1.420(e) and what constitutes "record activity."

Interestingly enough, the most influential case law surrounding motions to dismiss for failure to prosecute pre-dates Rule 1.420(e), and the passage of (and amendments to) the rule and appear to have had little effect upon subsequent cases.[4] For example, *Gulf Appliance Distributors, Inc. v. Long*, 53 So. 2d 706 (Fla.1951), looms large over all decisions dealing with motions to dismiss for failure to prosecute. Under this case, Florida courts would examine the underlying record activity in order to determine if the activity was "of a sufficient quality that it was something more than a mere passive effort to keep the suit on the docket of the court; … some active measure taken by [the] plaintiff, intended and calculated to hasten the suit to judgment"[5]

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Once the Florida Supreme Court embraced this language in 1951, it became an indispensable part of any court's evaluation of a motion to dismiss for failure to prosecute, despite the fact that the 1976 amendment to the rule appears to have overruled *Gulf Appliance*.[6]

For example, in *Toney v. Freeman*, 600 So. 2d at 1100 (Fla. 1992),[7] the Florida Supreme Court, almost verbatim, issued a holding that echoed the *Gulf Appliance* analysis. As recently as 2002, the Florida Supreme Court warmly embraced this analysis. In *Moossun v. Orlando Reg'l Health Care*, 826 So. 2d at 946 (Fla. 2002), the court held that a trial court order setting a case management conference was not sufficient "record activity" to preclude a dismissal for failure to prosecute, because it was not an "affirmative act calculated to hasten the suit to judgment."[8]

There were, however, court decisions that did not conform to the *Gulf Appliance / Moossun* standard. For example, in *Metropolitan Dade County v. Hall*, 784 So. 2d 1087 (Fla. 2001), the court held: "[A]ctions '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."

In the fall of 2005, by issuing its opinion in *Wilson v. Salamon*, the Florida Supreme Court said "enough is enough," and corrected what appears to be decades worth of erroneous jurisprudence, firmly establishing that "record activity" means precisely what it says. There is no longer room in the rule for interpretation as to the meaning of "record activity":

[T]he language of the rule is clear — if a review of the face of the record does not reflect any activity in the preceding year, the action shall be dismissed, unless a party shows good cause why the action should remain pending; however, if a review of the face of the record reveals activity by "filings of pleadings, order of court, or otherwise," an action should not be dismissed…. This construction of the rule establishes a bright-line test that will ordinarily require only a cursory review of the record by a trial court.

*Wilson*,
thus, demonstrates that the court is not only committed to a plain meaning interpretation of the law, but that it is amenable to addressing past mistakes, no matter how well entrenched those mistakes may be:

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T[illegible] we attempt to remedy our past errors of construction and return to the plain meaning and, more importantly, the purpose and policy of the rule. We conclude that

continuing to abide by the principles of stare decisis where there has been a clear showing, as we believe there has been here, that our original purpose and policy have been undermined, only serves to undermine the integrity and credibility of our court system.

In doing away with the requirement that a court examine the character of the "record activity," the Florida Supreme Court clarified a potentially problematic line of cases and a departure from the plain language of the rule. The new rule is really the old rule — "there is either activity on the face of the record or there is not."[9]

The court made its underlying rationale clearer still: "We find this bright-line rule appealing in that it establishes a rule that is easy to apply and relieves the trial court and litigants of the burden of determining and guessing whether an activity is merely passive or active." In doing so, the court remedied an errant streak of jurisprudence that should be of great benefit to lower courts, litigants, and attorneys alike.[10]

**Further Modification of Rule 1.420(e)**

On the heels of its criticism of a half-century of jurisprudence surrounding motions to dismiss for failure to prosecute in *Wilson v. Salamon*, in 2005, the Florida Supreme Court, as part of its two-year cycle of revision for the Florida Rules of Civil Procedure, announced yet another shift in how these motions may be employed in the Florida courts.[11]

This rule change should not be viewed in a vacuum, but should be seen through the lens of the *Wilson* court's strong statement that Rule 1.420(e) provides a means for clearing the "dead wood" from the court system.[12] Nevertheless, the courts "must never lose sight of our primary policy of fostering resolution of cases on the merits."[13]

As of January 1, 2006, the amended rule employs a mandatory notice requirement that eliminates the "gotcha" element of Rule 1.420(e), and changes the time frame from one year to 10 months. creating a requirement that the moving party in a 1.420(e) motion must provide the other party with notice, and also give that party an opportunity to cure the lack of activity, Rule 1.420(e) is now de-fanged as a means for attorneys to force the dismissal of civil actions.[14]

Prior to the amendment, the rule functioned in the manner that we all have come to know: If there was no record activity in a case for a period of one year, the case could be dismissed on the court's own motion or by motion of any interested person. If the plaintiff was unable to show good cause as to why the court should not do so, the court was bound to dismiss the case.[15]

A Rule 1.420(e) dismissal was (or should have been) an embarrassment for attorneys whose cases were dismissed — often after the statute of limitations had passed — precluding refiling the suit, and, thus, acting as a complete extinguishment of the claim. While the rule achieved its goal of clearing debris from court files, it was not without its critics. James P. Waczewski, writing in The Florida Bar *Journal*, commented that this type of dismissal was harsh punishment for a litigant who suffered the dismissal of his or her claim simply due to the inexperience or negligence of counsel.[16] Mr. Waczewski additionally commented that 1.420(e) "serve[d] to perpetuate mistrust in lawyers, our legal system, and our courts." He sharply criticized the rule for trampling on the right of access to the courts, and appears to have predicted the rule adjustment.[17]

The continuous existence of Rule 1.420(e) threatens the goal of every attorney in this state: to improve the image of our profession and of our judicial system in the eyes of the public. Allowing cases to be dismissed on technicalities and against the plain language of the rule is inconsistent with that goal and with our courts' interpretation of the constitutional right to access the courts.[18]

Those who agree with Mr. Waczewski should be pleased with the new amendment to Rule 1.420(e). As of December, subdivision (e) provides that an action may not be dismissed for lack of prosecution without prior notice to the nonmoving party and an opportunity for the claimant to recommence prosecution of the action in order to avert dismissal.[19] Now, instead of a window that slams shut on the 365th day of inactivity, each action now starts a 10-month clock ticking. If there is no record activity in a case for 10 months, the court, "the clerk, or any interested person, whether a party to the action or not, may serve notice that no activity has occurred."[20] At that point, a 60-day clock begins to tick, and if no activity occurs during this grace period, the action must be dismissed unless a party can show "good cause in writing at least five days before the hearing on the motion why the action should remain pending."[21]

What does this mean with respect to the principles behind Rule 1.420(e)? As of the writing of this article, only one reported case has acknowledged the amendment, and that was only to note that the amendment was of no effect to that case, since the motion to dismiss for failure to prosecute was filed in 2004.[22]

The primary beneficiaries of the removal of the sharp edge from 1.420(e) will be plaintiffs' attorneys who fail to pay attention to their pending cases — and their clients. It remains t[illegible] seen whether this is a negative result. As Mr. Waczewski pointed out, the effect of t[illegible] rule could be seen as unjustly punishing a party with an otherwise meritorious

claim simply because the plaintiffs' lawyer is careless, inexperienced, or unfortunate. The downside is that cases that might otherwise be worthy of a quick death now have the ability to be kept on life support virtually indefinitely — and that "dead wood" could clog court dockets to the point that all litigants are denied speedy justice.

## Conclusion

Previously, Rule 1.420(e) seemed to be a plaintiff's nightmare. A miscalendared date, forgetfulness, negligence, or inexperience could have extinguished an otherwise valid claim. Additionally, what "record activity" means was open to interpretation, so even a diligent attorney could find a case dismissed for failure to prosecute. With the Florida Supreme Court's corrective decision in *Wilson*, the court has made it clear that it will not stand beholden to bad case law, no matter how old or ingrained. With the amendment to Rule 1.420(e), the court shored up its bold statements in *Wilson v. Salamon* that Art. I, §21 of the Florida Constitution mandates citizens' access to the courts and that the primary mission of the courts is to see that cases are decided on their merits, not on arbitrary technicalities.

1 *See Wilson v. Salamon*, 923 So. 2d 363 (Fla. 2005); *In re Amendments to the Florida Rules of Civil Procedure*, 917 So. 2d 176 (Fla. 2005).

2 It is virtually certain that there will still be embarrassing moments caused by Rule 1.420(e). However, the embarrassment will be on the part of defense attorneys who may not keep abreast of these changes. In effect, this rule change has transformed the plaintiff's attorney's legal malpractice burden into a possible §57.105 trap for defense attorneys who fail to break their old habits. The cost of defending a 1.420(e) motion based on the old rule and standards should fall upon the erroneously moving party under **Fla. Stat**. §57.105.

3 *See Moossun v. Orlando Reg'l Health Care*, 826 So. 2d 945, 946 (Fla. 2002); *Toney v. Freeman*, 600 So. 2d 1099 (Fla. 1992).

4 Rule 1.420(e) was not adopted until 1966. *See In re Fla. Rules of Civil Procedure*, 187 So. 2d 598, 624 (Fla. l966). The rule was amended in 1976 and in 1980. *In re The Fla. Bar, Rules of Civil Procedure*, 339 So. 2d 626, 629 (Fla. 1976); *The Fla. Bar re Rules of Civil Procedure*, 391 S[illegible] (Fla. 1980).

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5 [illegible] *Gulf Appliance Distributors, Inc. v. Long*, 53 So. 2d 706 (Fla.1951) (quoting *Augusta*

*Sugar Co. v. Haley*, 112 So. 731, 732 (La. 1927)) (interpreting the statutory predecessor to Rule 1.420(e), **Fla. Stat**. §45.19(1) (1949)).

6 In 1976, the Florida Supreme Court significantly amended Rule 1.420(e). Prior to 1976, the rule was: "All actions in which it does not *affirmatively* appear from some action taken by filing of pleadings, order of court or otherwise that the same is being prosecuted for a period of one year shall be. . . dismissed." *In re Fla. Rules of Civil Procedure*, 187 So. 2d 598, 624 (Fla. l966) (emphasis added). The 1976 amendment deleted the word "affirmatively" and added the requirement that activity sufficient to preclude dismissal must appear "on the face of the record." *Id*.

7 "Record activity must be more than a mere passive effort to keep the case on the docket; the activity must constitute an affirmative act calculated to hasten the suit to judgment."

8 *See also Barnett Bank v. Fleming*, 508 So. 2d 718, 720 (Fla. 1987) (same); *Moransais v. Jordan*, 870 So. 2d 177, 178 (Fla. 2d D.C.A. 2004) (same); *Sewell Masonry Co. v. DCC Constr., Inc.*, 862 So. 2d 893, 896 (Fla. 5th D.C.A. 2003) (same), *review dismissed,* 870 So. 2d 823 (Fla. 2004); *Florez v. City of Miami*, 858 So. 2d 378, 378 (Fla. 3d D.C.A. 2003) (same); *Nicolitz v. Baptist Eye Inst., P.A.*, 830 So. 2d 270, 272 (Fla. 1st D.C.A. 2002) (same); *Kearney v. Ross*, 743 So. 2d 578, 580 (Fla. 4th D.C.A. 1999) (same).

9 *Wilson*, 923 So. 2d at 373, citing *Metropolitan Dade County v. Hall*, 784 So. 2d 1087, 1090 (Fla. 2001).

10 *See id.* at 375 ("Rather than allowing continuing confusion surrounding the rule to continue, we conclude that interpreting the language of **Fla. R. Civ. P**. 1.420(e), as amended in 1976, by its plain meaning will further the purpose of decreasing litigation over the purpose of the rule and fostering the smooth administration of the trial court's docket.").

11 *In re Amendments to The Florida Rules of Civil Procedure*, 917 So. 2d 176 (Fla. 2005).

12 The stated purpose of Rule 1.420(e) is "to encourage prompt and efficient prosecution of cases and to clear trial dockets of litigation that has essentially been abandoned." *E tt Bank of East Polk County v. Fleming,* 508 So. 2d 718, 720 (Fla.1987); *Elegele v. H rt*, 890 So. 2d 1272, 1273 (Fla. 5th D.C.A. 2005) ("The intent of [R]ule 1.420(e) is to

make litigants, particularly plaintiffs, more vigilant about hastening suits to their just conclusion.”).

13 *Wilson,* 923 So. 2d at 377.

14 **Henry P. Trawick, Jr., Trawick’s Florida Practice and Procedure, insert to the 2006 edition (2006).**

15 *See Nesbitt v. Community Health of South Dade, Inc.*, 566 So. 2d 1, 2 (Fla. 3d D.C.A. 1989); *Martinez v. Fuenmayor,* 533 So. 2d 935 (Fla. 3d D.C.A. 1988); *National Enterprises, Inc. v. Foodtech Hialeah, Inc.,* 777 So. 2d 1191 (Fla. 3d D.C.A. 2001).

16 James P. Waczewski, *The Misinterpretation of the Dismissal for Failure to Prosecute Rule*, 75 **Fla. B. J. 16, 20** (Oct. 2001).

17 Florida’s Constitution mandates that the courts be open and accessible to all citizens to address all legitimate grievances. **Fla. Const**. art **. I, §21.**

18 *Waczewski*, at note 17.

19 *In re Amendments to the Fla. R. Civ. P.* (Two-year Cycle), 917 So. 2d 176, 182 (Fla. 2005).

20 *Id.*

21 *Id.*

22 *Cabrera v. Pazos, Larrinaga & Taylor, P.A.*, 922 So. 2d 422 (Fla. App. 2006).