

CERTIFICATE OF TYPE SIZE AND STYLE

Undersigned counsel certifies that the type size and style used in this brief is 14 point Times New Roman for the body of the brief, and 14 point Arial for the Argument headings.

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ARGUMENT

I. THE THIRD DISTRICT COURT OF APPEAL IMPROPERLY FAILED TO APPLY THE APPROPRIATE STANDARD OF REVIEW, AND INCORRECTLY CONCLUDED THAT PLAINTIFF'S APPEARANCE FOR HIS OWN DEPOSITION CONSTITUTED GOOD CAUSE TO DEFEAT A MOTION TO DISMISS FOR LACK OF PROSECUTION

In his Answer Brief, Plaintiff has totally failed to address the County's arguments. He has totally ignored the principal reason the Third District must be reversed: It improperly usurped the role of the trial court, and failed to apply the appropriate standard of review—abuse of discretion. Hall consequently utterly fails to respond to the numerous cases cited by the County demonstrating the importance and application of that standard to the case at bar.

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In addition, Hall stands mute in response to the County's demonstration that the Third District was incorrect for several reasons in relying on *Eastern Elevator v. Page*, 263 So.2d 218 (Fla. 1972). He does not challenge, therefore, the County's position that *Eastern Elevator* is distinguishable on its facts, because the issue

¹ *Cole v. Department of Corrections*, 726 So.2d 854 (Fla. 4th DCA 1999); *Edgcumbe v. American General Corp.*, 613 So.2d 123 (Fla. 1st DCA 1993); *Canakaris v. Canakaris*, 382 So.2d 1997 (Fla. 1980); *Adams Engineering Co., Inc. v. Construction Products Corp.*, 156 So.2d 497 (Fla. 1963).

there was not what quantum of activity was necessary to defeat the motion, but rather *who* was undertaking the activity. *Id.* at 219. He does not discuss the fact that in *Eastern Elevator*, this Court ultimately concluded that no conflict in fact existed, and therefore discharged the writ of certiorari initially granted. Most importantly, Hall ignores the critical fact that the procedural rule at issue in *Eastern Elevator* has also changed significantly. At the time *Eastern Elevator* was decided, the rule did *not* include a requirement that the activity necessary to overcome a dismissal for lack of prosecution be “on the face of the record.” The apparent attempt by the Third District to “amend” the current rules of Civil Procedure back to the pre-1976 amendment is wholly outside the jurisdiction of that court. If it is felt that it would be “common sense” (Ans. Br. at 2) or otherwise better practice to allow unfiled depositions to qualify as record activity, only this Court may implement such an amendment to the Rules. As the County pointed out in its Initial Brief, it must be remembered that the 1976 amendment was specifically intended to prevent *non-record* activity from tolling the 1-year period.

Hall also ignores the fact, as this Court recognized in *Eastern Elevator*, that in the context of determining whether good cause exists to excuse a plaintiff’s lack of prosecution, it matters which party initiates the non-record activity. *Smith v.*

DeLoach, 556 So.2d 786 (Fla. 2d DCA 1990). As the Second District properly held:

The fact that the *appellee* took the appellant's depositions would not create a good cause claim on behalf of the *appellants*. This action by the appellee in no way prevented the appellants from further prosecuting their action.

Id. at 789. The same reasoning should have applied here: Nothing about the Defendants taking Hall's deposition afforded him any excuse or explanation for his total failure to prosecute the case.

Plaintiff similarly does nothing to explain or justify the Third District's refusal to follow *Levine v. Kaplan*, 687 So.2d 863 (Fla. 5th DCA 1997). Just as in *Levine*, Hall utterly failed to present to the trial court a compelling reason for his failure to prosecute. Simply appearing for his own deposition can hardly be considered prosecution, and to this day, he *still* has never suggested how the Defendants' noticing and taking of his deposition prevented him from doing anything.

Hall also conveniently ignores the fact that he never submitted to the trial court as part of his showing of good cause the taking of his deposition. Instead, at the trial level, he relied *only* upon his claim that his attorney believed that an associate had noticed the case for trial. Thus, not only did the Third District decide the issue on the merits incorrectly, it never should have reached it in the first place, because Hall never

had properly placed it before the trial court, in light of the fundamental principles of appellate review that issues not timely raised and ruled upon in the trial court will not be considered on appeal for the first time, *Morales v. Sperry Rand Corp.*, 601 So.2d 538 (Fla. 1992), and that the failure to argue a specific point before the trial court precludes appellate review of that particular point. *See, e.g., Perez v. Winn-Dixie*, 639 So.2d 109 (Fla. 1st DCA 1994).

Plaintiff does argue, albeit incorrectly, that this Court “held in *Del Duca v. Anthony*, [587 So.2d 1306 (Fla. 1991),] that dismissal under Rule 1.420 is proper only if discovery was undertaken in bad faith and without any design to move the case toward a conclusion on the merits.” Ans. Br. at 4, 5. That statement is true *only* with respect to the question of “whether there was, in fact, record activity within the year that was not a mere passive effort to keep the suit on the docket.” *Del Duca* at 1309 (internal quotations and citations omitted). Here, in contrast, the issue was not whether there was record activity (which there unquestionably was not), but rather whether the *non*-record activity of the Defendants’ taking of the Plaintiff’s deposition excused the absence of *record* activity.

Here, the trial court judge properly exercised his discretion to manage his calendar, only to have his considered judgment usurped by the appellate court, in the face not

one but two decisions directly supporting the trial judge's order. In so doing, the appellate court has effectively removed from trial judges an effective case management tool, and, more importantly, has eschewed the important standard of review in this and similar cases.

CONCLUSION

Because the Third District improperly took it upon itself to make a *de novo* determination of whether Hall demonstrated good cause to avoid dismissal, and Plaintiff's passive appearance at a his own deposition, without any further evidence explaining why *he* had totally failed to prosecute his case, does not constitute good cause, the COUNTY respectfully requests that this Court ACCEPT jurisdiction over this case, REVERSE the Third District's decision, and remand with directions that the lower court's order of dismissal be AFFIRMED in all respects.

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing was served by MAIL on Tuesday, November 07, 2000 upon: HOFFMAN, LARIN & AGNETTI, P.A., Counsel for Plaintiff/Respondent, Attention John Agnetti, Esquire, Suite 201, 909 North Miami Beach Boulevard, North Miami Beach, Florida, 33162.

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IN THE SUPREME COURT OF THE STATE OF FLORIDA

Case Number SC00-1647
DCA Case Number 99-2794

<p>METROPOLITAN DADE COUNTY, Defendant/Petitioner, v. WALTER HALL Plaintiff/Respondent.</p>	
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REPLY BRIEF OF METROPOLITAN DADE COUNTY

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