IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-1908

MICHAEL MASON, WATERMAN BROADCASTING CORPORATION OF FLORIDA, a Florida corporation, and MSNBC INTERACTIVE NEWS, L.L.C., a Delaware Corporation,

Petitioners,

-vs.-

JEFFREY LANG, M.D. and JEFFREY LANG, M.D., P.A.,

Respondents.

RESPONDENTS' JURISDICTIONAL BRIEF

ON PETITION FOR DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL, SECOND DISTRICT

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STATEMENT OF THE CASE AND FACTS

The jurisdictional question before the Court concerns a purported express and direct conflict of decisions regarding the meaning of "good cause" within Florida Rule of Civil Procedure 1.420(e), the lack of prosecution rule.

The respondents, Jeffrey Lang, M.D. and his professional association, sued petitioners Michael Mason, Waterman Broadcasting Corporation of Florida, and MSNBC Interactive News, L.L.C. (the "Media Defendants") for defamation.[1] The trial court dismissed the case for lack of prosecution, and the Second District reversed—denying the Media Defendants' motion for certification. *Lang v. Mason*, 911 So. 2d 167 (Fla. 2d DCA 2005). The Media Defendants then sought this Court's jurisdiction.

Since this is a discretionary review proceeding, the relevant facts are contained in the Second District's opinion:

> Here, the critical points are the media defendants' filing of their answer and defenses *on February 19, 2003*, and their motion to dismiss for lack of prosecution on [Friday] February 20, 2004. The next important record entry reflects that Dr. Lang filed discovery requests on [Monday] February 23, 2004. The filed documents, however, bear a certificate of service dated [Wednesday] *February 18, 2004, two days before the media defendants filed their motion to dismiss for lack of prosecution*.
>
> * * *

[1] Another defendant, Mary Catherine Tourtillott, has not petitioned for review.

> Dr. Lang concedes . . . that there was no record activity within the one-year period preceding the media defendants' filing of their motion to dismiss. Under these circumstances, the court must take the second step of affording the plaintiff an "opportunity to establish good cause why the action should not be dismissed." A plaintiff can demonstrate good cause by pointing to nonrecord activity calculated to move the case forward to a conclusion.
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> * * *
>
> *The undisputed fact adduced at the hearing on the motion to dismiss was that Dr. Lang mailed discovery requests to the defendants on February 18, 2004*, two days before the media defendants moved for dismissal for lack of prosecution. *The media defendants received the mailed requests on February 20, 2004*, but only after they had filed their motion to dismiss on that same day.

Lang, 911 So. 2d at 168-69, App. at 3-4 (emphasis added; citations omitted). In short, it is undisputed that Dr. Lang served his discovery 364 days since the last record activity had occurred in the case—and two days before the Media Defendants moved to dismiss.

The Second District considered caselaw from this Court and the other districts, and held that interrogatories served within the relevant one-year period—but filed a few days later—"constitute good cause to avoid dismissal, if the interrogatories are serious discovery efforts." App. at 5-6. In reversing, the court explained that it had "examined Dr. Lang's discovery requests" and concluded that they were "specific to the issues framed by the pleadings and, on their face, calculated to advance the case to conclusion." *Id.* at 5.

SUMMARY OF ARGUMENT

The Second District held that non-record discovery designed to move a case forward satisfies the good cause prong of Rule 1.420 if served less than one year since last record activity. The Media Defendants claim that this Court should exercise its discretion to review the Second District's decision because that decision expressly and directly conflicts with one decision from another district on this issue and two decisions from this Court. No such conflict exists. The cases the Media Defendants rely on do not expressly or directly analyze whether non-record discovery can satisfy the good cause prong of Rule 1.420.

Even if the Court were to find that some *implicit* conflict existed, it would still be appropriate to decline jurisdiction. The Second District's decision contains a substantial analysis and is well-reasoned; it is likely that the other districts will follow suit. If they do not, they will provide some analysis that creates an express and direct conflict for review at that time. Until then, at least, the Court should decline exercise jurisdiction.

ARGUMENT

1. There is No Express and Direct Conflict.

The Second District's decision in this case turned entirely on the "good cause" prong of Rule 1.420(e)—not the Rule's "record activity" prong. As the court explained: "Dr. Lang concedes, however, that there was no record activity within the one-year period preceding the media defendants' filing of their motion to dismiss. *Lang*, 911 So. 2d at 169; App. at 4. Under these circumstances, the court must take the second step of affording the plaintiff an 'opportunity to establish good cause why the action should not be dismissed.'" *Id.* (citations omitted). The court then held that Dr. Lang's discovery satisfied the good cause prong of Rule 1.420(e) because the discovery was designed to move the case forward and was served less than one year after the last record activity in the case.

The Fifth District's purportedly conflicting decision, *American Wall Systems v. Madison International Group*, 898 So. 2d 111 (Fla. 5th DCA 2005), *pet. filed*, Case No. SC05-868 (May 16, 2005), analyzed discovery solely under the record activity prong: "[I]t is the *filing* date of court papers that determines *record activity* under Rule 1.420(e). 898 So. 2d at 112 (emphasis added in second instance). While there was discussion in *American Wall* relating to good cause, that discussion was limited to whether the appellant had shown good cause due to the pendency of an attorney's motion to withdraw and related pending cases—not due

to discovery designed to move the case forward. There is no express and direct conflict.

The Media Defendants also claim that the Court should exercise its discretion to accept review because the Second District's decision purportedly conflicts with this Court's decisions in *Wilson v. Salamon*, Case No. SC04-140 (Fla. Oct. 20, 2005), and *Frohman v. Bar-Or*, 660 So. 2d 633 (Fla. 1995). However, no express or direct conflict exists with those decisions either.

Wilson dealt with the "record activity" prong of Rule 1.420 (e), not the "good cause" prong of the Rule. The bright-line holding in *Wilson* simply does not apply to a good cause analysis—an examination that is inherently subjective. *Frohman* held that a party must show good cause for a lack of record activity. But that is *precisely* what the Second District held Dr. Lang did, by showing that he had served substantial discovery (1) less than one year since the last record activity and (2) before the Media Defendants moved to dismiss. No Florida appellate court has ever expressly or directly reached a contrary decision.

2. The Court Should Decline to Exercise Jurisdiction.

The Court should exercise its discretion to deny review even if it finds that it is constitutionally permitted to review the Second District's decision in this case. The decision contains a well-articulated analysis of the interplay between non-record discovery and the good cause prong of Rule 1.420(e). The purportedly

conflicting *American Wall* decision contains no analysis whatsoever of the issue and, to whatever extent it can be read to implicitly conflict, is likely to be unpersuasive to future district courts considering the issue. There is no need to grant review unless and until there is a conflicting *analysis* regarding whether non-record activity can satisfy the good cause prong of the Rule.

CONCLUSION

The Court should deny the Media Defendants' petition for discretionary review.

Respectfully submitted,

_____

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